



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 198 OF 2014

1. Santosh Mahadu Rakshe
Age about 42 years,
Occupation : Agriculture
2. Sandip Mahadu Rakshe
Age about 40 years,
Occupation : Agriculture
3. Jijabai Mahdu Rakshe
*[Appellant no.3, deleted as per Court's Order
dtd.11/12/23]*
All Nos. 1 to 3 above
R/o.-Rajgurunagar (Wada Road),
Tal-Khed, Dist- Pune

**...Appellants.
(Orig.Plaintiffs)**

Versus

1. Pandurang Mathu Khangate
since deceased through his legal Heirs:
- 1a) Ramesh Pandurang Khangte
Aged – about Adult
R/o- Satkarshthal, Raigurunagar
Wada Road, Tal-Khed, Dist-Pune
- 1b) Sou. Pramila Shashikant Palange
Aged: about 45 years,
R/at- Keshnandgaon, Tal-Haveli
District- Pune.
- 1c) Sou. Nanda Shivaji Lad
Aged about 40 years,

R/o- Alkuti, Tal-Parner,
Dist- Ahmednagar

1d) Sou. Kalpana Ashok Thorat
Aged about 36 years,
R/o- Satkarshthal Rajurunagar,
Wada Road, Tal- Khed,
Dist – Pune

1e) Suman Pandurang Khangte
Aged about – Adult
R/o- Satkarsthal, Rajgurunagar
Wada Road, Tal- Khed, Dist-Pune

**...Respondents.
(Orig.Defendants)**

*Mr. T. D. Deshmukh and Mr. S. S. Mohanty, Mr. H. D. Chavan for the appellants.
Mr. Abhijit P. Kulkarni i/b Mr. Manoj M. Badgujar for respondent nos. 1B, 1C,
1D and 1E.
Mr. Satish S. Raut for respondent no. 1A.*

Coram : Sharmila U. Deshmukh, J.

Reserved on : February 15, 2024.

Pronounced on : March 05, 2024.

JUDGMENT :

1. Vide order dated 8th July 2014, the second appeal was admitted by this Court. The original Plaintiff is before this Court being dissatisfied by the judgment and order dated 1st February 2014 passed in Civil Appeal No. 442 of 2013 by which the appellate Court has partly allowed the appeal and set aside the judgment and decree passed by the Civil Judge, Junior Division, Khed, Pune in Regular Civil Suit

No.309 of 2010 to the extent of direction to hand over possession of the suit land to the appellant herein. For sake of convenience, the parties are referred to by their status before the Trial Court.

Background Facts :

2. By registered sale deed dated 4th April 1983, the original defendant- Pandurang Khangate sold the suit property being western half portion admeasuring 81.5 Ares out of Survey No. 199 (New Survey No. 140) situated at Mauje Rajgurunagar, District Pune, in favour of the husband of defendant no.1-Mahadu Rakshe for a consideration of Rs.11,000/-. On the same day agreement of re-conveyance was executed between Mahadu and Pandurang by which Pandurang was entitled to repurchase the suit property after five years upon payment of Rs 11,000/-. The Plaintiff no.1 is the widow of Mahadu Rakshe, plaintiff nos.2 and 3 are the sons and plaintiff no.4 is the brother of deceased Mahadu Rakshe. During the pendency of the proceedings, the original Defendant expired and his legal heirs were brought on record. Subsequently, Mahadu Rakshe expired and the Plaintiff No.3 agreed to execute an Agreement for sale in respect of the suit property in favour of the defendant. The defendant had borrowed a sum of Rs.24,000/- from deceased Mahadu Rakshe and the plaintiff No 3 agreed to execute sale deed for total consideration of Rs.35,000/-,

i.e., Rs.11,000/- of re-conveyance + Rs.24,000/- borrowed by the defendant. A registered agreement for sale in favour of the defendant was executed on 6th April 1990 by accepting the earnest money of Rs.10,000/- and on the same day, the Defendant was put in possession of the suit property.

