

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 247 OF 1992
WITH CA/11710/2016

Kishan s/o Gajananrao Ghorpade,
Age 45 years, Occ. Agriculture,
R/o. Pimpri-Raja Tq & Dist.
Aurangabad.

... Appellant
(Orig. Plaintiff)

VERSUS

Shivaji s/o Sarjerao Thombre,
Age Major, Occ. Agriculture,
R/o. Pimpalgaon Pandhari,
Tq. & Dist. Aurangabad.

... Respondent.
(Orig. Defendant)

...
Advocate for the Appellant : Mr S. C. Arora
Advocate for the Respondent : Mr. S. R. Sapkal.
...

CORAM : MANGESH S. PATIL, J.
RESERVED ON : 24.02.2022.
PRONOUNCED ON : 21.03.2022.

JUDGMENT :

This is a second appeal by the plaintiff who succeeded in obtaining a decree for possession by rescinding an agreement to sell the suit property to the respondent/defendant dated 17.06.1978, but is aggrieved and dissatisfied by the judgment and order passed by the lower appellate court, allowing the appeal of the latter and dismissing the suit.

2. Admittedly, the appellant had agreed to sell the suit property which was exclusively owned by him to the respondent for a total consideration of Rs. 13,500/- by accepting Rs. 8000/- as an earnest money. Balance amount of consideration was to be paid, Rs. 2000/- on 21.06.1978 and the remaining Rs. 3500/- on or before 15.11.1978, by which date the sale-deed was to be executed. Possession was also delivered under the agreement and

it was witnessed by a writing styled as 'Isarpawati' dated 17.06.1978 (Exh. 30).

3. Complaining that the respondent had failed to keep the terms and conditions of the agreement in spite of couple of notices the appellant filed the suit with a prayer that the agreement be declared as rescinded and ineffective and claimed possession and mesne profit.

4. The respondent contested the suit. He admitted about having agreed to purchase the suit property for the consideration and the transaction was witnessed by Isarpawati (Exh. 30). He also contended that the possession was delivered to him under the agreement but denied that there was any lapse on his part to comply with the terms and conditions that were expected of him. He contended that on the very next day of the agreement he paid Rs. 2000/- to the appellant on 18.06.1978 still he avoided to execute the sale-deed. Even the balance amount of Rs. 3500/- was paid in the office of the Registrar. The stamp paper was purchased by him in the name of the appellant however with some ill intention he avoided to execute the sale-deed. He tried his level best to perform his part of the contract. He was in lawful possession under the agreement which he was entitled to protect.

5. The trial court decreed the suit holding that the respondent had failed to prove that he was ready and willing to perform his part under the agreement. He failed to substantiate his stand of having paid the balance amount of consideration and was not entitled to seek any protection under Section 53A of the Transfer of Property Act. It decreed the suit. The appellate court by the judgment and order under challenge has allowed the respondent's appeal and dismissed the suit by reversing both these material findings of the trial court. The lower appellate court has held that the respondent had duly established the fact of having paid the balance amount of consideration and was entitled to a protection under Section 53A of the

Transfer of Property Act. It dismissed the suit also on the point of limitation.

6. The second appeal was admitted on 28.07.1992 by indicating that it involved a substantial question of law as covered by the decision in the case of **1991(1) Mh.L.J. 256 (Adinath Limbaji Navale and others Vs. Policeman Housing Society, Beed and others)** in the matter of application of Section 53A of the Transfer of Property Act.

7. Apart from such substantial question of law, in my considered view, even the following substantial question of law arises for determination of this Court :

(1) Whether the lower appellate court has erred in holding that the suit was barred by limitation ?

8. I have heard the submissions of learned advocate Mr. Arora for the appellant and learned advocate Mr. S.R. Sapkal for the respondent on aforementioned both the questions.

9. As far as the first substantial question is concerned, it is quite apparent that in view of the principles of law that were holding the field at the material time when the second appeal was admitted, this court had formulated it relying upon the decision in the case of **Adinath Limbaji Navale (supra)**, wherein, it was held that a purchaser who was holding possession under a written agreement to sell the property is entitled to protect possession in view of the provision of Section 53A of the Transfer of Property Act only till the time his claim for specific performance was not barred by limitation.

10. In fact, in the matter of **Nanasaheb Vs. Appa, A.I.R. 1957 Bombay 138**, a Single Bench of this Court had taken a contrary view holding that a purchaser was entitled to protection under Section 53A even if his remedy to seek specific performance was time barred.

11. On a reference to the larger bench, in the matter of **Mahadeo Nathuji Patil Vs. Surjabai Khushalchand Lakkad and others; 1994(2) Mh.L.J. 1145**, the full bench of this Court has approved the view taken in the matter of **Nanasaheb (supra)** and expressed disapproval of the one taken in the matter of **Adinath (supra)**.

12. Incidentally, the Supreme Court has approved the decision of the full bench of this Court in the matters of **Mahadeo Nathuji Patil (supra)** in **Shrimant Shamrao Suryavanshi and another Vs. Pralhad Bhairoba Suryavanshi (dead) by L.Rs. and others; A.I.R. 2002 Supreme Court 960**.

13. In view of such a settled position, even though the claim of the respondent to seek specific performance has become time barred, he is entitled to seek a protection under Section 53A of the Transfer of Property Act.

