



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 390 OF 2011**

1. Ramesh Bagaram Mankane

Adult, Occ: Agriculture,
Residing at: Gulsunde,
Tal. Panvel, District Raigad.

2. Hemant Bagaram Mankame

Adult, Occ: Agriculture,
Residing at: Gulsunde,
Tal. Panvel, District Raigad.

....Appellants

Vs.

1. Vasant Dattatray Pawar (Deceased)
through legal heirs

1/1. Smt. Vasanti Vasant Pawar
(Since deceased through legal heirs)

1/1.1) Mrs. Manisha Rajendra Chavan
Age 36 years, Occ: Household,
R/at Ratholi, Tal- Badlapur, Dist. Thane.

1/1.2) Mr. Manoj Vasant Pawar
Age 34 years Residing at: Gulsunde,
Tal. Panvel, District Raigad.

1/1.3) Mr. Mangesh Vasant Pawar
Age 30 years R/at Gulsunde
Tal- Panvel, Dist- Raigad.

2. Shri. Mukund Dattatray Pawar,
Adult, Residing at- Gulsunde
Tal-Panvel, District Raigad.

3. Shri. Ganesh Dattatray Pawar
Adult, Residing at- Gulsunde
Tal-Panvel, District Raigad.

4. Shri. Suresh Dattatray Pawar

Adult, Residing at- Gulsunde
Tal-Panvel, District Raigad.

5. Shri. Tukaram Dattatray Pawar

Adult, Residing at- Gulsunde
Tal-Panvel, District Raigad.

6. Kum. Shobha Dattatray Pawar

Residing at- Gulsunde
Tal-Panvel, District Raigad.

7. Ku. Ranjana Dattatray Pawar

Residing at- Gulsunde
Tal-Panvel, District Raigad.

8. Smt. Sitabai Dattray Pawar

Residing at- Gulsunde
Tal-Panvel, District Raigad.

**(Appeal stand abated against
respondent no. 8 vide Reg.
Judl-I Order dated 18/11/2011)**

....Respondents

Mr. Venkatesh A. Shastry Advocate for the Appellants

Mr. Ajay Joshi h/f Mr. Rajesh More Advocate for the Respondents

CORAM : GAURI GODSE, J.

RESERVED ON: 24th OCTOBER 2024

PRONOUNCED ON: 18th FEBRUARY 2025

JUDGMENT:

Facts in brief:

1. This second appeal is preferred by original defendant nos. 1 and 2 to challenge the concurrent judgments and decrees granting declaration of title of the suit property and injunction restraining the

defendants from obstructing the plaintiffs' possession over the eastern side of suit property shown in green color in the suit map.

2. The respondents are original plaintiffs who had filed the suit for declaration and injunction based on title. Plaintiff nos. 1 to 5 are real brothers, and plaintiff nos. 6 and 7 are their sisters. Plaintiff no. 8 is their mother. The plaintiffs are claiming through the original owner Dattatray, i.e. father of plaintiff nos. 1 to 7 and husband of plaintiff no. 8. There is no dispute that Dattatray was the original owner of the suit property. Defendants are claiming rights in the suit property based on two agreements, one possession receipt and a Will allegedly executed by Dattatray. The trial Court decreed the suit granting declaration of title and injunction as prayed, and the said decree is confirmed in the first appeal preferred by the defendants.

3. By an order dated 16th January 2014, the second appeal was admitted on the following substantial question of law:

“(i) Whether there is a bar under section 43 of the Bombay Tenancy and Agricultural Lands Act, to transfer the tenancy land by a Will?”

4. When the second appeal was taken up for final disposal, learned counsel for the appellants submitted that in view of the decision of the

Hon'ble Apex Court in the case of *Vinodchandra Sakarlal Kapadia Vs. State of Gujarat and others*¹, the aforesaid question of law is no longer *res integra*. He submitted that as held by the Hon'ble Apex Court, there is a bar under Section 43 of The Maharashtra Tenancy and Agricultural Lands Act, 1948 ('Tenancy Act') for testamentary disposition. He thus submits that the question of law framed is not required to be answered by this Court. However, learned counsel for the appellants pointed out that the second appeal raised another question of law. Hence, the parties were heard on 26th September 2024, and the following question of law was framed under the proviso to sub-section (5) of Section 100 of Code of Civil Procedure, 1908, which reads as under:

“(i) Whether the findings recorded by both the courts regarding the plaintiffs being in possession of eastern side of the suit property would amount to incorrect appreciation of the evidence on record and more particularly ignoring the admissions given by PW-1?”

