

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

SECOND APPEAL NO.537/2018

Gajanan Laxmanrao More,
-VS-
Suraj Motilal Jogi and others.

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

Court's or Judge's Orders

Shri D.R. Khapre, Senior Advocate with Shri P.S. Patil, Advocate
for appellant.
Shri R.N. Ghuge, Advocate for respondent no.1.

CORAM : S.M. MODAK, J.
DATE : AUGUST 30, 2021.

Heard learned Senior Advocate Shri Khapre for the appellant/defendant. Also heard learned Advocate Shri R.N. Ghuge, for respondent no.1/original plaintiff no.1, who has filed caveat on behalf of respondent no.1.

2. The plaintiffs' suit for possession of the suit land was decreed by the Trial Court. When the defendant filed First Appeal, he was not successful and decree was confirmed. That is how, he had come by way of the Second Appeal.

3. After reading the papers, it reveals that the plaintiffs have come up with a case of money lending transaction by their predecessor in title Shri Motilal Jivandas Jogi with the defendant. Whereas the defendant on one hand, has denied the money lending transaction and on the other has pleaded about the transaction of purchase of land from the said Motilal Jogi as per the agreement for sale dated 17/04/1995 and claimed to be in possession since then. The suit is for restoration of possession,

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with the theory that it was forcibly taken by the defendant from the said Motilal in the year 1996-1997. Both the parties have adduced evidence before the Trial Court. The plaintiff examined Suraj plaintiff no.1 and Amarchand Panchawatkar, their relatives. Whereas defendant has examined himself and one Manik Hanwata More (on the point of purchase transaction), one Bhimrao Sarnaik (the adjacent land owner), one Gajanan Sarnaik (on the point of giving possession by said Motilal Jogi to the defendant) and one Keshav Gawali (witness to the agreement dated 17/04/1995).

4. The Trial Court has believed the case of the plaintiffs and gave a finding that the agreement for sale/Issar Patra was nominal transaction and in fact, it was money lending transaction. On the point of defence of defendant, on the basis of part performance under Section 53-A of the Transfer of Property Act, the Trial Court has given the finding against the defendant. The main reason for this finding is forcible act of taking possession by the defendant.

5. The First Appellate Court has also confirmed those findings. Learned Senior Advocate Shri Khapre submitted that the confirmation of the finding by the First Appellate Court is not in consonance with law laid down by the Full Bench of this Court in the case of Mahadev Nathuji Patil Vs. Surajabai Khushalchand Lakkad and others reported in 1994 Mh.L.J. 1145. According to him, even if transferee in possession has not filed a suit for specific performance, he can defend his possession when the transferor has asked for the possession. According to him, the Hon'ble Supreme Court has also confirmed the observations in

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the case of Mahadev Nathuji Patil (*supra*). According to him the First Appellate Court has relied upon the observations in the case of Deorao s/o Balaji Bhoyar (D) through L.Rs. Vs. Ganpat S/o Punjai Bawne (D) through L.Rs. reported in 2014 (4) Mh.L.J. 820 (which is no more a good law).

6. So far as complying with the conditions under Section 53-A of the T.P Act, he invites my attention to the clauses of the agreement for sale. According to him the considerations of Rs.3 Lakhs and Rs.1 Lakh were paid at the time of agreement and Rs.2 Lakhs agreed to be paid on the date of execution of sale-deed which was agreed as on 16/03/1996.

7. During the evidence, there is a reference of two notices. One is the suit notice given by the plaintiffs contending that the transaction was the money lending transaction and possession is being asked as the amount borrowed has been repaid and for the reason that forcible possession was taken. This notice was issued on 15/07/2007. Whereas there is one notice on behalf of the defendant at Exhibit-74 given to the plaintiffs thereby communicating them about desire of the defendant to execute a sale-deed and showing readiness to pay remaining part consideration. Both these notices are filed at page 127 and 180 of the compilation tendered today.

8. According to the learned Senior Advocate Shri Khapre, while disbelieving part performance theory of the defendant, the trial court has emphasized only on one aspect i.e. not filing of the suit for specific performance by the defendant. According to him, this observation is not in consonance with the

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law laid down by the Hon'ble Supreme Court. Secondly, he submitted that both the Courts below have totally failed to consider the notice given by the defendant to plaintiffs at Exhibit-74. It does not bear the date. Learned Advocate for the respondent no.1 fairly conceded that this notice was not at all referred by the Courts below. According to learned Senior Advocate Shri Khapre, giving of notice thereby expressing desire to complete the transaction is material factor while appreciating the case of part performance.

9. At this stage, my attention is drawn to page 197 of the additional compilation containing the photocopies of the receipts about the posting of that notice. Receipts bear the date 25/09/2007. He relied upon the judgment in case of Nathulal Vs. Phoolchand reported in 1969 (3) Supreme Court Cases 120 in support of his contention that the obligation of defendant as per the agreement will come into picture only when the plaintiff is ready to fulfill his reciprocal promise.

10. Learned Advocate for respondent no.1 invited my attention to the observations of the Trial Court about accepting their grievance about forcible possession and according to him on the basis of this finding the part performance theory cannot be accepted.

11. After considering the above submission, what I find is that there is room for saying that both the Courts below have not considered the law laid down by the Hon'ble Supreme Court regarding part performance. In fact Hon'ble Supreme Court has recognized the principle laid down under Section 53-A of the T.P.

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Act. It is for the reason that such transferee in possession should not lose their possession only for the reason that they have not filed suit for specific performance. No doubt, the fulfillment of the condition under Section 53-A of the T.P. Act is very much required.

12. If the contents of the agreement of sale are perused, at this stage it can be said that there was only an obligation of defendant to pay remaining consideration. Both the Courts below have not considered the notice given by the defendant. There is a need for this Court to look into that issue.

13. Even after perusing the findings of both the Courts below regarding the issue of possession, at this stage, it can very well be said that there is a need for this Court to go into those findings. In view of that, I am inclined to issue notice before admission by framing following substantial questions of law:

i) Whether the Courts below have not applied law interpreted by Hon'ble Supreme Court in case of S.S. Suryavanshi Vs. P.B. Suryavanshi reported in AIR 2002 Supreme Court 960 about part performance under Section 53 of the T.P. Act properly?

ii) Whether the Courts below have failed to appreciate the evidence adduced by the defendant on the point of voluntary handing over of the possession of the suit land by Motilal Jogi, predecessor in title of the plaintiffs to the defendant?

14. Learned Advocate for the respondent no.1 waives notice.

15. Issue notice to other respondents, returnable after **eight weeks**.

CIVIL APPLICATION (CAS) NO.526/2021

Today this Court has framed substantial questions of law and issued notice before admission to respondents. This Court has already observed that there is need for this Court to ascertain the appreciation of evidence by the Courts below. In view of that, possession of the defendant needs to be protected. This application is filed after filing of execution proceedings R.D. No.23/2019. Hence, the relief in terms of prayer clause-1 of the application up to the stage of admission is granted. The appellant/defendant not to create any third party interest on the basis of the possession or the part away the possession, in any manner, till the decision on admission is taken.

CIVIL APPLICATION (CAS) NO.1330/2018

This was filed for stay and temporary injunction when execution proceedings were not filed. After filing of execution proceedings, Civil Application No.526/2021 is filed. The order is passed thereon, today.

In view of that Civil Application (CAS) No.1330/2018 is disposed of.

JUDGE