14. But then, such a protection under Section 53A of the Transfer of Property Act can be had, as has been rightly pointed out by the learned advocate Mr. Arora for the appellant, on strict compliance with all the necessary concomitants as prescribed in that provisions. It is not that the protection is blanket one. As has been laid own in the case of **Nanjegowda & Anr vs Gangamma & Ors (2011) 13 Supreme Court Cases 232**, in order to have a protection under Section 53A, *inter alia* the transferee should have either performed his part of contract or should be willing to perform it.

15. In view of such a legal position, it was imperative for the respondent if he wanted to take shelter of Section 53A of the Transfer of Property Act to demonstrate that he had paid the balance amount of the consideration or was ready and willing to do it. The trial court held him not to have paid the balance amount of consideration whereas the appellate court has reversed that finding. It would, therefore, be necessary to scrutinize the material in that respect.

16. The respondent has led evidence apart from his testimony, in the form of couple of witnesses to prove that he paid Rs. 2000/- to the appellant on the very next day of the agreement that is on 18.06.1978 and the balance amount of Rs. 3500/- on the day when everybody was present in the office of the Sub Registrar for executing the sale-deed. The lower appellate court seems to have concluded about such payments having been made by relying upon these witnesses.

17. Conspicuously the lower appellate court has clearly overlooked the reasoning which was assigned by the trial court in discarding such testimonies and the evidence regarding payment of the balance amount of consideration. The trial court refused to believe these witnesses because of their inconsistent version regarding the date and place of payment. It also pointed out that when the agreement itself was in writing, absence of any receipt regarding such subsequent payments was a clinching circumstance to disbelieve the stand of the respondent of having paid the balance amounts of consideration. The lower appellate court has clearly erred in meeting this plausible reasoning given by the trial court.

18. The trial court had also disbelieved the respondent even on the ground of probability by questioning as to how if the amount of Rs. 2000/- was to be paid after about seven days the respondent could have paid it the very next day that too without any receipt. The trial court also disbelieved the respondent because it felt unlikely that the respondent would have paid the entire amount of consideration even before actual execution of the sale-deed. If such was the reasoning given by the trial court it was imperative for the lower appellate court to have considered the reasoning which to my mind clearly justified the inference drawn by the trial court to disbelieve the stand of the respondent of having paid balance amounts of consideration.

19. True it is that there is some evidence in the form of a stamp paper having been purchased in the name of the appellant and being in possession

of the respondent. But then, the signature on the register of the stamp vendor was not confronted to the appellant and the stamp vendor who was also examined as a witness flatly stated that he was not knowing the appellant or could identify the person who purchased the stamp paper in his name.

20. Apart from the inherent shortcoming in such a circumstance, it is also conspicuous to note that though the appellant served couple of notices to the respondent one in the year 1979 and the other in the year 1983 both of which were duly exhibited before the trial court on proof thereof, the respondent never responded to either of the notice much less by taking what ever stand he wanted to. Independently, the respondent never called upon the appellant to execute the sale-deed may be by accepting the remainder of the consideration or if it was already paid by calling upon the appellant to remain present for execution of the sale-deed. If such was the state of evidence, the observation and the conclusion of the trial court was certainly based on correct and plausible appreciation of the evidence which without there being any sufficient and cogent reason has been reversed by the lower appellate court.

21. I, therefore, hold that the observation and the conclusion of the lower appellate court holding that the respondent was ready and willing to perform his part under the agreement which is a *sine qua non* for seeking a benefit under Section 53A of the Transfer of Property was based on irrelevant material and overlooking the relevant ones. He was not entitled to have it. The observations and the conclusions of the lower appellate court in this regard are clearly faulty and illegal.

22. This takes me to the issue regarding limitation. It is quite clear that by a specific prayer the appellant was seeking to rescind the agreement and consequently, the suit would be governed by article 59 from the Schedule to the Limitation Act, 1963 which prescribes for a period of limitation of three

years from the date when facts which entitle the appellant to have the contract set aside or rescinded became known to him. Admittedly, apart from the dispute regarding payment of the balance amount of consideration and keeping aside the issue regarding the readiness and willingness, the appellant had served the respondent first notice on 10.07.1979 (Exh. 53) and the second notice on 10.06.1985 (Exh. 34). Attempt is being made to demonstrate on behalf of the appellant that since the respondent did not give response to the latter notice (Exh. 34), the period of limitation would begin to run from that day. The suit was filed within three years, on 04.07.1985, from the date of this notice and therefore it was within limitation.

23. As has been rightly pointed out by the lower appellate court it is the first date when the plaintiff became entitled to rescind the contract would be the date from which the period of three years is to be counted. Going by the recitals in the notice dated 10.06.1979 (Exh. 53) the appellant had specifically put the respondent to notice that unless the balance amount of consideration of Rs. 5500/- was paid within a month and the sale-deed was not got registered, the transaction was to come to an end and the earnest money would stand forfeited. If such was the scenario, at the most one month after this notice when the respondent had not obliged by paying the balance amount of consideration and had not taken steps to get the sale-deed registered, the appellant ought to have filed the suit seeking rescission of the contract within three years after lapse of one month after the notice dated 10.07.1979 and to be precise latest by 09.08.1982. The suit was filed on 04.07.1985 and was clearly barred by limitation. The observation and the conclusions of the lower appellate court in this regard are certainly legal. I find no hesitation in upholding it.

24. Consequently, even though the lower appellate court had erred in holding that the respondent was entitled to a protection under Section 53A of the Transfer of Property Act, it was right in non suiting the appellant on

the ground of limitation. I answer these substantial questions of law accordingly.

25. The Second Appeal is dismissed with costs.

26. Pending Civil Application is disposed of.

(MANGESH S. PATIL, J.)

mkd/-