



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

**High Court Civil Suit No. 1 of 2005
in O.L.R. No. 38 of 2003 (D)
(Old Regular Civil Suit No. 2574 of 1989)**

(1) Ramgiri Apartment Owners'
Association (Proposed) through its
Chief Promoter, Shri Mukund S/o
Krishnarao Paturkar, aged about 60
years, Occupation : Service, resident
of 19-K, Bharat Nagar, Nagpur.

(2) Shri Yeshwanta Rajaram Kothalkar,
aged about 70 years,
Occupation : Service, resident of
C/o C.D. Puranik, 90, Ramnagar,
Nagpur-10. (Dead)

Amended as
per Court's
order dtd.
5-7-2024

L.Rs of Plaintiff No. 2
Shri Ankur S/o Yashwant Kothalkar,
Occ. Service, R/o. Flat No. 503,
Sterling Tower-15, Amanora
Park Town, Hadapsar, Kharadi Road,
Opp. Magarpatta City,
Pune-411028.

(3) Shri Arun Krishnarao Paturkar,
aged about 56 years,
Occupation : Service,
r/o 19-K, Ramnagar, Nagpur-10.

(4) Shri Shriranga Nilkant Abhyankar,
aged 67 years, Occupation : Service,
r/o 234, Ramnagar, Nagpur-10.

(5) Ku. (Dr.) Neela dt/o Krishnarao
Paturkar, aged 70 years,
Occu : Service, r/o 19-K, Bharatnagar
Nagpur-1 (Dead)

Amended as
per Court's
order dtd.
5-7-2024

L.Rs of Plaintiff No. 5
Shri Mukund Krishnarao Paturkar,
aged about 74 years, Occu : Retired,
R/o 19-K, Bharatnagar, Nagpur.

(6) Shri Subramaniam Swaminathan,
aged 60 years, Occupation : Service,
r/o F-79/B, Central Railway Colony,
Nagpur.

.... Plaintiffs

VERSUS

(1) M/s Orange City Builders Pvt. Ltd.
through the Diorector Smt. Charumati
Wd/o Vasant Sonwane, aged major,
Occupation : Business, r/o 19, Daga
Layout, Nagpur.

(2) Smt. Shardabai Wd/o Baburao
Parate, aged 69 years,
Occupation : Housewife

(3) Shri Rajiv S/o Baburao Parate
aged 46 years, Occupation : Business

(4) Shri Sanjay S/o Baburao Parate
aged about 44 years, Occu : Business

(5) Shri Pradumya S/o Baburao Parate
aged 41 years, Occu : Student,
Defendants 2 to 5 all residents of
105, Ramnagar, Nagpur.

(6) Official Liquidator, High Court,
New Secretariat Building,
Opposite: V.C.A. Stadium,
Civil Lines, Nagpur.

.... Defendants

Mr. A. B. Patil, Advocate for the plaintiffs

Mr. Shriniwas Deshpande, Advocate for defendant nos. 1 and 6

Mr. C. B. Dharmadhikari, Advocate for defendant nos. 2 to 5

CORAM : ANIL L. PANSARE J.

Date of reserving order : 09-05-2025

Date of pronouncing order : 09-06-2025

P.C.

The plaintiffs have filed suit for declaration and permanent injunction. Substantive prayers read as under :

- “(i) a decree be passed in favour of the Plaintiffs for declaration that the agreement dated 18th March, 1989 is binding on the Defendants and further a declaration to the effect that the Defendant No. 1 has no authority, right, title or interest in the proposed “Ramgiri Apartments” in view of the agreement dated 18th March, 1989 ;*
- “(ii) a decree be passed in favour of the Plaintiffs for permanent injunction restraining the Defendants 1 to 5 from disposing of the suit property in any part or the whole, and further be pleased to restrain the Defendants from interfering with the possession and construction activities of the Plaintiffs on plot No. 105/C, Ramnagar, Nagpur;*
- “(iii) a decree to the above effect be passed in favour of the Plaintiffs with costs;*
- “(iv) any other relief which this Hon’ble Court deems fit, in the facts and circumstances of the case.”*

2. The agreement dated 18-3-1989 as referred to in first prayer is an agreement executed by and between the plaintiffs and defendant no. 1 – company. The said agreement will be hereinafter referred to as agreement of 1989. According to plaintiffs, defendant no. 1 has transferred and assigned all rights of construction to plaintiffs. The rights so assigned by defendant no. 1 flow from agreement dated 8-6-1987 (hereinafter referred to as ‘agreement of 1987’) entered into by and between defendant no. 1 on one side and defendant nos. 2 to 5 on the

other. The defendant no. 1 agreed to purchase suit plot bearing Plot No. 105/C admeasuring about 4200 sq.ft. situated at Telangkhedi, Ramnagar, Nagpur which is owned by defendant nos. 2 to 5 (hereinafter referred to as 'the land owners').