Submissions on behalf of appellants:

5. Learned counsel for the appellants submitted that the suit property was a tenanted property, and a certificate under Section 32M

¹ 2020 AIR (SC) 5138

of the Tenancy Act was issued in the name of Dattatray on 31st May 1966. Learned counsel for the appellants submitted that through the suit property, there was a road passing through to reach another village by the name Dandphata. He submitted that the said village road was passing through the North-South direction. He thus submitted that the suit property was divided into two parts, i.e. one on the eastern side of the road, which the plaintiffs claimed to be in possession, and the western part of the road, in possession of the defendants.

6. Learned counsel for the appellants submitted that the plaintiffs filed a suit on the ground that the defendants were obstructing the plaintiffs' possession over the eastern side of the said road. The appellants relied upon the agreement to sale deed 20th June 1983 executed by Dattatray in favour of the defendants. Learned counsel for the appellants submitted that by way of the said agreement for sale, the defendants had paid the amount of ₹ 10,000/- as an earnest amount out of total consideration agreed at ₹ 22,000/-. Learned counsel for the appellants submitted that thereafter another agreement was executed in their favour on 18th March 1991 for total consideration of ₹ 28,000/- out of which, an amount of ₹ 26,000/- was paid by the defendants.

7. Learned counsel for the appellants further submitted that Dattatray handed over possession of the suit property to the defendants and executed a possession receipt dated 7th January 1993. The defendants also relied upon a Will dated 18th June 1992 executed by Dattatray in their favour in respect of the suit property. Thus, the appellants contended that the right had been created in their favour pursuant to the two agreements executed by Dattatray and possession receipt executed by Dattatray confirming handing over possession of the suit property to the defendants. Learned counsel for the appellants submitted that the oral evidence of the plaintiffs indicated that the appellants were in possession of the suit property. He submitted that though the plaintiffs are owners of the suit property, they would not be entitled to any decree for injunction to protect their possession in the absence of any specific findings recorded of them found in possession of the suit property.

8. Learned counsel for the appellants submitted that there was no dispute that the appellants were in possession of the western side of the suit property. However, the dispute was as to whether the plaintiffs (respondents) had possession of the eastern side of the road. Learned counsel for the appellants submitted that in the oral evidence of PW 1,

he admitted that defendants had stored heaps of rubble on the eastern side of the road, which clearly indicates that defendants are also in possession of the eastern side. Learned counsel for the appellants thus submitted that the admission given by PW 1 would, in any case, mean that during the pendency of the suit, the plaintiffs lost their possession on the eastern side. He further submitted that though the plaintiffs were not in possession of the eastern side, they never amended the plaint or adduced any additional evidence explaining that they were in possession of the eastern side. Learned counsel for the appellants thus submitted that the findings recorded by both the courts on plaintiffs, being in possession of the eastern side of the road, would amount to a perverse finding, as the admissions given by PW 1 are completely ignored.

9. Learned counsel for the appellants further relied upon the possession receipt to support his contentions that Dattatray had admitted that defendants were put in possession of the suit property. Learned counsel for the appellants submitted that both the Courts misconstrued and misinterpreted the contents of the possession receipt. Learned counsel for the appellants relied upon the relevant part of the cross-examination of PW 1. He submitted that PW 1 was re-

examined by asking a specific question to him as to whether the defendants have stored heaps of rubble on the eastern side of the suit property. He submitted that in response to the question put to PW 1 in re-examination, he admitted that after filing the suit, the defendants had stored heaps of rubble on the eastern side of the suit property.

10. Learned counsel for the appellants referred to further cross-examination after PW 1's re-examination. He submits that in further cross-examination, PW 1 admitted that he had photographs showing that defendants stored heaps of rubble on the eastern side, and the photographs were taken; however, he was unable to answer as to the date the photographs were taken. Learned counsel for the appellants thus submitted that the question put to PW 1 in the re-examination in chief and the further cross-examination clearly indicates that the defendants were in possession of the eastern part of the suit property. He thus submits that both the Courts completely ignored and failed to appreciate the material evidence in the form of admissions in cross-examination of PW 1, which supports the defendants' case that they are in possession of also the eastern side of the suit property. Learned counsel for the appellants thus submitted that the impugned decree of injunction deserves to be quashed and set aside for incorrect

appreciation of the evidence on record and, more particularly, ignoring the admissions given by PW 1. He thus submits that the question of law framed by this Court vide order dated 26th September 2024 must be answered in favour of the appellants.

