IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

**SECOND APPEAL NO.177 OF 2018**

Smt. Indumati Bhimashankar Surwase ...Appellant.
***Versus***
Vithal Pirappa Aarvat and Anr. ...Respondents.

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*Mr. Nitin Gaware-Patil and Mr. Divyesh Jain i/b Mr. Abhishek D. Nagode for the appellant.*
*Mr. Samir Kumbhakoni for the respondent Nos.1 and 2.*

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**Coram : Sharmila U. Deshmukh, J.**

**Date : 17th April, 2024.**

**P. C. :**

1. Heard.

2. Being dissatisfied by the judgment dated 20th January 2018 passed by the Appellate Court in RCA No.113/2014 dismissing the appeal there by confirming the judgment dated 2nd April 2014 passed by the Trial Court in Regular Civil Suit No.317/2012, original defendant is before this Court.

3. Regular Civil Suit No.317/2012 was instituted in respect of the the suit properties described as suit property A and B being row houses situated at Solapur. The case of the plaintiff was that the suit

properties were owned by them having purchased the same from the developer M/s. A. V. Pandhe. It was contended that for the purpose of purchasing of the suit property loan of Rs.50,000/- was raised from M/s. A. V. Pandhe and Rs.90,000/- was obtained from Finance Company viz., Vasudha Finance. The possession was obtained in the year 2000 and the loan installments were paid regularly to Vasudha Finance. Agreement for sale dated 25th November 2002 was entered into between the parties by which defendant agreed to purchase the suit property for total consideration of Rs.3,05,000/- out of which Rs.1,65,000/- was paid on the date of execution of agreement for sale and remaining amount of Rs.1,40,000/- was to be paid by repaying the loan installments of Vasudha Finance and the defendants were put in possession of the suit property. It was contended that as there was non- compliance by the defendants as regards the repayment of the loan installments, the plaintiffs were compelled to pay amount of Rs.2,60,000/- towards loan, interest and penalty amount and after the said payment the developer executed the sale deed of the property in favour of the plaintiff. It was contended that the plaintiff had approached the defendant for compliance of their obligation. However defendant instead of repaying the loan amount issued a false notice dated 15th September 2008 which was duly replied by the plaintiff. The cause of action arose as the defendant upon being called upon by the plaintiffs to hand over possession of the suit properties did not handover possession.

4. Suit came to be resisted by the defendants contending that as per the agreement for sale, the purchase consideration was Rs.3,05,000/- out of which Rs.1,65,000/- was paid at the time of execution of agreement for sale. It was admitted that balance Rs.1,40,000/- was to be repaid by way of paying loan installments of Vasudha Finance. It was pleaded that as the interest component of the loan installments was excessive the defendant was unable to pay the same and on 25th July 2008 defendant approached Vasudha Finance for the purpose of one time payment where she was informed that for the said purpose permission of the plaintiff was required. It was contended that when defendant approached the plaintiffs for seeking NOC for one time payment, demand was raised for an additional amount of Rs.50,000/-. As a result, on 15th September 2008, legal notice was issued. Subsequently, in November 2008 there was a compromise entered into between plaintiffs and defendant and defendant paid plaintiffs a sum of Rs.2,00,000/- till May, 2010 and it was decided that the defendant would remain in possession. The details of the payments made is that on 10th March 2009, Rs. 50,000/- was paid, on 15th December 2009 further sum of Rs.50,000/-, on 5th

January 2010 further sum of Rs.50,000/- and on 20th April 2010 further sum of Rs.50,000/-. It was contended that though the witnesses were present at the time of payments, the plaintiff refused to execute the receipt. It was contended that subsequently defendant made certain improvements in the suit property. By way of a counter claim injunction was sought against the plaintiffs.

5. The parties went to trial. The Trial Court by judgment dated 2nd April 2014 answered the issue of readiness and willingness against the defendant. The Trial Court took into consideration the fact that the plaintiffs were constrained to pay amount of Rs.2,60,000/- towards satisfaction of loan of Rs.1,40,000/- which was evident from the receipts produced on record. The Trial Court also took into consideration the evidence of the witness of the Finance Company who specifically deposed that the defendant had not approached the Finance Company for one time repayment of the loan amount.

6. As against this the defendant approached the Appellate Court. The Appellate Court framed and answered the following points for determination while dismissing the appeal:

| **Sr. No.** | **POINTS** | **FINDINGS** |
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| 1 | Whether plaintiffs prove that, defendant failed to repay the loan amount of M/s. A. V. Pandhe and Vasudha Finance and the plaintiffs have paid the same ? | Yes |
| 2. | Whether defendant proves that, she has paid the loan of plaintiffs to M/s. A. V. Pandhe and Vasudha Finance and despite that plaintiffs failed to execute sale deed in her favour ? | No. |
| 3. | Whether she proves that, plaintiffs are causing obstruction to her possession ? | No. |
| 4. | Whether she is entitled for perpetual injunction ? | No. |
| 5. | Whether plaintiffs are entitled for a decree of possession and mense profits as prayed ? | Partly proved. |
| 6. | Whether plaintiffs are debarred from enforcing any right in respect of the suit property against t9 pthe defendant by virtue of Sec.53A of the Transfer of property Act ? | No. |
| 7. | Whether the impugned judgment and decree of the ld. Trial Court suffers from any illegality and interference by this Court is necessary ? | No. |
| 8. | What order ? | As per final order. |

7. The Appellate Court framed specific issue No.6 as regards the protection of possession of the defendant under Section 53A of the Transfer of Property Act. The Appellate Court considered that as there was non-compliance of the obligation of the defendant to pay loan of Vasudha Finance, it cannot be said that the defendant had performed or was willing to perform his part of the contract and answered the issue against the defendant.