3. According to plaintiffs, defendant no. 1 had undertaken to construct flats scheme on the said plot. The plaintiffs agreed to purchase undivided shares in the suit plot and thus are entitled to 1/7th share in the land. The proposed scheme of apartment is having 7 flats. The plaintiffs have paid substantial amount towards costs of flats as well as land. The defendant no. 1, however, has paid to the land owners an amount of Rs. 2,53,750/- and balance amount of Rs. 1,66,250/- remains unpaid.

4. It is the case of the plaintiffs that by an agreement of 1989, defendant no. 1 transferred and assigned all the rights in favour of the plaintiffs and the association because defendant no. 1 was not in a position to pay the balance consideration amount of the suit plot. The plaintiffs then averred that defendant no. 1 has also handed over possession of the suit plot to the plaintiffs and were thus entitled to commence and carry on construction of the proposed apartment in accordance with the sanction plan.

5. The plaintiffs have then put forth a categorical case that it was agreed between them and defendant no. 1 that the balance amount to be paid by defendant no. 1 to the land owners, will be paid by plaintiffs directly to them (the land owners). The plaintiffs are ready and willing to pay the amount to the land owners provided they agree to accept the same.

6. The plaintiffs have then mentioned about pendency of one suit being Regular Civil Suit No. 2502/1988 which was filed by defendant no. 1 against the land owners. The trial Court vide order dated 19-8-1989 granted interim injunction restraining the land owners from interfering with the possession of defendant no. 1 over the suit plot with a condition that defendant no. 1 shall deposit balance amount within one month from the date of order, failing which, the order of injunction shall stand vacated automatically. Defendant no. 1 did not deposit the amount and, therefore, order of injunction stood vacated. According to the plaintiffs, defendant no. 1 did not deposit the amount because the scheme was already handed over to them.

7. The plaintiffs have then averred that the defendant no. 1 approached them and demanded money due towards installment and threatened plaintiffs to cancel allotment of flat if the amount is not paid. Defendant no. 1 had issued notice of cancellation of allotment of flat to

plaintiffs no. 3. The flats were so booked under separate agreements but said agreements stood cancelled by virtue of execution of agreement of 1989, wherein the entire scheme along with its construction was transferred in favour of plaintiffs.

8. The cause to file suit arose in the month of September, 1989 when the plaintiffs became aware of pendency of Civil Suit No. 2502/1988. It further arose in the first week of December, 1989 when the plaintiffs came to know that defendant no. 1 is negotiating with other persons for disposing of flats allotted to the plaintiffs. It then arose when the land owners informed plaintiffs that they are unable to accept the amount in view of civil suit pending in the court and accordingly, the suit came to be filed. Pending suit, the Architect engaged by defendant no. 1 filed company petition, registered as Company Petition No. 7/1995, wherein winding up order was passed on 20-8-1999. The defendant no. 6 has been appointed as Official Liquidator and accordingly was added as defendant no. 6.

9. Defendant no. 1 contested the suit stating therein that suit is not maintainable because plaintiff no. 1, the so called apartment owners' association is not registered under the provisions of the Maharashtra Apartment Ownership Act, 1970. That apart, the agreement of 1989 has been cancelled, which fact is suppressed by the plaintiffs. According

to defendant no. 1, the plaintiffs did not pay the balance amount of Rs. 1,65,000/- to the land owners nor did they pay the said amount to defendant no. 1. It is then averred that though rights under agreement of 1987 were transferred by defendant no. 1 in favour of plaintiffs, possession of suit plot was never given to them. Defendant no. 1 while denying the case put forth by plaintiffs has repeatedly averred that plaintiffs have committed breach of the agreement as they did not pay the balance amount of consideration either to the land owners or to defendant no. 1. Accordingly, agreement executed between defendant no. 1 and plaintiffs was cancelled.

10. The land owners also filed written statement. They have admitted execution of agreement of 1987 but denied execution of agreement of 1989 being not party to said agreement. According to them, the alleged agreement is not binding on them as they never agreed to accept remaining/balance amount from the plaintiffs. The plaintiffs' possession has been also denied rather they claimed to be in possession of the suit property on the ground that the order of injunction granted in favour of defendant no. 1 stood vacated.