Submissions on behalf of the respondents:

11. Learned counsel for the respondents supported the impugned judgments and decrees. He submitted that defendants relied upon two agreements produced on record, i.e. agreements dated 20th June 1983 and 18th March 1991; however, the defendants claimed to be in possession not based on the agreements but based on the possession receipt dated 7th January 1993. Learned counsel for the respondents referred to paragraph 9 of the agreement dated 20th June 1983. He submits that the said paragraph of the agreement would indicate that no semblance of right is created in favour of the defendants. He submits that the defendants' case is based on the written notes submitted before the trial Court wherein the defendants claimed ownership based on the two agreements. He submitted that the possession receipt relied upon by the defendants cannot be accepted

as sufficient proof of them being in possession in furtherance of any valid contract.

12. Learned counsel for the respondents submitted that the defendants' pleadings indicate that they claimed to be in possession of the suit property in accordance with the agreement dated 18th March 1991. However, the said agreement also does not refer to handing over of possession to the defendants. Learned counsel for the respondents submits that admittedly, the plaintiffs are owners of the suit property, and thus, they are in *de-jure* possession and thus, are entitled to a decree for injunction against the wrongful acts of the defendants. To support his submissions, learned counsel for the respondents relied upon the following decisions:

*Himatrao Ukha Mali and others Vs. Popat Devram Patil and another*²,
*Nanjegowda & Anr Vs. Gangamma & Ors*³, *Lalitkumar Jagdishkumar Grover & Ors Vs. New Bandra Hill Co-operative Housing Society Ltd and Ors*⁴ and *Vijay s/o Mahadeo Gaikwad Vs. Parasram s/o Bhanu Meshram*⁵.

² [1998(2) Mh.L.J. 383]

³ (2011) 13 SCC 232

⁴ 2022 0 Supreme (Bom) 1347

⁵ 2012(2) ALL MR 339

13. Learned counsel for the respondents by relying upon the aforesaid decisions submitted that the suit property is a tenanted property of Dattatray. Admittedly, the order under Section 32G and the certificate under Section 32M is issued in the name of Dattatray, which is a conclusive proof of title and possession as held by this Court in the case of *Himatrao Mali*. Learned counsel for the respondents further submitted that the legal principles settled by the Apex Court in the decision of *Nanjegowda* are clearly applicable to the facts of the present case. He submits that the defendants are claiming to be in possession pursuant to an agreement for sale executed in their favour by Dattatray. He submits that admittedly, the defendants never claimed any specific performance of the contract in their favour. The only provision to aid a person claiming to be in possession based on an agreement for sale is the provision of Section 53A of The Transfer of Property Act, 1882. However, in the absence of any readiness and willingness on the part of the defendants to perform their part of the contract, they are not entitled to seek any protection of their alleged possession.

14. Learned counsel for the respondents thus submits that once the plaintiffs' ownership is not in dispute and there is inference that they are in lawful possession, and if there is a threat to their possession, they,

being owners of the suit property, are entitled to seek protection of their possession. To support the said submissions, Learned counsel for the respondents relied upon the decision of this Court in the case of *Lalitkumar Grover*.

15. With reference to the submissions made on behalf of the appellants by relying upon the admissions given by PW 1 regarding storing heaps of rubble by the defendants, learned counsel for the respondents submitted that a stray admission cannot be picked up from the oral evidence by ignoring the substantive oral evidence of PW 1. He submits that in the present case, a suggestion was given with respect to the suit property to which PW 1 gave his answer. Thus, the admission given on a particular question put to him cannot be picked up by way of a stray admission by ignoring the substantial evidence that clearly indicates that the plaintiffs are in possession of the eastern part of the suit property. To support his submissions, Learned counsel for the respondents relied upon the decision of this Court in the case of *Vijay Gaikwad*.

16. Learned counsel for the respondents submits that the defendants had gone to the extent of relying upon a Will allegedly executed by Dattatray in their favour. He submits that the defendants miserably

failed to prove the validity of the Will. He thus submits that the defendants are in nowhere entitled to oppose the decree of injunction on the ground that they are in possession of the suit property.