3. Regular Civil Suit No.310 of 2000 (old RCS No 1699/1995) was instituted by the defendant seeking specific performance of the agreement for sale dated 6th April 1990 and in the alternative for refund of earnest money. In that suit, plaintiffs filed written statement denying the execution of agreement for sale, delivery of possession and payment of earnest money. The case of plaintiff nos. 2 and 3 was that they were minors at the time of the execution of the Agreement for Sale and were not parties to the contract. The Trial Court by judgment dated 13th February 2009 dismissed the suit of defendant. While dismissing the suit, trial Court answered the issue of execution of agreement for sale on 6th April 1990 in favour of the defendant as well the issue of possession. As the trial Court held that agreement for sale was not legal and valid, the trial Court did not go into the issue as regards the readiness and willingness of defendant to perform his part of contract.

4. Against the judgment of trial Court, the defendant went into

appeal being Civil Appeal No. 235 of 2009. By the judgment dated 19th October 2010, the appeal came to be dismissed. In the said appeal, the plaintiffs had filed cross objections praying for possession of the suit property which also came to be dismissed. The appellate Court reversed the finding of the trial Court as regards the readiness and willingness and held that the defendant was ready and willing to perform his part of contract. The Appellate Court negated the issue as regards the entitlement of defendant to specific performance of contract for the reason that defendant nos. 2 and 3 were not parties to the contract and were minors and no permission was sought under section 8 of the Hindu Minority and Guardianship Act, 1956. The Appellate Court dismissed the cross objection filed by the Plaintiff seeking possession of the suit property for the reason that there was no counter claim by Plaintiffs in the trial Court seeking possession of the suit property and the cross objection was not permissible.

Proceedings Leading to the Second Appeal :

Trial Court proceedings :

Plaint :

5. RCS No.309 of 2010 was filed by the plaintiffs seeking recovery of possession of suit land and for permanent injunction restraining the Defendant from creating third party interest. The Suit property

was the same property which was the subject matter of earlier litigation, i.e., half portion on the western side of Gat No. 140, admeasuring 81.5-Are. The case of plaintiffs was that the suit land was purchased by deceased Mahadu Rakshe on 4th April 1983 and the defendant is in possession of the suit land on the basis of alleged agreement for sale stated to have been executed by the wife of Mahadu Rakshe, i.e., plaintiff no.3. It was pleaded that the defendant had earlier filed RCS No. 310 of 2000 for specific performance which came to be dismissed by the trial Court as against which the appeal was also dismissed by the appellate Court. It was pleaded that the defendant has no right to retain the possession of suit land as his agreement for sale is declared as void and his possession is held to be illegal by the courts. It was also pleaded that during the minority of plaintiff nos. 1 and 2, plaintiff no.3 being the natural guardian had handed over possession of the suit land to the defendant which is not binding on plaintiff nos. 1 and 2 and as such the possession of share of plaintiff nos. 1 and 2 in the suit land was permissive and the plaintiff have right to seek possession of the suit land.

Written Statement :

6. The defendant resisted the suit by filing written statement and also filed a counter claim. It was contended by the defendant that

the cross objection of the plaintiff in the earlier litigation was dismissed and as such the present suit is not maintainable. It was contended that since the year 1990, the defendant is in possession of the entire suit property and for a period of 12 years, the possession has not been sought and as such the suit is barred by limitation. It was contended that the defendant is the owner of property, which has been established in the earlier proceedings. It was contended that there was an agreement for sale of the year 1983 between the husband of plaintiff no.1 and the defendant, as the defendant was in need of money and thus agreement for sale was executed in respect of 81.5 Are land of Survey No. 199. That, an agreement for re-conveyance was executed by the husband of plaintiff no.1. That the Defendant was informed that the provisions of resettlement law came in the way of execution of deed of re-conveyance for which permission had to be sought from the competent authority. It was pleaded that the agreement for sale dated 6th April 1990 was executed by plaintiff no.3 in favour of defendant and on the same day by execution of possession receipt dated 6th April 1990, the possession of the entire land was handed over to the defendant. It was contended that from 6th April 1990, the plaintiff's possession over the suit land is continuous without any obstruction from the plaintiffs and for the last more than 21 years the possession of the suit land is

with the defendant and although the plaintiffs were the owners, the defendant has become owner by adverse possession.

