

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

SECOND APPEAL NO.15 OF 2020

[Baburao s/o Wasudeo Podey and one .vs. Bhaurao s/o Tukaram Bodhe and others]

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders.

Court's or Judge's orders

CORAM : MADHAV J. JAMDAR, J.

DATED : 11.03.2020.

1] Shri Rohit Joshi, learned advocate appearing on behalf of the appellants, contended that there are two substantial questions of law involved in the present second appeal; first is for getting benefit of Section 53A of the Transfer of Property Act, 1882 (hereinafter referred to as 'the Act'), the party has to show that he is ready and willing to perform his part of the contract and that the agreement by which the appellants' father agreed to sale the land to the father of the respondents is illegal, null and void, as there is nothing on record to show that the respondents' father was an agriculturist and transfer to non-agriculturist is barred under Section 89 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 (hereinafter referred to as 'the Tenancy Act').

2] In the light of above substantial questions, as argued by the learned advocate for the appellants, the factual position on record shows that on 5.9.1969 Wasudeo Rajeshwar Podey i.e. father of the appellants agreed to sell the suit land to Tukaram Krushnaji Bodhe i.e. father of the respondents for a price of Rs.5,000/- and out of that

Rs.4,500/- was paid and possession of the suit land was handed over to said Tukaram Krushnaji Bodhe. It is specifically mentioned in the agreement that said Wasudeo Rajeshwar Bodhe i.e. the vendor will apply to the Collector seeking permission and that the balance amount of Rs.500/- is to be paid at the time of execution of sale deed and registration of the same. Admittedly, said Wasudeo Rajeshwar Bodhe has not filed any application seeking permission to the Collector and, therefore, there was no question of further payment of Rs.500/- to said Wasudeo Rajeshwar Bodhe.

3] The learned advocate of the appellants has relied on certain judgments to contend that to claim protection under Section 53-A of the said Act, it is for the transferee to take steps either by sending notices or requesting the seller to comply with the terms and conditions which are his part of the contract. He has relied on the judgment of the Madhya Pradesh High Court, reported in **2010 (3) M.P.L.J. 83** in the matter between **Harnam Singh s/o Shri Anant and others .vs. Haricharan s/o Ramprasad Ojha and others**. He also relied on the judgment of the Apex Court reported in **(2007) 14 SCC 87** in the matter between **A. Lewis and another .vs. M.T. Ramamurthy and others**, particularly paragraph 11 of the said judgment. The said paragraph 11 is reproduced herein below for ready reference.

“11. As rightly pointed out by the High Court, the existence of right to claim protection under [Section 53-A](#) of the Transfer of Property Act would not be available if the transferee just kept quiet and remained passive without taking effective steps. Further, he must also perform

his part of the contract and convey his willingness. On the other hand, the factual finding is that there was no intimation by defendant Nos.3 and 4 to perform their part of contract to claim protection of [Section 53-A](#) of the Transfer of Property Act. Likewise, as rightly concluded by the courts below, there is no material to show that the plaintiff had notice of agreement of sale Ext.D-1 in favour of defendant Nos.3 and 4. The conclusion of the High Court that defendant Nos. 3 and 4 or even defendant No.1 who claims through them are not entitled to protection of [Section 53-A](#) of the Transfer of Property Act is acceptable and the argument contrary to the said conclusion is liable to be rejected.”

4] He also relied on the judgment of the Apex Court reported in **AIR 1996 SC 910** in the matter between **Mohan Lal (deceased) through his Lrs. Kachru and others .vs. Mira Abdul Gaffar and another**, to contend that to get benefit of Section 53A of the Act, it is necessary that the purchaser should prove that he is ready and willing to perform his part of the contract so as to enable him to retain his possession under the agreement. In view of this settled legal position, it is necessary to see factual position in this case.

5] As already discussed herein-above, in this particular case, the total consideration was Rs.5,000/- and out of which, substantial consideration of Rs.4,500/- was paid at the time of execution of agreement dated 5.9.1969 and at that time, possession of the suit property was handed over to the father of the respondents. It is significant to note that in the evidence as well as in the written statement, it is specifically contended by the respondents that they are