17. Learned counsel for the respondents thus submits that both the Courts have exhaustively considered all the evidence on record and thus rightly accepted the defendants' case that they are in possession of the eastern side of the suit property. He submits that in a second appeal, this Court cannot take a different view by re-examining the evidence on record. Learned counsel for the respondents thus submits that in the absence of any perversity or illegality in the findings recorded by both the Courts, there would not be any question of re-appreciating the evidence for taking a different view than that is concurrently taken by both the Courts. Learned counsel for the respondents, therefore, submits that the question of law framed by this Court must be answered accordingly in favour of the plaintiffs. He thus submits that the impugned judgments and decrees protecting the plaintiffs' possession be confirmed.

Submissions in rejoinder on behalf of the appellants:

18. In response to the submissions made on behalf of the respondents, learned counsel for the appellants submitted that it was

never the case of the defendants that they were put in possession pursuant to the agreements executed in their favour by Dattatray. He further submits that the defendants' specific case was that they were put in possession, and subsequently, the same was confirmed by executing the possession receipt. He submits that the trial Court framed issue no. 4 on the defendants being trespassers, and the same was recorded in the negative. Thus, he submits that there is no substance in the arguments raised on behalf of the respondents that they were entitled to protect their possession against any wrongful acts of the defendants. Learned counsel for the appellants further submitted that the defendants have produced on record the payment receipts worth ₹ 26,000 paid to Dattatray as against the execution of the agreements in favour of the defendants. He thus submits that the evidence on record clearly indicates that substantial right is created in favour of the appellants and thus only based on the ownership rights claimed by the plaintiffs, they are not entitled to grant of any injunction protecting their alleged possession in the absence of any substantial evidence of them being in actual physical possession of the suit property. He thus submits that the question of law be accordingly answered in favour of the defendants.

Consideration of submissions and analysis:

19. I have considered the submissions made on behalf of the parties. I have perused the impugned judgments as well as pleadings and evidence on record. The plaintiffs pleaded that they own the suit property in view of the certificate under the Tenancy Act in favour of their predecessor, Dattatray. They further pleaded that the defendants have encroached on the western part of the suit property shown in red on the suit map, and the eastern side shown in green is in their possession and is cultivated by them. Since the defendants were obstructing the plaintiffs' possession, they prayed for a declaration of their title and an injunction restraining the defendants from obstructing the plaintiffs' possession in the area shown in green on the map.

20. I have carefully examined the oral evidence of PW 1 and, in particular, the re-examination and further cross-examination of PW 1, which is interpreted by the learned counsel for the appellants as an admission on the part of the plaintiffs that defendants were in possession of the eastern side of the suit property. A perusal of the oral evidence led on behalf of the plaintiffs indicates that the plaintiffs have specifically supported their pleadings that they are in possession of the eastern part of the suit property. The admission given by PW 1 that

after filing of the suit, the defendants had stored heaps of rubble on the eastern side of the suit property cannot be accepted as an admission on the part of the plaintiffs that defendants are in possession of the eastern side. Forcible entry on the eastern side of the suit property or storing heaps of rubble without any permission cannot be construed to mean that the defendants are in possession of the eastern side of the suit property. Thus, admissions given on behalf of PW 1 cannot be read as an admission about defendants being in possession of the eastern side of the suit property. In fact, correct perusal of the oral evidence of PW 1, his re-examination and further cross-examination would mean that PW 1 has only accepted that after filing of the suit, the defendants have kept heaps of rubble in the suit property. Thus, the oral evidence of PW 1 indicating the defendants' act of storing heaps of rubble on the eastern side would mean a wrongful act on the part of the defendants to store heaps of rubble on the plaintiffs' property.

21. Admittedly, the plaintiffs are the owners of the eastern side as well as the western side of the suit property. Though there are two agreements of sale in favour of the defendants, admittedly, the defendants have never attempted for specific performance of the contract in their favour. The defendants' case of making payment

towards the consideration amount is disbelieved by both the courts for lack of sufficient evidence. After considering the admissions of DW 2, who had signed possession receipt, both the Courts have held that execution of the possession receipt is proved, but actual handing over of possession is not. A perusal of the evidence of DW 2 does not indicate that possession of the suit property was handed over. Thus, the possession receipt would not assist the defendants in seeking protection under section 53-A of The Transfer of Property Act without proof of payment of the consideration amount and without proof of defendants put in possession in furtherance of the contract, if any, between defendants and Dattatray.

