

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

SECOND APPEAL NO. 213 OF 2005

- 1) Jiwan S/o Pandu Kapgate,
Aged about 51 years, Occ. Agriculturist,
R/o. Devalgaon, Tahsil Arjuni (Morgaon),
District Gondia.
- 2) Haridas Harku Kapgate (Deceased)
through his Legal representatives,
- 2-a) Vilas Hari Kapgate,
Aged about 24 years, Occ. Agriculturist,
R/o. Devalgaon (Navegaon),
Arjuni (Morgaon), Distt. Gondia.
- 2-b) Sau. Lata w/o Tanu Bansod,
Aged about 30 years, Occ. Household,
R/o. Kokadi (Tulsi), Tahsil Wadsa,
District Gadchiroli.
- 2-c) Sau. Sunita w/o Suresh Mungulmare,
Aged about 26 years, Occ. Household,
R/o. Duggipar (Kohmara),
Tahsil – Sadak Arjuni, District Gondia.
- 2-d) Smt. Anusaya wd/o Hari Kapgate,
Aged about 47 years, Occ. Household,
R/o. Devalgaon (Navegaon),
Tahsil – Arguni (Morgaon),
District Gondia

.... **APPELLANTS**

// VERSUS //

- 1) Shri Thakaram S/o Mohan Kosre,
Aged about 40 years,
R/o. Dewalgaon, Tah. Arjuni (Mor.),
District Gondia.
- 2) Vikram S/o Mohan Kosre, (Dead)
through his legal representatives,

- 2-a) Smt. Meena wd/o. Vikram Kosre,
Aged 40 years, Occ. Housewife,
- 2-b) Swapnil S/o. Vikram Kosre,
Aged 10 years, Occ. Student,
- 2-c) Nikhil S/o. Vikram Kosre,
Aged 8 years, Occ. Student,
- 2-d) Manisha D/o. Vikram Kosre,
Aged 5 years,

Nos. 2-b to 2-d, minor through their
natural guardian mother –
Smt. Meena Wd/o. Vikram Kosre,
All R/o. Devalgaon, Tah. Arjuni (Morgaon),
District Gondia.

- 3) Sau. Geetabai Janardhan Meshram,
Aged about 28 years,
(**Deleted** as per Court's order dt.31.01.2007
in CA St. No.616/2007)
- 4) Sau. Shobhabai W/o Istari Sontakke,
Aged about 26 years,
R/o. Sangadi, Tah. Sakoli,
District Bhandara.

.... **RESPONDENTS**

Mr. P.A. Markandeywar, Advocate for the appellants.
Mrs. S.C. Deo, Advocate for respondents.

CORAM : AVINASH G. GHAROTE, J.

DATED : 29th September, 2022

ORAL JUDGMENT :

- 1) Heard Mr. Markandeywar, learned counsel for the
appellants and Ms. S.C. Deo, learned counsel for the respondents.

2) Mr. Markandeywar, learned counsel for the appellant contends that the entire consideration of Rs.12,100/- under the agreement dated 13.9.1974 executed by Mohan Motiram Kosre, the original owner in favour of Jivan Kapgate, the present appellant, stood paid and possession of the property also stood delivered, thereunder considering which the plaintiffs were not entitled to a decree for possession, as has been passed by the learned appellate Court, though the learned trial Court was correct in having dismissed the suit. He therefore submits that the impugned judgment of the learned appellate Court cannot be sustained. In the alternative he submits that the matter needs to be remanded back to the learned trial Court for the reason that the question of readiness and willingness of the defendants/appellants under Section 53-A of the Transfer of Property Act, 1882 (for short the "TP Act") was never framed by the learned trial Court, in view of which, the defendants/appellants were deprived of the opportunity to lead evidence in that regard. It is submitted that the requirement of framing issue under Order XIV Rule 1 of the Code of Civil Procedure, 1908 (for short the "CPC") was for the purpose of crystallizing the dispute which ought to have been done by the learned trial Court. Reliance is placed upon the cases of *Sri Gangai Vinayagar Temple and another Vs. Meenakshi Ammal and others*, 2015 (6) *Mh.L.J.*, 96, (para No. 12) and *Viswanatha Achari Vs.*

Kanakasabapathy, 2006 (1) Civil LJ 263 (SC), (para No. 9), for the proposition that the lower appellant Court was not justified in deciding issues which were not framed by the trial Court as that would lead to depriving the defendant of the opportunity to counter the plaintiff's evidence.