8. Learned counsel for appellant would submit that the admitted position was that agreement of sale was executed between the parties pursuant to which the possession was handed over to the defendant. He submits that the possession being handed over in part performance of the contract, Section 53A would come into play and his possession is required to be protected. He would further submit that readiness and willingness will be demonstrated from the notice dated 15th September 2008 wherein it was specifically stated that the defendant was ready and willing to repay the entire loan amount in one settlement and it was only by reason of the refusal by the plaintiff to give the no objection that there was non-compliance. He would further submit that there are witnesses examined to show payment of Rs.2,00,000/- which had been accepted by the plaintiff and as such readiness and willingness is amply demonstrated.

9. *Per contra* learned counsel for respondent would submit that there is a specific finding based on evidence that the defendant is not ready and willing to perform the part of the contract. He would submit that as there are concurrent findings of fact, this Court in exercise powers under Section 100 of CPC may not interfere with the concurrent findings of fact.

10. Considered the submissions and perused the record.

11. It is not in dispute that an agreement for sale was executed between the parties pursuant to which the defendant was put in possession of the property. The issue which arises for consideration is the applicability of Section 53A of the Transfer of Property Act which reads thus:

> *"[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 2 ***, 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.]"*

12. It is very clear from the said provision that the ingredients which are mentioned therein are required to be satisfied before the possession can be protected by applying the doctrine of part performance. The provisions provide that there must be a contract in writing for transfer for consideration of immovable property which must be in such words that the terms can be ascertained with certainty and the transferee must in part performance of the contract take possession of the property and must have done some act in furtherance of the contract and the transferee must have performed or willing to perform his part of the contract. It is only when the defendant is able to establish the ingredients of Section 53A of the Transfer of Property Act that the possession could be protected under the doctrine of part performance. The material ingredient is that the transferee must have done some act in furtherance of the contract and must have performed or willing to perform his part of the contract. Apart from the fact that in the written statement there is no specific plea raised as regards Section 53A of Transfer of Property Act, there are concurrent findings of the

Trial Court and the Appellate Court that the defendant was not ready and willing to perform the contract. Perusal of the written statement would indicate that the plea taken is that though agreement for sale was executed on 25th November 2002, the terms were varied by oral agreement and sum of Rs. 2 Lakhs was paid. As regards the essential conditions of the agreement of sale which was repayment of loan of Vasudha Finance the contention of the defendant is that as the interest component was on excessive side and on 25th July 2008 the defendant had approached the Finance Company for one time settlement where she CASwas informed that without the no objection of the plaintiff settlement could not be done. However, judgment of the Trial Court shows that plaintiff had examined official of the finance company who has specifically denied in the cross examination that the defendant has ever approached the Finance Company for repayment of the loan amount. There is nothing which has been demonstrated before this Court from the cross examination of the said witness which would falsify the deposition as regards the defendant not approaching the Finance Company for the purpose of repayment of the loan. Further it needs to be noted that if the consideration was Rs.3,05,000/- out of which a sum of Rs.1,65,000/- was already paid and the balance was Rs.1,40,000/- which was to be repaid to the Finance Company, there is no explanation which is tendered as to why sum of Rs.2 lakhs was paid.

13. For the purpose of applicability of Section 53A of the Transfer of Property Act, there must be readiness and willingness to perform the agreement. In the present case, despite specific obligation on the defendant to repay the loan of Vasudha Finance, the admitted position is that due to the excessive interest component, the defendant was not in position to repay the loan amount. The Trial Court has also noted that no documentary evidence has been produced to prove payment of Rs.2 lakhs to the plaintiff and neither any documentary evidence to show that any installments of the Finance Company was repaid by the Defendant.

14. Considering that the very ingredient of Section 53A of readiness and willingness has been answered against the Defendant by concurrent findings of the Trial Court and Appellate Court based on evidence on record which has not been demonstrated to suffer from any perversity, no substantial question of law arises in the present case. There is no quarrel with the proposition of law laid down by the Apex Court in ***Rambhau Namdeo Gajre vs. Narayan Bapuji Dhotra (dead) thr. Lrs., (2004) 8 Supreme Court Cases 614*** . However in the facts of the present case as readiness and willingness has not been

established by the defendant the said decision is of no assistance to the appellant.

15. Resultantly, Appeal stands dismissed.

**[Sharmila U. Deshmukh, J.]**