22. Admittedly, the plaintiffs' predecessor, Dattatray, is the tenant purchaser of the suit property under Section 32G of the Tenancy Act. The purchase certificate under Section 32M of the Tenancy Act was issued to Dattatray on 31st May 1966. The defendants claim possession based on alleged agreements to sell executed by Dattatray in 1983 and 1991 and a possession receipt dated 7th January 1993. Learned counsel for the respondents submitted that the certificate under Section 32M is conclusive proof of the plaintiffs' title and possession. He, therefore, relied upon paragraphs 8 and 9 of the decision of this Court,

in the case of *Himatrao Ukha Mali*, and submitted that the defendants would not be entitled to seek protection under Section 53A of the Transfer of Property Act.

23. To correctly understand the applicability of Section 53A and the bar under Section 43 of the Tenancy Act, it is necessary to refer to the facts and the proposition laid down in the decision of *Himatrao Ukha Mali*. The decision in the said case arose from the proceedings under Section 84 of the Tenancy Act for summary eviction of a party who was admittedly put in possession in furtherance of a contract by a protected tenant. The protected tenant had filed a suit for possession, and pending the suit, an order of purchase was passed under Section 32G of the Tenancy Act. However, the first suit filed by the tenant purchaser and the second suit by his heirs were dismissed, holding that the purchaser was entitled to protect his possession under Section 53A of the Transfer of Property Act. The heirs of the tenant purchaser then filed an application under Section 84 of the Tenancy Act for summary eviction of the purchaser. However, that was also dismissed, holding that the protection under Section 53A was available. In these facts, this Court in the decision of *Himatrao Ukha Mali*, held in paragraph 9 that a contract to sell property purchased under the Tenancy Act will be

invalid in view of the provisions of Section 23 of the Indian Contract Act, because it contravenes the provisions of Section 43(1) of the Tenancy Act and thus such an agreement to sell would be illegal by virtue of Section 43(2) of the Tenancy Act. Thus, it was held that the purchaser of such land would not be entitled to the protection under Section 53A of the Transfer of Property Act.

24. It is necessary to refer to the well-established principles on a statutory bar for the sale of a property and the applicability of Section 53A of the Transfer of Property Act to a purchaser put in possession in furtherance of a contract. The Hon'ble Apex Court, in the decision of *Nathulal Vs Phoolchand*⁶, was dealing with the provisions of Madhya Bharat Land Revenue and Tenancy Act 66 of 1950. The facts in the said case and the legal principles were summarised in the following paragraphs:

“5. Under the terms of the agreement Nathulal had undertaken to get the name of his brother Chittarmal removed from the revenue records and to get his own name entered, but the lands continued to stand recorded in the name of Chittarmal till October 6, 1952, and before that date Nathulal rescinded the contract. Again by virtue of Section 70(4) of the Madhya Bharat Land Revenue and

6 (1969) 3 SCC 120

Tenancy Act 66 of 1950, Phoolchand not being an agriculturist the land could not be sold to him without the sanction of the State Government. In the absence of any specific clause dealing with this matter, a condition that Nathulal will secure the sanction under Section 70(4) after paying the appropriate fee must be implied for *it is well settled that where by statute property is not transferable without the permission of the authority, an agreement to transfer the property must be deemed subject to the implied condition that the transferor will obtain the sanction of the authority concerned: see Motilal v. Nanhelal [LR 57 IA 333] and Mrs Chandhee Widya Vati Madden v. Dr C.L. Katial [(1964) 2 SCR 495]*.

6. Phoolchand could be called upon to pay the balance of the price only after Nathulal performed his part of the contract. Phoolchand had an outstanding arrangement with his Banker to enable him to draw the amount needed by him for payment to Nathulal. To prove himself ready and willing a purchaser has not necessarily to produce the money or to vouch a concluded scheme for financing the transaction: *Bank of India Ltd. v. Jamsetji A.H. Chinoy and Messrs. Chinoy and Company* [LR 77 IA 76,91].

7. The High Court proceeded to decide the case largely upon the view that Nathulal committed breach of contract. But the question whether Nathulal had committed the breach is not of much significance. Nathulal was the owner of the land; he had executed no conveyance in favour of Phoolchand in the land or the factory.

Nathulal had sued for possession relying upon his title, and Phoolchand could defeat that claim if he established his defence of part performance under Section 53-A of the Transfer of Property Act.