Counter Claim :

7. The defendant by way of counter claim sought a declaration of title by adverse possession.

Written statement to counter claim :

8. The plaintiffs filed their written statement to the counter claim denying the contention that the defendant has become owner of suit land by adverse possession. An objection was also raised that counter claim does not disclose the valuation of suit property or the Court fees paid on the said amount.

Finding of Trial Court :

9. Trial Court by its judgment dated 3rd May 2013, decreed the suit. Trial Court held that as the defendant's suit i.e., RCS No. 310 of 2000 for specific performance of contract for sale was dismissed on 13th February 2009 as against which the appeal was also dismissed on 19th October 2010, the defendant had no right to retain the possession of suit property as the agreement for sale has been declared to be void and the possession of defendant is illegal. As regards the counter claim of defendant seeking ownership by adverse possession, the trial

Court held that in the earlier suit for specific performance, he has sought specific performance of the sale deed and has pleaded that the present plaintiffs are the owners of suit property. Trial Court held that nowhere the defendant had denied the title of plaintiff and his only contention is that he is in possession of the suit property since last more than 12 years. Trial Court held that the defendant has not pleaded when his permissive possession has become adverse to the plaintiffs and as such answered the issue against the defendant.

Findings of Appellate Court :

10. The Appellate Court framed following points for consideration.

Sr. No	POINTS	FINDINGS
1	Do the plaintiffs prove that the possession of defendant on suit land is illegal ?	No.
2	Whether the suit is barred by limitation ?	No.
3	Whether the defendant prove that he acquired title on suit property by adverse possession ?	No.
4	Whether the plaintiffs are entitled for possession of suit land ?	No.
5	Whether the plaintiffs are entitled for injunction restraining the defendant from creating third party interest over the suit land ?	Yes.
6	Whether the Judgment and Decree of learned Trial Court requires interference at the hands of this Court ?	Yes.
7	What order ?	As per final order.

11. The appellate Court considered the evidence of plaintiff no.1 and the admission that during the execution of sale deed by the defendant in favour of Mahadu Rakshe, she was present in the Sub Registrar's office and that she has no knowledge about the transaction between her husband and the defendant. The Appellate Court held that the evidence discloses that the plaintiff has not come before the Court with clean hands. The appellate Court considered the finding given in the previous litigation between the parties and observed that the appellate Court in Civil Appeal No. 235 of 2009 has held that the defendant was ready and willing to perform his part of contract and the said issue has been answered in favour of the defendant. The appellate Court also observed that the judgment in the earlier litigation does not hold that the agreement for sale is illegal and void and the only finding is that the defendant is not entitled to the relief of specific performance on the ground that defendant nos. 2 and 3 were not party to the agreement. The appellate Court held that mere non mentioning of Section 53A of Transfer of Property Act in the written statement will not cause prejudice to the Plaintiffs. It was held that plea of protection of section 53A of the Transfer of Property Act though not specifically raised, it was the mistake of advocate for which the defendant cannot be punished. The appellate Court considered the decision of the Apex

Court in the case of ***Shrimant Shamrao Suryavanshi v. Pralhad Bhairoba Suryavanshi [(2002) 3 SCC 767]*** on the issue of protection under section 53A of the TP Act, in which the Apex Court has held that if the ingredients of section 53A of the TP Act are complied with, the law of limitation does not come in the way of defendant seeking to protect his possession under section 53A of the TP Act. The appellate Court applied the said case law to the facts of present case and upon consideration of the documentary evidence, held that the plaintiff had not filed suit for declaration that the agreement for sale is void and till such a declaration is obtained by the plaintiff, the defendant is entitled to protect his possession. While setting aside the direction of trial Court to the extent of handing over of possession, the Defendant was also restrained from creating third party interest over the suit land.