11. The land owners then averred that in the suit filed by defendant no. 1 against land owners, the plaintiffs filed application, Exhibit 46 seeking direction to the land owners to execute sale deeds in

plaintiffs' favour. The said application came to be rejected vide order dated 19-11-1991 and accordingly, prayed for dismissal of the suit.

12. The parties lead evidence. Certain documents were marked exhibits.

13. I have heard Mr. A. B. Patil, learned counsel for the plaintiffs, Mr. Shriniwas Deshpande, learned counsel for defendant nos. 1 and 6 and Mr. C. B. Dharmadhikari, learned counsel for defendant nos. 2 to 5.

14. In view of the rival submissions, issues were framed vide order dated 26-9-1996. Issue no. 1 was re-framed vide order dated 13-9-2024. Issue no. 4 was also re-framed vide order dated 18-10-2024. Thereafter on 25-10-2024, additional issue was framed. I will refer to the pleadings, evidence, arguments etc. to the extent necessary to decide the issues and have recorded findings thereon for the reasons to follow.

Sr. No.	Issues	Findings
1.	Does the plaintiffs prove that the agreement dated 18.03.1989, between plaintiff and defendant no. 1 is binding on all the defendants ?	In negative.
2.	Does the plaintiffs prove that the defendants are trying to disturb the plaintiffs possession without due course of Law ?	In negative.
3.	Are the plaintiffs entitled for declaration and injunction, as prayed ?	In negative.
4.	Does defendant No. 1 prove that the plaintiffs have committed breach of	In affirmative.

	agreement dated 18.03.1989, by not releasing the balance amount of Rs. 1,65,000/- in favour of defendant Nos. 2 to 5 ?	
5.	Whether the suit is properly valued by the plaintiffs ?	Does not survive.
6.	Does the plaintiffs prove that in part performance of contract dated 18/3/1989, they are in possession of the suit property, enabling them to seek protection under Section 53A of the Transfer of Property Act, 1882 ?	In negative.
7.	What order and decree ?	Suit is dismissed.

REASONS

As to issue nos. 1 to 6

15. The plaintiffs have examined Shri Mukund Paturkar in support of their case. The Official Liquidator entered witness box on behalf of defendant nos. 1 and 6. Defendant no. 2 Smt. Shardabai Parate examined herself on behalf of the land owners. Various documents were marked exhibits.

16. All the issues being interlinked are decided by common reasoning. The evidence and documents will have to be assessed in context with the prayers made by the plaintiffs. The first prayer refers to the effect of agreement of 1989 (Exhibit 113) executed between plaintiffs and defendant no. 1. The question is whether the said agreement will be binding on the land owners.

17. There is no dispute that the defendant no. 1 and land owners entered into agreement of sale to purchase suit plot. There is further no dispute that defendant no. 1 and plaintiffs entered into agreement of assignment of rights allegedly arising under the agreement of 1987 (Exhibit 89). Thus, the terms of agreement of 1987 will have to be looked into to ascertain whether the rights were assignable.

18. I have, with the assistance of the learned counsels, gone through the terms of agreement of 1987. The purpose of agreement appears to be development of apartment scheme. The land owners agreed to sell the plot to defendant no. 1 for a total consideration of Rs. 4,20,000/-. Out of said amount, Rs. 30,000/- was paid at the time of execution of agreement. Remaining amount was to be paid, based on contingencies put forth in the agreement viz. Rs. 25,000/- to be paid within seven days of Nagpur Improvement Trust's (NIT) acceptance of payment and regularization of allotment, Rs. 2,00,000/- was to be paid within fifteen days from the date of intimation of mutation entries in favour of the land owners and Rs. 1,55,000/- was to be paid at the time of executing power of attorney in favour of one of the directors of defendant no. 1 – company for the purpose of executing sale deeds in favour of prospective buyers. The power of attorney was to be executed within 30 days from the date of sanctioning plan by NIT. Under the

agreement, the land owners have acknowledged that defendant no. 1 intends to construct multi-storied building consisting of various apartments and accordingly, the land owners agreed to execute sale deeds (through power of attorney), each relating to undivided proportionate shares and interest in favour of the prospective buyers, as may be nominated by the defendant no. 1. In addition, the defendant no. 1 was given authority to advertise or sell the undivided proportionate shares and interest in the suit plot together with individual apartments proposed to be constructed thereon and to enter into agreement with such prospective buyers and also to receive sale/purchase money from such buyers.