8. The argument raised by counsel for Nathulal, that by virtue of Section 70(8) of the Madhya Bharat Land Revenue and Tenancy Act, the plea of part performance is not available to a person put in possession of the property under a contract of sale, has, in our judgment, no force. Section 70(8) provides:

“No sale under this section shall be deemed to be valid until the sale deed effecting such a sale has been registered in accordance with the law of registration in force for the time being.”

But this clause only requires that not only the conditions prescribed by Section 70, but registration of sale deed in accordance with the law of registration for the time being in force is a condition require to be complied with before a sale is deemed valid. *There is no sale in the present case, and Phoolchand is not relying upon any sale. He is relying upon a contract of sale and equity which he may set up to defend his possession against the claim made by Nathulal. To the making of such a claim, relying upon the doctrine of part performance in Section 53-A of the Transfer of Property Act, there is nothing in Section 70(8) of the Madhya Bharat Land Revenue and Tenancy Act 66 of 1950 which may operate as a bar.*

9. The conditions necessary for making out the defence of part performance to an action in ejectment by the owner are:

“(1) that the transferor has contracted 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;

(2) that 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.

(3) that the transferee has done some act in furtherance of the contract; and

(4) that the transferee has performed or is willing to perform his part of the contract.”

If these conditions are fulfilled then notwithstanding that the contract, though required to be registered, has not been registered, 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 is debarred from enforcing against the transferee 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.”

emphasis applied

25. This Court, in the decision of ***Balu Baburao Zarole Vs Shaikh Akbar Shaikh Bhikan***⁷, followed the legal principles settled by the Hon'ble Apex Court in the decision of ***Nathulal***. This Court, while dealing with the issue of applicability of the bar under Section 43 of the Tenancy Act to a contract for purchase of a land under the Tenancy Act held as under;

“3. Section 43 of the Act provides, in so far as is material that no land purchased by a tenant inter alia under S. 32 “shall be transferred by sale, gift, exchange, mortgage, lease or assignment without the previous sanction of the Collector”. The requirement of taking the previous sanction of the Collector would apply to a transfer by sale or by any of the other modes specified therein. In so far as the requirement of taking the sanction of the Collector under the provisions of S. 43 of the Bombay Tenancy and Agricultural Lands Act, 1948 is concerned, the Trial Court and the Appellate Court correctly held that the decree for specific performance would be subject to the condition of the sanction being obtained to the sale from the collector under S. 43. In the event of the Collector not granting sanction, the Plaintiff would be entitled to a refund of the purchase price together with interest only as, in the absence of sanction under S. 43 the sale cannot be concluded. In taking this view, no error has been committed by the Trial Court and by the appellate Court.

⁷ 2001 SCC OnLine Bom 103

In Nathulal v. Phoolchand reported in AIR 1970 SC 546, a Bench of the Supreme Court, consisting of Mr. Justice J.C. Shah (as the Learned Chief Justice then was) and Mr. Justice K.S. Hegde held that where by a statute property is not transferable without the permission of an authority, an agreement to transfer the property must be deemed to be subject to the implied condition that the transferor will obtain the sanction of the authority concerned. While laying down the aforesaid proposition in paragraph 5 of its Judgment, the Supreme Court referred to the judgment of the Privy Council in AIR 1930 PC 187 and the judgment of the Supreme Court in AIR 1964 SC 978.

4. Section 43 of the Act would be attracted at the stage of the execution of the conveyance since upon the execution of the sale deed, the property is transferred by sale. An agreement to sell does not create any interest in property. In this regard, a reference may be made to a Judgment of a learned single Judge of this Court, D.K. Deshmukh, J., delivered on 1st October, 1997, in Appeal from Order No. 713 of 1997. The earlier judgment delivered by M.F. Saldanha, J. reported in (1994) 1 Bom. C.R. 715 which was subsequently referred to in the Judgment of V.H. Bhairavia, J. reported in (1994) 4 Bom. C.R. 575, will have to be construed with reference to the observations of the learned Judge in para 9 of the judgment where the Learned Judge clarified that the observations which were made in the order were for the limited purpose of the petition before the Court, which arose against an interim order. Since the Suit was pending before the Trial Court, the Learned Judge held that it would be open to the