Submissions :

12. Heard Mr. T. D. Deshmukh, learned counsel appearing for the appellant and Mr. Raut, learned counsel appearing for respondent no. 1A and Mr. Abhijit Kulkarni, learned counsel appearing for respondent no. 1B, 1C, 1D and 1E.

13. Mr. Deshmukh submits that the possession of the Defendants

is protected under Section 53A of the TP, which was neither pleaded nor proved. Pointing to the written statement filed by defendant, he submits that the defendants had put up a case of adverse possession and there is no pleading as regards section 53A of the TP Act. He submits that the suit for specific performance filed by the defendants has been dismissed by trial Court and the appeal preferred as against which was also dismissed and, as such, the same has attained finality. He submits that the possession handed over was on the basis of agreement of sale of the year 1990 and once the suit for specific performance of the agreement has been dismissed, the possession of defendants was rendered unauthorised and illegal. He submits that in absence of plea of Section 53A of the TP Act, the possession cannot be protected. He submits that no issue as regards section 53A of the TP Act was framed by the trial Court as there was no pleading to that effect. He submits that the reliance by the appellate Court on the decision in the case of ***Shrimant Shamrao Suryawanshi (supra)*** is misplaced as in that case the suit for specific performance was barred by limitation and would contend that where the dismissal of suit is on the ground of limitation, the remedy ceases to exist however the right subsists and it is this right which is protected. He submits that in the facts of present case, the dismissal being on merits, the possession of prospective purchaser is rendered unauthorised and illegal and the

plaintiffs are thus entitled to possession. He submits that specific case of ownership by adverse possession was put up by the defendant and the said plea is mutually destructive of the plea of part performance. According to him, the doctrine of part performance would not apply in the instant case as by raising a plea of adverse possession the defendant has claimed a title hostile to the owner whereas in the case of part performance, the title of owner is admitted. He submits that facts of the case do not demonstrate compliance with the ingredients of section 53A of the TP Act as Defendants by taking a plea of adverse possession cannot be said to be ready and willing to perform their part of contract and there is nothing to demonstrate that there was something done in furtherance of the agreement once the plea of adverse possession has been taken. In support of his submissions Mr. Deshmukh relies upon following decisions :

(a)	<i>Sharadamma v. Mohammed Pyrejan [(2016) 1SCC 730];</i>
(b)	<i>A. Nawab John v. V. N. Subramaniam [(2017) 7 SCC 738];</i>
(c)	<i>Ussein Gazi v. Razia Shaikh [AIR 2023 Bom 25]; and</i>
(d)	<i>Revanasiddayya v. Gangamma [(2018) 1 SCC 610].</i>

14. *Per contra* Mr. Raut, learned counsel appearing for the

defendant would submit that the suit is barred by limitation as the cause of action arose in the year 1996 when the first suit for specific performance was filed in the year 1995. He would further submit that the agreement of re-conveyance was executed on 4th April 1983 in respect of which an independent suit has been filed by the defendant and the possession of defendant is liable to be protected under section 53A of the TP Act. Pointing out the findings of appellate Court in Appeal No. 235 of 2009, he submits that the appellate Court has held that the defendants are ready and willing to perform their part of contract and the ingredients of section 53A of the TP Act are satisfied in the present case. He submits that the execution of agreement of the year 1983 is not disputed and possession is claimed by virtue of an independent possession receipt executed on 6th April 1990, that is on the date of agreement for sale. He distinguishes the judgments referred to by Mr. Deshmukh as in those cases there was only one agreement and the specific performance of the said agreement was dismissed in which case the question of willingness would not arise. According to him, however the distinguishing factors in the present case are that firstly the agreement was held to be valid and secondly the readiness and willingness of the defendant has been established and thirdly the suit seeking re-conveyance as per the agreement of 4th April 1983 is pending. He submits that there is no