19. Thus, the land owners have in unequivocal terms permitted defendant no. 1 to enter into agreement with prospective buyers and thereby to enter into contract of sale of undivided proportionate share and interest in the suit plot together with individual apartments. In fact the defendant no. 1 appears to have entered into such agreements with plaintiff nos. 2 to 6. However, defendant no. 1 failed to pay balance amount of consideration to land owners and, therefore, defendant no. 1 and plaintiffs entered into agreement of 1989 by which the rights of development of suit plot were assigned to the plaintiffs.

20. To my mind, this arrangement/assignment travels beyond terms of agreement of 1987. What was permitted by the land owners was to develop the scheme and to sell various apartments to prospective buyers. There is nothing in the agreement to indicate that land owners authorized defendant no. 1 to transfer/assign rights of development to third party. Further, the parties viz. defendant no. 1 and land owners agreed to a specific term, permitting defendant no. 1 to construct multi-storied building on the suit plot and to execute various sale deeds relating to undivided proportionate shares and interest in favour of prospective buyers through power of attorney to be executed by the land owners in favour of one of the directors of defendant no. 1. As stated earlier, the power of attorney was to be executed, upon payment of Rs. 1,50,000/-, which the defendant no. 1 was supposed to pay within 30 days from the date of sanctioning of plan by NIT.

21. There is nothing on record to show that such power of attorney was executed by land owners in favour of one of the directors of defendant no. 1 – company. In this regard, a specific query was made in cross-examination by the land owners as to whether power of attorney was executed by land owners in favour of defendant no. 1, the plaintiffs' witness showed ignorance. When asked as to whether he had enquired about the same, the witness said that he had not enquired with defendant

no. 1. Thus, it appears that the power to execute conveyance was not given to defendant no. 1 and, therefore, the same is not produced on record either by defendant no. 1 or by the plaintiffs.

22. The execution of power of attorney was an integral part of agreement of 1987 because to enter into agreement to sale of apartment with prospective buyers, the consent of land owners would be necessary. The terms of agreement of 1987, stipulates that the defendant no. 1 may sell the apartment and undivided shares to prospective buyers and for that purpose, the land owners shall execute power of attorney in favour of defendant no. 1. This arrangement was made because consent of land owners would be mandatory to enter into valid agreement with prospective buyers. Power of attorney is further necessary to execute sale deed of each apartment. In any case, the assignable rights available to defendant no. 1 were in respect of each apartment and proportionate undivided shares in suit land. Nonetheless, if one has to presume that under the agreement of 1987, the land owners authorized defendant no. 1 to transfer/assign rights of development in favour of third party, the consent of land owners would be necessary in order to seek relief against them. Having not done so, it will be difficult to bind the land owners with the terms of contract agreed between defendant no. 1 and plaintiffs, more so, because under the agreement of 1989, the plaintiffs

and defendant no. 1 incorporated a condition that would bind land owners to accept balance payment of consideration directly from the plaintiffs. This condition has been incorporated without seeking consent of the land owners. As such, the land owners will be interested in receiving balance consideration amount. However, there is nothing in the agreement of 1987 permitting defendant no. 1 to pay to the land owners, the balance amount from third party.

23. In addition to above, there are other reasons why the land owners will be not bound by the terms of contract of 1989. The defendant no. 1 had filed a suit against the land owners being Regular Civil Suit No. 2502/1988. The suit was filed for declaration and permanent injunction. Defendant no. 1 averred that under the agreement of 1987, the land owners agreed to execute sale deed in favour of prospective purchaser but have declined to do so and made an attempt to interfere with the defendant no. 1's possession and to obstruct the ongoing construction. Accordingly, defendant no. 1 sought declaration that the agreement of 1987 is binding on the land owners and to restrain them from interfering with possession. Thus the prayer indicates that the land owners had either terminated the agreement or have withdrawn from it. As stated earlier, the Court below granted interim relief with condition to deposit balance amount of consideration.

Defendant no. 1 failed to deposit amount and, therefore, the order of injunction stood vacated. That, however, would not mean and further there is no evidence to show that the land owners have taken back the possession of suit plot nor is there cogent evidence to show that possession was ever handed over to the plaintiffs.