3) Mrs. Deo, learned counsel for the respondents/plaintiffs, supports the judgment of the learned First Appellate Court and submits as under :

- (i) That the requirement of Section 53-A of the TP Act, had not been fulfilled by the defendants, and therefore, any length of possession by the defendants, of the property in question, would not substitute the requirement of law in that regard.
- (ii) She submits that the agreement indicated delivery of possession on the execution and the registration of sale deed and not earlier and therefore the possession of the defendants/appellants, cannot be related to Section 53-A of the TP Act, as a result of which, the said provision would

not come to the help of the defendants/appellants, in protecting their possession.

- (iii) That though the agreement indicated balance of Rs.1,400/- to be paid, there is nothing on record, to indicate that the payment having been made, except for a bare averment in the written statement, sans anything else.
 - (iv) Even otherwise, there is nothing on record on behalf of the defendants/appellants to indicate the satisfaction of requirement that the transferee has performed or is willing to perform his part of the contract, which according to her, is the mandatory requirement of law for Section 53-A of the TP Act, to be applicable, presuming that the same is attracted.
- 4) The following facts are admitted :
- (A) The execution of the agreement dated 13.9.1974 by Mohan Motiram Kosre, in favour of the defendants/appellants Jivan Kapgate as well as the contents therein are not in dispute.

(B) So also the receipt of Rs.10,700/- by Mohan Motiram Kosre from the appellant Jivan Kapgate under the aforesaid agreement is also not disputed.

(C) The possession of the defendants/appellants over the suit property since 1974, till date, is also not disputed.

5) What is in dispute is that no possession was delivered under the agreement dated 13.9.1974 and the balance consideration of Rs.1,400/- also was not paid within the time of three years, as stipulated in the agreement, as a result of which, the requirement of Section 53-A of the TP Act was not fulfilled.

6) Section 53-A of the TP Act being the bone of contention, for the sake of ready reference is reproduced as under :

“53-A. Part performance – Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part

performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract :

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.”

7) The basic requirement for attracting Section 53-A of the TP Act among other things would be (a) the transferee has been placed in possession in part performance of the agreement, (b) the transferee has done some act in furtherance of the contract and (c) the transferee has performed or is willing to perform his part of the contract.

8) Insofar as the first ingredient necessary for applicability of Section 53-A of the TP Act is concerned, there is no dispute, that the terms of the agreement dated 13.9.1974 (Exh.29) specifically mandate, that the possession of the subject property, shall be delivered to the

proposed transferee, defendants/appellants on the date of execution and registration of the sale deed. It is necessary to note that the agreement in question, is a registered document having been registered with the Sub-Registrar, Sakoli at Sr.No.2795 on 13.09.1974. Thus, when the agreement itself contemplates the delivery of possession on the execution and registration of the sale deed, in order to establish that the possession was delivered to the defendants/appellants in part performance under Section 53-A of the TP Act, at any point of time subsequent to the execution of the agreement itself was a burden upon the defendants/appellants. There is, however, no material on record, to indicate that any possession in part performance, was delivered to the defendants/appellants in pursuance to the agreement. No document, receipt or any other material has been placed on record by the defendants/appellants to demonstrate this. Neither any independent witness has been examined by the defendants/appellants to indicate this. There is no day, month or year, on which, such possession is claimed to have been delivered to the defendants/appellants by the original owner. Thus, in absence of any such material on record, the possession of the defendants/appellants of the suit property cannot be co-related, to the agreement in question, more so, when as indicated above the agreement did not contemplate so, rather specifically provided the delivery of the possession, to be on the date of execution