finding that the agreement of the year 1983 or of the year 1990 is illegal and the possession of defendant is not rendered unauthorised. He submits that on the contrary the Courts have held that the agreement of sale dated 6th April 1990 has been validly executed. He would further submit that the plaintiffs in the earlier round of litigation had raised the defence that the possession of the suit land was with the plaintiffs and in the present case a completely different stand is being taken seeking recovery of possession. He submits that a litigant cannot be permitted to approbate and reprobate. He would submit that the Plaintiffs do not have any right to prosecute the present proceedings as during the pendency of proceedings, the property has already been sold. In support of his submissions, Mr.Raut relied upon following decisions :

(a)	<i>Premlata @ Sunita v. Naseeb Bee [2023(1) Bom. C.R. 368]; and</i>
(b)	<i>D. Narain Roy v. Joges Chandra De [AIR 1924 Calcutta 600].</i>

15. In rejoinder Mr. Deshmukh would submit that the defendant has in the earlier round of litigation sought specific performance of the agreement of sale dated 6th April 1990 and in the present case he cannot seek protection of possession by relying on the Agreement of the year 1983. As regards the limitation, he would submit that after

the suit for specific performance was dismissed the possession became adverse and that the plaintiffs have accepted the finding as regards the possession of defendant and has therefore filed suit for recovery of possession within the period of limitation prescribed under Article 65 of Limitation Act.

SUBSTANTIAL QUESTION OF LAW:

16. The substantial question framed by this Court while admitting the appeal reads as under:

“Whether the appellate Court was right in setting aside the decree passed by the trial Court in a suit for possession based on title on the only ground that the Defendant is entitled to protection of possession on the basis of part performance of contract under Section 53A of the Transfer of Property Act, 1882 particularly when the agreement dated 6th April, 1990, on which the reliance was placed has already been held to be invalid and which decision has attained finality”.

ANALYSIS:

17. The Defendant in the earlier round of litigation has been denied the relief of specific performance of the Agreement for sale dated 6th April, 1990. The cross objection filed by the Plaintiffs at the appellate

stage was dismissed on ground of absence of counter claim. As the dismissal of counterclaim was not on merits, the dismissal of the cross objection does not operate as *res judicata* in the present case.

18. Before proceeding further it would be relevant to reproduce section 53A of the Transfer of Property Act, 1882 (TP Act) which reads as under :

53A. 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, or, 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."*

19. In the present case, there is a contract in writing for transfer made for consideration executed by plaintiff no.3 and in part performance of the contract, possession has been taken by the defendant. In the earlier round of litigation, the appellate Court has held that the defendant is ready and willing to perform his part of contract. However it is pertinent to note that in the present case, the Defendants do not seek to protect their possession under Section 53A of TP Act. There is no such defence taken in the written statement. The Defendants claim ownership on basis of adverse possession and by way of counter claim seeks title by prescription. As the defence of Section 53A was not taken, no issue was framed in that respect. Before the appellate Court for the first time during the arguments the defence of section 53A of the TP Act was raised. The provisions of Section 53A of TP Act envisages certain conditions to be fulfilled and it is necessary to plead and prove the ingredients of Section 53A of TP Act. By claiming title by prescription, there is denial to the title of the original owner and though in the earlier round of litigation, the issue of readiness and willingness was answered in favour of the Defendant, in the instant case by seeking ownership by adverse possession, the Defendants have given up their right to protection of possession under the Agreement for Sale of the year 1990 under doctrine of part-performance. I find considerable force in the

contention of Mr. Deshmukh that plea of adverse possession cannot co-exist with the condition of readiness and willingness which is one of the ingredients to be satisfied before doctrine of part performance can be invoked. The Appellate Court has failed to consider the specific plea of ownership by adverse possession.