24. I will comment upon the aspect of possession a little later. What is important at this stage is that plaintiffs were aware of said suit and, therefore, sought impleadment in the suit, which was allowed. The plaintiffs then filed application, Exhibit 46 seeking direction to the land owners to execute sale deed in favour of plaintiffs. The prayer was so made on the basis of agreement of 1989. The trial Court rejected the application, *inter alia*, on the ground that the plaintiffs, while filing written statement, did not lodge counter claim seeking specific performance of agreement of 1987 and 1989 and thus, granting relief as sought will amount to granting specific performance of contract without any prayer to that effect. That apart, the Court noted that the pleadings are such that defendant no. 1 will have to establish its right over the suit land and if the suit is dismissed, no other relief could be granted. Thus the defendant no. 1 was under obligation to establish its rights over the suit land. Unfortunately, it did not pursue the suit and, therefore, the suit came to be dismissed vide order dated 20-2-1997. The plaintiffs, who

were party to the suit, did not make efforts to transpose themselves as plaintiffs nor did they file suit for specific performance of contract, instead restricted their prayers under Section 53A of the Transfer of Property Act.

25. The net result of the aforesaid lapses is that the suit filed by defendant no. 1 seeking declaration that agreement of 1987 is binding on land owners stood dismissed, meaning thereby that the agreement of 1987 became unenforceable against the land owners. This finding having attained finality, the plaintiffs cannot seek relief in terms of agreement of 1989 which gives alleged rights of transfer/assignment of development work under terms of agreement of 1987. It cannot be, therefore, said that agreement of 1989 is binding on the land owners.

26. Having said so, the question of granting injunction as sought by the plaintiffs will not arise. Nonetheless, I have gone through the evidence to find that plaintiffs utterly failed to prove that the possession of suit land was ever given to them. The cross-examination of plaintiffs' witness on this point would certify the aforesaid inference. The witness deposed that suit plot is as it is since the date of agreement, Exhibit 113 (agreement of 1989). He then deposed that the said plot is open plot and he is not aware whether possession of said plot is with the land owners.

27. The evidence weakens the case of plaintiffs. It is surprising that the plaintiffs' witness is not even aware as to who is in possession of the suit property, particularly when they are seeking protection of possession, which according to them, was given towards part performance of contract. Thus, the plaintiffs' witness should have spontaneously stated that they are in possession of suit plot instead, he deposed that he is not aware whether the land owners are in possession of the suit plot.

28. The Official Liquidator has also in cross-examination deposed that he is not aware, as on date, who is in physical possession of the suit plot. He however, volunteered that symbolic possession is with him. So far as land owners are concerned, the witness deposed in cross-examination that there is construction till plinth level at the suit plot. He further deposed that the board of High Court's Liquidator is at the site.

29. The aforesaid evidence indicates that the defendant no. 1 was put in possession of suit plot in terms of agreement of 1987. It had made construction up to plinth level. The plaintiffs' witness admitted that the position of suit plot is as it is since the date of agreement of 1989. Thus, it is evident that the construction up to plinth level was done prior to entering into agreement of 1989. This would also mean that the plaintiffs, after entering into aforesaid agreement, have not

carried forward the construction work. Such evidence coupled with testimony of plaintiffs' witness that he is not aware as to whether the land owners are in possession of suit plot is an evidence sufficient to prove that plaintiffs were never put in possession of suit plot.

30. Such status appears to be the reason why Mr. Patil, learned counsel for plaintiffs relied upon various judgments to argue that plaintiffs were in constructive possession of suit plot, which is not even the case pleaded by them. I will comment upon the said judgments a little later. The facts and evidence as stands on record is otherwise. The plaintiffs thus failed to prove that they were/are in physical possession of the suit plot.

31. Another aspect of the case is whether the plaintiffs have committed breach of the term of agreement of 1989 as regards releasing payment in favour of land owners. As noted earlier, the plaintiffs and defendant no. 1 agreed to a condition that plaintiffs will pay balance amount of consideration of suit plot directly to the land owners. In this regard, there is absolutely nothing, either in the pleadings or in the evidence to show that the plaintiffs have ever made an attempt to pay to the land owners the balance amount of consideration. Rather, the plaintiffs' witness admitted in cross-examination that plaintiffs have not made any payment directly to the land owners. As such, in further cross-

examination relating to the additional issue framed by the Court, the plaintiffs' witness deposed that they made an attempt to pay balance amount, but land owners refused, however, the witness also deposed that in this regard, the plaintiffs have not made any communication with the land owners. Thus, except for bare words in the evidence, which as such do not find place in the pleadings, there is nothing to show that plaintiffs have ever made an attempt to pay to land owners the balance consideration amount.