ready and willing to perform their part of the contract, however, the same could not be done, as the father of the appellants failed to obtain permission from the Collector. The terms and conditions of agreement dated 5.9.1969 clearly stipulate that it is the responsibility of the father of the appellants to obtain permission from the Collector and to pay balance consideration of Rs.500/- at the time of execution of the sale deed and registration of the same. Therefore, by no stretch of imagination, it can be said that the father of the respondents was not ready and willing to perform his part of the contract. In this particular case, the courts below have recorded the concurrent finding that the father of the respondents was ready and willing to perform his part of the contract. In paragraph 23 of the impugned judgment of the learned appellate court, the evidence of the defendant no.1 Bhaurao is considered and in the subsequent paragraph the other evidence on record is considered and finding is recorded that the respondents are entitled to protect their possession under Section 53A of the Act. Learned advocate of the appellants has not shown anything to suggest that the said evidence is perverse or contrary to the evidence on record. The facts of the judgment reported in **(2007) 14 SCC 87** (supra) are totally different. In this case, it was the complete responsibility of the father of the appellant to obtain permission from the Collector and the evidence on record shows that the father of the appellant has assured the father of the respondents from time to time that he would do the needful, therefore, the said judgment of the Apex Court is not applicable to the facts of the present case, as the evidence on record shows that the

father of the respondents had not remained passive and, in fact, pursuing with the father of the appellants. As far as the judgment reported in **AIR 1996 SC 910** (supra) is concerned, the suit filed by the purchaser seeking specific performance was dismissed throughout and the matter before the Hon'ble Apex Court was arising out of suit filed by the vendor for possession. In the said case in the second appeal, High Court has found that the purchaser in that case failed to prove his readiness and willingness and the Hon'ble Apex Court has confirmed the said finding. In this case, the courts below have concurrently held that the father of the respondents was ready and willing to perform his part of the contract. Therefore, the said judgment is not applicable to the facts of the present case. As far as the judgment reported in **2010 (3) M.P.L.J. 83** is concerned, in that case also, the finding is recorded that the purchaser in that case failed to prove that he was ready and willing to perform his part of the contract. As in the present case, both the courts have concurrently held that the father of the respondents was ready and willing to perform his part of the contract, all these judgments are not applicable to the present case.

6] The learned advocate of the appellants, in support of his second substantial question namely that agreement is null and void under Section 89 of the Tenancy Act, has relied on the judgment of the Bombay High Court (Aurangabad Bench) reported in **1982 (2) BCR 18 (Dnyanoba Sukhdeo Lande and another .vs. Shrirang Mahataraji Dhurwade)**, particularly paragraphs 7 to 10 of the said judgment. It is observed in the said judgment that

it is well settled that the provisions of Section 53A of the Act would not apply to an invalid or a void contract of an agreement of sale. There cannot be any dispute about the said proposition of law. However, it is to be noted that in the present case for the first time in the present second appeal the appellants have raised the contention that the respondents would not get the protection under Section 53A of the Act, as the agreement of sale dated 5.9.1969 is invalid or a void, as by the said agreement, agricultural land is sought to be transferred to non-agriculturist.

7] A bare perusal of the plaint in Regular Civil Suit No.30/2011 filed by the appellants shows that there is no reference to the agreement of sale dated 5.9.1969. In fact, the contention was raised that the father of the appellants was cultivating the suit land personally and after the death of the father of the appellants, the appellants were cultivating the said land and on 10.6.2010 they found that the respondents were cultivating the suit land and, therefore, complaint to police was filed and after issuing notice, the suit was filed by contending that the defendants have encroached upon the suit land and, therefore, decree for recovery of possession was sought. Therefore, it is clear that in the plaint, the contention that agreement dated 5.9.1969 was illegal or void as the same is contrary to Section 89 of the Act, is not raised. Even the contention that as the father of the respondents was not agriculturist and, therefore, the agreement to sale dated 5.9.1969 is illegal, null and void, is not raised in the plaint. Therefore, the respondents have no opportunity to deal with the said

contention. It is significant to note that the said contention has not been raised in the trial court as well as appellate court and, therefore, the contention that father of the respondents was not an agriculturist and, therefore, the suit land could not have been sold to him is a question of fact which cannot be allowed to be raised for the first time at the stage of the second appeal. It is also to be noted that the agreement dated 5.9.1969 specifically records that the vendor would get the permission from the Collector under 'Chakbandi' to execute the sale deed and the same is not relating to the aspect that the sale is to the non-agriculturist.

8] In view of the concurrent findings recorded by the courts below and as it is found that the respondents and their predecessor were in possession of the suit property since 5.9.1969 in part performance of the contract and, therefore, their possession is protected under Section 53A of the Act, no substantial question is involved in this second appeal and, therefore, the second appeal is dismissed.

JUDGE