20. Mr. Deshmukh is right in his contention that the Apex Court in the case of ***Shrimant Shamrao Suryawanshi (supra)*** was considering the doctrine of part performance in a case where the remedy of specific performance was lost by limitation. In the facts of that case the suit was brought by the transferor for recovery of possession of the suit property and there was no suit for specific performance filed by the transferee as that remedy was barred by law of limitation. It is in that context the Apex Court held that the Limitation Act only bars the remedy and does not extinguish a defence. In the present case, the suit for specific performance has been rejected on merits which finding has attained finality and there is no defence of Section 53 A taken by the Defendants. To salvage the situation learned counsel for the defendants would submit that there is an independent suit filed for re-conveyance as per the agreement of the year 1983. In the earlier round of litigation it was the agreement of sale dated 6th April 1990 which was the subject matter of trial and the appellate Court has

protected the possession which was handed over under the agreement of 1990. The filing of an independent suit for execution of re-conveyance agreement of the year 1983 would not enure to the benefit of defendants so as to protect his possession as admittedly the possession has been handed over under the agreement of the year 1990. Once the specific performance of agreement has been denied, the possession of defendant would be rendered unauthorised and illegal. Support can be drawn from the decision of Apex Court in case of ***D.S. Parvathamma vs A. Srinivasan*** (supra).

21. In the case of ***Revanasiddayya v. Gangamma*** (supra) the Apex Court was considering the issue of section 53A of the TP Act in a case where the suit for specific performance was dismissed on merits. The Apex Court in paragraph 16, 17 and 18 held as under :

“16. In our considered opinion, one of the effects of the dismissal of appellant's suit/appeal, which was filed for specific performance of the agreement, was that the appellant was not entitled to retain possession of the suit land. In other words, the possession of the appellant on the suit land, after the dismissal of his suit for specific performance, became unauthorized and illegal thereby entitling the respondents to claim back the same from the appellant on the strength of their ownership.

17. The appellant was, however, entitled to defend his possession over the suit land by taking recourse to the provisions of [Section 53-A](#) of the Transfer of Property Act, 1882 (hereinafter referred to as “[T.P. Act](#)”) but once his suit

for specific performance stood dismissed, the protection available under [Section 53-A](#) of the T.P. Act was no longer available to him.

18. So far as the present appeal is concerned, it does not arise out of the suit filed by the appellant against the respondents but arises out of a suit filed by the respondents against the appellant. We cannot, therefore, examine the legality and correctness of judgment/decreed passed in appellant's suit/appeal but can certainly examine its effect while examining the legality and correctness of the impugned judgment."

22. Closer home, learned Single Judge of this Court in ***Ussein Gazi (supra)*** following the decision of the Apex Court in the case of ***Revansiddayya V. Gangamma*** has held in paragraphs 16 and 18 as under :

"16. The doctrine of part performance in Section 53-A of the Transfer of Property Act is an equitable doctrine. Therefore, in a situation where the Appellant's suit for specific performance (mandatory injunction) came to be rightly dismissed by the two Courts, there is no question of such Appellant's possession being protected by a decree of a permanent injunction. Once the two Courts rightly dismissed the suit for specific performance, the Appellant's so-called possession became unauthorised and illegal. There was no question of protecting such illegal and unauthorised possession.

18. Section 54 of the Transfer of Property Act clearly provides that a contract for the sale of immovable property by itself does not create any interest in or charge on such property. Therefore, based on the so-called agreement, the Appellant could have only sought a decree of specific performance. The Appellant did seek such a decree but the two Courts below rightly denied the same to the Appellant. Moreover, the Appellant has not even made any grievance about the same in this Second Appeal. In such a situation,

the Appellant cannot hold on to the suit shop illegally and unauthorisedly and further claim a decree of permanent injunction to protect his illegal and unauthorised occupation.”