32. Thus, it appears that the plaintiffs have, after entering into agreement of 1989, done nothing in the sense neither did they pay the land owners balance amount nor did they continue construction works. They miserably failed to establish that they were ready and willing to perform their part of contract. The plaintiffs therefore, carry a blame of breach of terms of agreement of 1989. In fact, Mr. Dharmadhikari, learned counsel for land owners submits that the instant suit was also dismissed as not prosecuted but was later restored to file. Thus, according to him, the protection available under Section 53A of the Transfer of Property Act, 1882 is, even otherwise, not available to the plaintiffs, they having failed to establish that they were ready and willing to perform their part of contract.

33. There appears substance in his argument that plaintiffs never made an attempt to perform their part of contract and thus failed to prove that they were/are ready to perform their part of contract, which is essential ingredient to seek protection under Section 53A of the Transfer of Property Act.

34. Coming to the judgments cited by the plaintiffs, Mr. Patil, learned counsel relied on following judgments to contend that the plaintiffs were in constructive possession of the suit plot.

(1) *Mohan Lal Vs. State of Rajasthan [(2015) 6 SCC 222]*,

(2) *G. P. Sharma Vs. Hari Shankar Sharma [2014 SCC OnLine Del 1042]*

and

(3) *Swaraj Kishore Arora Vs. Indian Bank and ors. [2016 SCC OnLine Del 2870]*.

In *Mohan Lal*'s case supra, the concept of possession was discussed in context with provisions of Narcotic Drugs and Psychotropic Substances Act, 1985. The contrabands were hidden away in secret place by the accused. In such set of facts, the Court observed that the concept of possession is flexible concept and its meaning depends upon the contextual purpose and objective of status concerned and appropriate meaning will have to be assigned to the word to effectuate the statutory object. The Court held that ordinarily, elements of possession are

physical control and animus to control the thing concerned/contraband. The Court further held that even in absence of physical control of the contraband, culpable mental state of accused can arise if the accused still has requisite degree of control over the contraband. The Supreme Court accordingly noted that accused was in conscious possession, in view of his special knowledge of location or site of contraband article, with animus and intention to retain exclusive control or dominion over it and thus would constitute offence punishable under Section 18.

35. To my mind, the aforesaid concept of possession will be of no help to the plaintiffs. For the purpose of Section 53A, the transferee (in the present case, plaintiffs) will have to establish that in part performance of contract, the possession of property was delivered to him. In addition, he must have done some act in furtherance of the contract and must have performed or be willing to perform his part of contract. In the present case, the plaintiffs intends to put forth a case of possession through defendant no. 1. Firstly, such possession cannot be recognized for granting protection under Section 53A of the Transfer of Property Act. Secondly, the plaintiffs have failed to establish that they have done any act in furtherance of the contract in as much as the plaintiffs were duty bound to pay to land owners the balance amount of consideration which they failed to prove. The status of construction as was standing at the

time of execution of agreement of 1989 continued so till the date of filing of suit. Thus, the plaintiffs failed to prove that in part performance of contract, they had taken possession of the property and have done some act in furtherance of contract and further failed to prove that they have performed or willing to perform their part of contract.

36. In the case of *G. P. Sharma* supra, the facts before the Delhi High Court were that the appellant and respondent therein were brothers. Both claimed to have contributed equally towards obtaining membership in a cooperative society and towards the transfer of the property, the respondent had executed agreement to sale in favour of the appellant for a half ownership interest in the property. The respondent claimed to be in possession of the property. The Court noted that the parties jointly owned the property and accordingly held that appellant was in constructive possession, especially when established through a fiduciary or joint relationship and accordingly held that appellant could invoke rights under Section 53 of the Transfer of Property Act. Thus, it was a case where both the brothers were owners of the property and in context therewith, the possession of respondent over the suit property was held to be possession in fiduciary relationship for and on behalf of other brother. The facts in the present case are altogether different. There is no scope for the plaintiffs to claim possession through fiduciary

relationship. Here, the plaintiffs and defendant no. 1 have entered into contract and accordingly, the plaintiffs are claiming to have taken over possession of the suit property. In fact, it is not the case of plaintiffs that they hold constructive possession or that defendant no. 1 was holding possession on their behalf. The judgment, therefore, will be of no help.