and registration of the sale deed. No doubt, that it is an admitted position, that since 1974 the defendants/appellants are in possession of the property in question, however, until and unless such possession is co-related, to the agreement in question, the benefit of plea under Section 53-A of the TP Act cannot be availed of by the defendants/appellants. The mutation of the name of the defendant in the revenue records as owner, by itself does not mean that the possession is delivered in part performance. The evidence of the Talathi (D.W.-2) who has taken the entry, does not reflect anything in this regard as he merely speaks of how the entry was made and nothing else. Though he states that the original owner Motiram Kosre was present when such entry was made, had this been the position, the record of right would have indicated this position with the signature of Motiram Kosre, depicting this, however that is not the position, as except of the bare statement there is nothing else.

9) Even presuming otherwise, that the possession of the defendants/appellants of the suit property was under the agreement dated 13.9.1974 (Exh.29), then the requirement of Section 53-A of the TP Act to continue in possession by virtue of the benefit conferred by the said provision must have been demonstrated on record by the defendants/appellants. In that context, perusal of the agreement

would indicate that the total consideration payable thereunder was Rs.12,100/- out of which, part consideration of Rs.10,700/- already stood acknowledged to have been paid. The balance consideration is of Rs.1400/-. It is also not in dispute that the sale deed was agreed to be executed upon obtaining the permission from the Consolidation Officer under Section 31 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. It is equally true, that the agreement did not fix a date for its performance, that is the time within which such permission was to be obtained and the sale deed was to be executed and registered in favour of the defendants/appellants, however, what is material to note, is that the balance consideration of Rs.1,400/- as is indicated in the text of the agreement was for the purpose of repayment of loan of the Co-operative Bank and other loans. This was a dual obligation inasmuch as the agreement indicated that either the owner would make payment of this amount and produce receipt for the perusal of the defendant or defendant should pay this amount from the balance consideration and make payment of the remaining amount to the owners. It is thus apparent, that the payment of the amount of Rs.1,400/- was not dependent upon any unilateral action to be performed by the owner alone, but it was equally open, for the defendants/appellants to have made this payment to the entities, from which the owner had taken loans, and pay the balance remaining

amount to the owner and get the sale deed registered and executed in their favour. This however, does not appear to have been done by the defendants/appellants at any point of time whatsoever.

10) The written statement of defendants/appellants, indicates a plea being raised that the entire consideration of Rs.12,000/- stood paid to the original owner, which would mean that the balance of Rs.1,400/- was also paid at some point of time or after the agreement in question. However, except for a bare averment, there is absolutely nothing on record, to indicate the payment of this consideration to the owner, which would indicate that though a plea has been raised in this regard, the same has not been proved.

11) The requirement of Section 53-A of the TP Act, which contemplates the applicability of the section, on the transferee having performed or is willing to perform his part of the contract, is not an empty formality but is the very gravamen of the provision, for the reason that it is such performance or willingness to perform, his part under the contract, which would grant him the protection to continue in possession of the property under Section 53-A of the TP Act. This would in sum and substance indicate some action to have been performed by the defendants/appellants, in pursuance to agreement

which is also indicated from the expression “and has done some act in furtherance of the contract” as occurring in the said provision. This would naturally indicate, a demand having been made by the defendants/appellants, consequent to the agreement for the execution of the deed of sale in his favour, which can either be a notice seeking the clearances which were required to be obtained for execution and registration of sale deed or the clearance regarding the so called loans as indicated in the agreement, or of tendering or offering to tender the balance of the consideration, as payment of the same is held not to have been proved. However, nearly for a period of 28 years, there has been a deafening silence on part of the defendants/appellants in the matter, which would indicate the absence of fulfillment of the requirement by the defendants/appellants, in so far as the defendants/appellants having performed or willing to perform his part of the contract. That being so, the benefit of Section 53-A of the TP Act could not have been made available to him as rightly held by the learned First Appellate Court. The substantial question of law at Sr.No.1 framed on 31.1.2007, is answered in affirmative and the substantial question of law at Sr. No.2 is answered in the negative.