23. The Appellate Court has answered the issue of limitation in favour of the Plaintiffs and as such it is not necessary for this Court to consider the issue of limitation in absence of cross objections. It is also pertinent to note that the trial Court as well as the appellate Court have negated the defendants’ claim for ownership by adverse possession and has protected the possession of Defendants under section 53A of the TP Act. Pertinently, while protecting possession, the appellate Court has restrained the defendants from creating any 3rd party interest in the suit land. Before the appellate Court the issue of independent suit for execution of re-conveyance of the agreement of the year 1983 was not argued. What can be inferred from the judgment of appellate Court is that although the suit for specific performance has been dismissed on merits, the possession of defendants is protected and at the same time the defendants has been restrained from creating any 3rd party interest over the suit land. As held by the Apex Court in ***Shrimant Shamrao Suryawanshi (supra)***, the legislative intent behind the introduction of section 53A of the TP Act is to provide protection to the transferee who in part performance of agreement had taken possession of the suit property even if the

limitation to bring a suit for specific performance had expired. The protection granted by section 53A of the TP Act, considering the object behind it, cannot be extended to a case where the same was not taken up as a defence to the suit for recovery of possession and where specifically plea of title by adverse possession is raised and a counter claim seeking the said relief is filed. The fine distinction is that upon the suit for specific performance being barred by limitation the right is not extinguished and what is lost is only the remedy. In a case where the specific performance has been dismissed on merits, the right itself is lost and as such the possession of transferee over the property becomes unauthorised.

24. It also needs to be noted that the agreement of sale dated 6th April 1990 was executed only by plaintiff no. 3 and not by plaintiff nos. 1 and 2 who were the co-owners of property and were minors at the time of execution of said agreement. In any event, the plea of section 53A of the TP Act could not be raised as a defence qua plaintiff nos.1 and 2 as the agreement was not entered into by plaintiff no. 3 as a guardian of plaintiff nos. 1 and 2 and plaintiff nos. 1 and 2 have sought recovery of the possession upon attaining majority.

25. As regards the submission that the Plaintiffs cannot be permitted to approbate and reprobate as in the earlier round of

litigation, the Plaintiffs had denied the possession of the Defendants and in the instant suit the possession is sought, the Defendants were held to be in possession of the suit property in earlier round of litigation and thus the instant suit, recovery of possession is sought accepting the finding of possession in favour of the Defendant.

26. One of the contentions of Mr. Raut was that as the Plaintiffs have already sold the suit property to third party, the Plaintiffs does not have any locus to continue the present proceedings. Mr.Deshmukh has rightly relied upon the decision of Apex Court in case of ***A. Nawab Joh and Other vs V.N. Subramaniam*** (supra) and ***Sharadamma vs Mohammed Pyrejan*** (supra) holding that merely due to assignment or release of the rights during the pendency of the appeal, the appellant did not in any manner lose the right to continue the appeal.

CONCLUSION :

27. Having regard to the discussion above, considering that no defence of Section 53A of TP Act was taken by the Defendants to protect their possession coupled with the counter claim seeking title by prescription, the Defendants cannot be said to continue to be ready and willing to perform their part of the contract so as to be entitled to seek protection of their possession by applicability of

doctrine of part performance. Once the suit for specific performance having been dismissed on merits, the possession of the Defendants have become unauthorised and the Plaintiffs are entitled to seek recovery of possession. The substantial question of law is answered accordingly. As such the judgment and order of the appellate Court dated 1st February 2014 is quashed and set aside and the judgment of the trial Court dated 3rd May, 2013 is revived.

28. In view of the disposal of second appeal, civil/interim application(s) taken out in this appeal, if any, does not survive and the same is disposed of.

[Sharmila U. Deshmukh, J.]

29. At this stage, request is made by learned counsel for the Respondents for stay of this judgment for period of 4 weeks from today. The request is opposed by learned counsel appearing for the Appellants. I am inclined to grant stay for period of 4 weeks from the date of uploading of this judgment on the official website of this Court.

[Sharmila U. Deshmukh, J.]

[This is corrected judgment pursuant to speaking to minutes order dtd. 8th April 2024.]