37. Similar is the fate of the third judgment. The issue before the Court was whether the agreement between the parties constitutes a lease or a licence. The dispute arose regarding electric connection leading to defendant therein claiming tenancy rights. In that context, the Court noted that though exclusive possession is a significant indicator of a lease, it alone does not conclusively establish tenancy, if the intention was to create licence and in context therewith, the concept of *de facto* and *de jure* possession was discussed. The Court then noted that constructive possession would be a possession through a representative, agent, tenant or a trustee and accordingly observed that legal concept of possession is not restricted to physical control and would depend on various factors such as nature of articles itself and attitudes and the activities of other persons.

38. Thus, the concept of possession was discussed in context with the issues before the Court. In first case, it was pertaining to possession of contraband. In the second case, it was in context with joint

ownership and in the third case, it was in context whether agreement was for lease or licence. The common element of concept of possession appears to be control/dominion over the property. In a given case, the party may not be in a physical possession of the property but may establish such possession taking aid of the control/dominion over the property. In the present case, the plaintiffs have neither pleaded nor proved that they enjoyed control/dominion over the suit property. Rather, their witness deposed in cross-examination that he is not aware whether the land owners are in possession of the suit property. He also admitted that status of property remained same as it was at the time of execution of agreement of 1989. Thus, the theory of constructive possession will not apply here.

39. On the point of legal possession, Mr. Patil, learned counsel referred to judgment of Supreme Court in the case of ***Sadashiv Shyama Sawant (dead) through LRs and ors. Vs. Anita Anant Sawant [(2010) 3 SCC 385]***. In the said case, the trespasser had dispossessed tenant. The landlord filed suit under Section 6 of the Specific Relief Act, 1963 to recover possession of a property after being forcibly dispossessed of her tenant. The Court examined whether a landlord can maintain such a suit against a trespasser when the property was in the actual occupation of a tenant at the time of dispossession. The Court held that the landlord,

who has let out property to a tenant continues to retain legal possession, even if, the tenant is in actual physical possession and control and accordingly, the Court held that the dispossession of the tenant by a third party is considered dispossession of the landlord. Thus, the Court recognized the concept of legal possession without there being *de facto* possession. This judgment, however, will not render any assistance to the plaintiffs in as much as the concept of legal possession, if at all, is to be applied, will be available to the land owners as to defendant no. 1 but not to the plaintiffs because plaintiffs are stranger to the property. They are neither owners nor tenants nor have they carried out any activity as has been done by defendant no. 1. They cannot, therefore, claim that they were in legal possession of the property.

40. Mr. Patil then referred to judgment of Delhi High Court in the case of ***Raj Kumari Garg Vs. S. M. Ezaz and ors. [2012 (132) DRJ 108 (DB)]***. Raj Kumari Garg was owner of the property. She entered into registered agreement to sale with respondent nos. 3 and 4 therein along with co-lateral documents like general power of attorney, special power of attorney etc. and received full consideration. Respondent nos. 3 and 4 sought to convert the property into freehold and later transferred their rights to respondent nos. 1 and 2, leading to disputes. Raj Kumari filed a suit for possession and injunction on the ground that her signatures were

forged on the sale agreement and she did not intend to sell the property and further alleging forgery and unauthorized application for conversion into freehold. The Court dismissed the suit with costs noting dishonest conduct of Raj Kumari and frivolous litigation. The Court noted terms of contract to find that Raj Kumari had transferred all the rights in favour of respondent nos. 3 and 4 and has parted with possession as well. The Court noted that Raj Kumari had given unfettered rights of assignment to respondent nos. 3 and 4. Respondent nos. 1 and 2 were claiming rights under respondent nos. 3 and 4 and accordingly, the Court held that provisions under Section 53A would protect rights of not only of transferee, but also of persons claiming under the transferee, even though the rights of the transferee are not perfected in view of the agreement to sell and not a registered sale deed.

41. As could be seen, the facts were altogether different. The owner of the property therein executed agreement to sell along with co-lateral documents including general power of attorney and special power of attorney. The possession was given to respondent nos. 3 and 4 in part performance of contract. The entire consideration amount was paid by respondent nos. 3 and 4. The agreement conferred unfettered and uninterrupted rights and powers on respondent nos. 3 and 4 to further sell or otherwise transfer the property to anybody. Accordingly,

the Court held that Raj Kumari gave unfettered rights of assignment to respondent nos. 3 and 4, who have then got the property converted into freehold for getting conveyance deed executed in favour of respondent nos. 1 and 2. The possession was then given to respondent nos. 1 and 2. In the aforesaid set of facts, the Delhi High Court held that the protection of possession under Section 53A is not only restricted to transferee but also to a person claiming under the transferee.

