



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

927 SECOND APPEAL NO. 250 OF 2018

Suresh Machhrumal Goklani

VERSUS

Raziya Begum Sk. Iqbal Ahmed Thr. Sk. Iqbal Ahmed Sharfuddin

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Mr. D. P. Palodkar, Advocate for Appellant

Mr. A. D. Kasliwal, Advocate for Respondent No 1-a

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WITH

CIVIL APPLICATION NO. 4267 OF 2018 IN SA/250/2018

WITH

CIVIL APPLICATION NO. 4692 OF 2023 IN SA/250/2018

CORUM : ROHIT W. JOSHI, J.

DATE : 3rd APRIL, 2025

ORDER :

1. The original defendant has filed the present second appeal being aggrieved by a reversing decree for possession passed against him in Regular Civil Appeal No. 315 of 2012.

2. The respondent, who is the original plaintiff, had filed a suit for possession against the appellant/defendant being Special Civil Suit No. 275 of 2023 seeking a decree for possession with respect to the suit property which comprises of one Shop Block in Municipal House No. 5-18-44, CTS No. 17692 at Paithan Gate, Aurangabad. The case of the plaintiff is that vide agreement dated

29.04.1997, the defendant had agreed to purchase the suit property along with adjoining shop block from her for a total consideration of Rs. 9,25,000/-, as against which a sum of Rs.3,00,000/- was paid by the defendant. The plaintiff contended that the defendant had forcibly entered the suit property in the year 2001. On this basis, the plaintiff filed suit for possession.

3. On being served with the suit summons, the defendant entered appearance in the matter and filed a written statement opposing the prayers in the suit. The contention of the defendant is that apart from part consideration of Rs. 3,00,000/- which was paid on the date of agreement, an additional amount of Rs. 2,00,000/- was paid by him to the plaintiff in cash on 10.05.1997. The defendant contended that the plaintiff was in need of additional amount of Rs. 50,000/-, which was also paid on 09.11.1998 and upon this payment being made, the plaintiff herself had delivered possession of the suit shop to him. The defendant denied the adverse allegations made by the plaintiff in the plaint including one of forcible entry in the suit property.

4. Based on the rival pleadings issues were framed by the learned Trial Court, on which the parties led their evidence. The

plaintiff examined her husband as a sole witness and closed her evidence. As against this the defendant examined himself and three other witnesses to evidence execution of agreement, payment of further consideration of Rs. 2,00,000/- and delivery of possession of suit shops by the plaintiff to the defendant. After hearing rival arguments, the learned Trial Court was pleased to dismiss the suit for possession on the ground that the plaintiff had failed to prove forcible entry of the defendant in the suit property. Aggrieved by the decree passed by the learned Trial Court dismissing the suit for possession, the plaintiff preferred First Appeal being Regular Civil Appeal No. 315 of 2012. The learned First Appellate Court has allowed the appeal vide judgment and decree dated 09.10.2017. The learned First Appellate Court has held that possession of the defendant over the suit property is illegal and the defendant has also committed breach of contract by failure to adhere to the schedule of payment as per the agreement of sale at Exhibit 42.

5. In view of the aforesaid, the present Second Appeal has been filed by the defendant challenging the order dated 26.03.2018. Notice was issued to the plaintiff on the following two substantial questions of law.

“A) Whether Power of Attorney holder can give evidence in place of the party to the suit especially in absence of any evidence showing that he was fully aware of the facts in issue ?

B) Whether owner can seek possession of suit shop from the defendant without seeking relief of declaration of cancellation of agreement of sale on the basis of which the defendant claims to be in possession of the suit shop ?”

6. Mr. D. P. Palodkar,, learned advocate for the appellant contends that it is well settled proposition of law that the plaintiff must enter the witness-box in order to prove his or her case. His contention is that the husband of the plaintiff was not a competent witness and as such the suit was liable to be dismissed on this count alone. He has placed strong reliance on the judgment of the Hon’ble Supreme Court in the matter of *Janki Vashdeo Bhojwani and others Vs. Indusind Bank Ltd., and others* reported in (2005) 2 SCC 217 .

7. As against this, Mr. A. D. Kasliwal, learned advocate for the respondents contends that a husband is always a competent witness for the wife in view of Section 120 of the Indian Evidence Act. Apart from this, he has drawn my attention to the depositions

of the witnesses in order to demonstrate that the husband was personally aware of the facts of the case on which he has deposed. He contends that the husband has deposed on the basis of his personal knowledge and therefore, on this count also he is a competent witness.