12) Having so answered the aforesaid substantial questions of law, the contention of Mr. Markandeywar, learned counsel for the

defendants/appellants that the matter needs to be remanded to the trial Court based upon *Sri Gangai Vinayagar Temple* (supra) and *Viswanath Achari* (Supra) has to be considered. In *Sri Gangai Vinayagar Temple* (supra) the Hon'ble Apex Court has held, that the obligation and duty to frame issues is cast solely upon the Court for the purpose of crystallization of the conflict or the distillation of the dispute between the parties to the *lis*, and are in the nature of the disputed questions of fact and/or of law and while discharging this primary function, the Court is expected to peruse the pleadings of the parties in order to extract their essence to analyse the allegations of the parties and the contents of the documents produced by them, and thereafter, proceed to frame the issues. No doubt, that the learned trial Court, has not framed an issue regarding the willingness of the defendants/appellants in having performed or being willing to perform his part of the contract, however what is material to note is that the plea under Section 53-A of the TP Act, was already raised by the defendants/appellants in paragraph No. 3 of the written statement and the parties had gone to trial, being well aware what their respective pleadings were and what they were required to prove considering the pleadings and defenses raised by them. Thus, when the defendants/appellants had specifically raised the plea under Section 53-A TP Act and also tendered his evidence in that regard, merely non

framing of an issue in that regard, would be of no consequence, as would be apparent, from the evidence of defendants/appellants in that regard at Exh.39, in which he has spoken about the agreement in question as well as delivery of the possession of the property to him in pursuance thereto. In cross examination he admits the contents of the agreement 13.9.1974 to be true and correct which would indicate the admission of the position, that under the agreement, the possession was to be delivered at the time of the execution and registration of the sale deed. In his evidence also, the defendant does not state as to on which date, in what manner the possession was received by him. In ***Sri Gangai Vinayagar Temple*** (supra) itself it has been held that “there is no gainsaying that where parties are aware of the rival cases the failure to formally formulate an issue fades into insignificance, especially when it is prominently present in connected matters and extensive evidence has been recorded on it without demur”, which proposition is clearly applicable to the matter in hand in view of what has been stated above.

13) Though it is contended that the mutation of land in question stood in the name of the defendants/appellants which is claimed to have been done on 22.4.1986, that by itself, would not assist the claim of having been put in possession under Section 53-A of the TP Act. The evidence of D.W.-2 Jogiram Istari Gahane, who was the

Patwari at that point of time when the mutation entry was made, also does not assist the plea of the defendants/appellants having been put in possession under Section 53-A of the TP Act as already indicated. It is thus apparent that the defendants/appellants, had gone to trial, with the specific plea under Section 53-A of the TP Act, as his defence considering which it was obligatory for him to have established the plea raised in defence, as it cannot be said that he was oblivious of the requirement of law in that regard since the plea in that regard was raised, for which reason, the dictum in **Viswanatha achari** (Supra) would not be attracted.

14) In view of the above discussion and the answers to the substantial question of law as framed on 31.7.2007 the Second Appeal is dismissed. No costs.

15) At this stage, Mr. Markandeywar, learned counsel for the appellant seeks protection of the possession of the appellants on the ground that while admitting the appeal on 31.1.2007, the effect and operation of judgment and decree passed by the learned First Appellate Court was stayed. Though the plea is opposed by Ms. Deo, learned counsel for the respondents, however considering that protection was

granted to the defendants/appellants in the order dated 31.1.2007, the same shall continue for a period of six weeks' more, from today.

(AVINASH G. GHAROTE, J.)

Kirtak