42. In complete contrast to above, the plaintiffs herein have failed to discharge their part of contract. They did not pay balance amount of consideration to the land owners. They failed to prove that they were ready and willing to perform their part of contract. In fact, the suit was dismissed as not prosecuted. The evidence indicates that plaintiffs did not even attempt to pay balance consideration amount to the land owners. That apart, the agreement of 1987 did not confer rights upon defendant no. 1 to transfer/assign the scheme of development to the third party. What was permitted is to construct the scheme and sell individual flats to the third party. The general power of attorney has been not produced on record and thus, the assignment of alleged rights by defendant no. 1 in favour of plaintiffs remained infringed for want of consent of land owners. Further, the suit filed by defendant no. 1 against land owners seeking declaration that agreement of 1987 is binding on

land owners has been dismissed. The dismissal will further hamper the rights of plaintiffs to claim reliefs which are based on terms of agreement of 1987. The judgment of Delhi High Court therefore, will be of no help to the plaintiffs.

43. As against, Mr. Dharmadhikari, learned counsel referred to the judgment of the Supreme Court in the case of ***Kapilaben and others Vs. Ashok Kumar Jayantilal Sheth [(2020) 20 SCC 648]*** to contend that assignment of right under the sale agreement requires consent of original owner and since there was no privity of contract between plaintiffs and land owners, no relief could be extended to the plaintiffs. The facts, in the said case, were such that original owner therein entered into agreement to sell the property to certain vendees, who subsequently executed additional agreement to assign their rights to respondent no. 1. The original owner, however, did not give explicit consent to these assignment. The Court examined whether the assignment was valid, considering the nature of contract, the necessity of consent and whether the rights could be assigned without the original owners' approval. The Court noted that original agreement were contingent and involved personal obligation and therefore, could not have been assigned in favour of respondent no. 1 without owners' consent. The Court noted that since the original agreements were contingent and since subsequent

agreements were not straightforward assignments, the assignment was invalid. The Court emphasized that contingent contract that depends on personal obligation cannot be enforced after the original agreement is cancelled and that privity of contract is essential for enforcement.

44. To my mind, the facts are somewhat different. Nonetheless, I have discussed in detail the terms of contract of 1987 and found that the defendant no. 1 was authorized to sell individual apartments with proportionate undivided shares in suit plot but was not authorized to transfer the construction work and, therefore, consent of land owners was necessary. That being so, defendant no. 1 could not have assigned the rights without land owners consent.

45. Mr. Dharmadhikari then referred to another judgment of the Supreme Court in the case of *Rambhau Namdeo Gajre Vs. Narayan Bapuji Dhotra (ded) through LRs. [(2004) 8 SCC 614]* wherein the Court held that doctrine of part performance under Section 53A of the Transfer of Property Act is a protective shield available only to a transferee, who has entered into a valid, written agreement of sale with the actual owner and has taken possession in pursuance of that agreement. The Court then held that the rights cannot be invoked by a third party, who has entered into agreement with a person who does not have ownership right or valid interest in the property. Accordingly, the Court held that

possession obtained through an agreement with a person lacking ownership right does not enjoy protection against the true owner.

46. This judgment has been referred to by Delhi High Court in *Raj Kumari's* case to note that in *Rambhau's* case, the finding was so given because the rights of assignment were not given through the original agreement. Thus, it would depend on the terms of original agreement. In the present case, the land owners had given absolute right to defendant no. 1 to sell individual apartments and proportionate undivided shares in the suit plot. Defendant no. 1 however, has transferred/assigned the rights of development to plaintiffs without there being any such authorization in the original agreement. In absence of such rights, the agreement of 1989 is held to be not binding on land owners. It cannot be, however, said, on the basis of *Rambhau's* case, that there is absolute bar to third party to invoke protection under Section 53A of the Transfer of Property Act.

47. The sum and substance of above discussion is that plaintiffs failed to prove that the agreement of 1989 is binding on land owners. The plaintiffs further failed to prove that the possession of suit plot was given to them. Therefore, they are not entitled for seeking relief under Section 53A of the Transfer of Property Act. As regards issue of valuation of suit, neither party argued on the point and as such, the said issue does

not survive. The issues are answered accordingly. Resultantly, the plaintiffs failed to make out a case. The suit is dismissed with no order as to costs. The decree be drawn accordingly. The defendant no. 6, shall however, move appropriate application in the company petition for passing further orders as regard handing over possession and the monetary issues relating to the suit plot.

(Anil L. Pansare, J.)

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