8. Having heard the rival submissions on the aforesaid question, in my considered opinion, having regard to the mandate of Section 120 of the Indian Evidence Act coupled with the fact the record clearly establishes that the husband was fully aware about the facts of the case and was in fact actively involved in the transaction between plaintiff and defendant is sufficient to hold that he has deposed on the basis of his personal knowledge and as such he was a competent witness. The first question of law is therefore, answered against the appellant in favour of the respondent/plaintiff.

9. As regards the second question of law, it needs to be mentioned that undisputedly, the plaintiff is owner of the suit property. The defendant is claiming to be in possession of the suit property on the basis of agreement of sale at Exhibit 42. It is not in dispute that the defendant has not filed a suit for specific

performance of contract. It also needs to be mentioned that as per Section 54 of the Transfer of Property Act agreement of sale does create any right in immovable property. The case of the defendant is that he had already parted with substantial amount of Rs.3,00,000/- while entering into agreement of sale. The learned advocate for the defendant contends that apart from the said amount of Rs. 3,00,000/-, he had paid a sum of Rs. 2,00,000/- to the plaintiff, which is duly proved by the witnesses examined by him. He contends that possession of the property was delivered voluntarily by the plaintiff. According to the learned advocate for the appellant, the evidence on record is sufficient to infer that the defendant was ready and willing to perform his part of the contract and was placed in possession of the suit property in part performance of the contract. The learned advocate for the appellant contends that although Section 53A of the Transfer of Property Act is not referred in the written statement, the pleadings in the written statement will suggest that the defence of the defendant is relatable to the said provision. He further contends that parties are required to plead the facts and not the law and therefore, the case should be examined on the touchstone of Section 53A of the Transfer of Property Act. In this regard, it is necessary to refer to the relevant clauses of the agreement which have been quoted by the learned

First Appellate Court at page No. 18 in paragraph 23 of the judgment.

10. Perusal of the clauses quoted by the learned First Appellate Court will demonstrate that there is no clause for delivery of possession of the suit property prior to execution and registration of the sale deed. In that view of the matter, possession of the defendant over the suit property cannot be said to be in part performance of the contract. The other material stipulation which is required to be satisfied in order to seek shelter under Section 53A is that the transferee i.e. the defendant herein, must prove that he has performed or was ready and willing to perform his part of the contract. The learned advocate contends that he was always ready and willing to perform his part of the contract, however, further payment could not be made since the suit shop was occupied by a tenant. Occupation of the property by a tenant according to him is an encumbrance since possession of the property could not be delivered as the same was in occupation of a tenant. The learned advocate has drawn my attention to Clause 7 of the agreement to contend that the property was to be transferred free from all encumbrances. I am afraid, the said contention also cannot be accepted. It is apparent from perusal of judgments by both the

learned Courts as well as the pleadings and evidence on record that such is not the case set-up by the defendant either in his pleadings or during course of evidence.

11. That apart, there is no legal bar for transfer of property in occupation of a tenant. Although physical possession could not be delivered, constructive possession could have been transferred by the plaintiff to the defendant, had the defendant made payment of the sale consideration in accordance with the schedule of payment. The undisputed facts of the case therefore, establish that the defendant has not performed his part of contract and is therefore not entitled to take shelter under Section 53A of the Transfer of Property Act. It will be pertinent to mention here that the suit property is a shop block situated in Aurangabad city and both the parties are residents of Aurangabad. It is therefore, obvious that while entering into agreement of sale the defendant was aware that the property was in possession of the tenant. It needs to be re-emphasized that it is not even the case of the defendant that he could not purchase the property since it was in possession of a tenant, which is an encumbrance as per clause 7 of the agreement.

12. As regards need for cancellation of agreement, in my considered opinion, since the vendor/the plaintiff is owner of the suit property, she is entitled to resume possession of the suit property from the defendant who according to her has entered into the suit property forcibly and also if it is held that the defendant is in possession in part performance of the contract since she has committed breach of this contract. Viewed from any angle, the defendant cannot oppose the prayer for possession made by the plaintiff/owner. In the light of above, the second substantial question of law also needs to be answered in favour of the plaintiff/respondent. In that view of the matter, I am not inclined to show any indulgence in the present appeal. The Second appeal is therefore liable to be dismissed and is dismissed as such with no order as to costs. At this stage, the learned advocate for the appellant contends that while making inquiry into mesne profits the amount of Rs. 3,00,000/-, which is admittedly paid by the appellant/defendant to the respondent/plaintiff should also be taken into consideration. It is obvious that payment of the said amount is not in dispute and the learned Court dealing with the issue will take it into consideration in accordance with law.

[ROHIT W. JOSHI]
JUDGE