parties in the said case to urge all contentions before the Trial Court “without being prejudiced even in the least by any of the observations made” in that Judgment. In view of the subsequent Judgment of a learned single Judge, D.K. Deshmukh, J., it would be clear that the provisions of S. 43 of the Act would be attracted at the stage of the execution of the conveyance. *Before the conveyance is executed in pursuance of a decree for specific performance the previous sanction of the Collector under S. 43 would have to be sought and the execution of the conveyance can only take place after and subject to the grant of sanction by the Collector, if the Collector grants sanction, the terms and conditions laid down therein have to be observed. If sanction is refused, no conveyance can be executed. Section 43 would unquestionably be attracted to the execution of the conveyance in respect of the land and it is, therefore, that both the Courts in the present case came to the conclusion that the decree will have to be subject to the condition that permission of the Collector would have to be sought under the provisions of S. 43.* The judgments of both the Courts below do not suffer from any infirmity. There is, therefore, no merit in the Second Appeal.”

emphasis applied

26. Thus, in view of the well-established principles of law settled by the Hon’ble Apex Court, a contract for the sale of land purchased under the Tenancy Act would not be invalid in view of Section 23 of the Indian Contract Act on the ground that it contravenes the provisions of Section

43 of the Tenancy Act. The bar under Section 43 would apply at the stage of conveyance and not at the stage of the agreement for sale, in as much as the sale is barred without prior sanction as contemplated under Section 43(1) the Tenancy Act. Hence, in view of the legal principles well-established by the Hon'ble Apex Court in the decision of *Nathulal*, followed by this Court in the decision of *Balu Baburao Zarole*, the legal proposition laid down by this Court in the case of *Himatrao Ukha Mali*, would have no binding effect.

27. In the present case, there is no proof that the defendants were put in possession in furtherance of the contract claimed by the defendants to be allegedly executed by the tenant purchaser. Hence, in view of the facts of the present case, the legal principles settled in the decision of the Hon'ble Apex Court in the case of *Nanjegowda*, relied upon by the learned counsel for the respondents(plaintiffs) would apply. The well-established legal principles for applicability of the protection under Section 53A of the Transfer of Property Act are summarised as under in paragraph 9 of the decision of *Nanjegowda*:

“9. From a plain reading of the aforesaid provision, it is evident that a party can take shelter behind this provision only when the following conditions are fulfilled. They are:

- (i) The contract should have been in writing signed by or on behalf of the transferor;
- (ii) *The transferee should have got possession of the immovable property covered by the contract;*
- (iii) The transferee should have done some act in furtherance of the contract; and
- (iv) The transferee has either performed his part of the contract or is willing to perform his part of the contract.

A party can take advantage of this provision only when it satisfies all the conditions aforesaid. All the postulates are sine qua non and a party cannot derive benefit by fulfilling one or more conditions.”

emphasis applied

28. In the decision of ***Vijay Gaikwad***, this court held that the aspect of oral admission cannot be placed at a higher pedestal than the substantive evidence and that the endeavour of the Court should be to find out the truth and that an alleged stray admission cannot be utilised to throw out the plaintiff from the Court. In the decision of ***Lalitkumar Grover***, this Court held that *de jure possession* has to be established on the basis of title to the property. This Court disbelieved the contentions of the defendant society in the said case, seeking right over the plaintiff's property by parking cars of the members, and thus

granted an injunction restraining the members of the defendant society from parking vehicles in the plaintiff's property.

Conclusions:

29. In the present case, the Trial Court accepted execution of the agreements by Dattatray but disbelieved that the defendants paid the consideration amount as they claimed or were put in possession of the suit property in pursuance of the alleged contract. The first appellate court recorded findings disbelieving the execution of the agreements, the theory of defendants being put in possession and payment of consideration amount. I have recorded reasons to confirm the findings disbelieving execution of the contract and payment of consideration as claimed by the defendants, and I have confirmed the concurrent findings that the defendants failed to prove that they were put in possession in pursuance of the alleged contract. I have also confirmed the findings that the plaintiffs are in possession of the eastern part of the suit property.

30. The defendants failed to prove the valid execution of the agreements for sale, payment of consideration amount and theory of being in possession pursuant to the alleged agreements. Learned

counsel for the respondents is right in submitting that only a stray admission from the cross-examination of PW 1 cannot be picked up to conclude that defendants are in possession of the eastern side of the suit property. Even otherwise, mere storing any heaps of rubble in an area that is in possession of the owners of the property would not mean that the defendants are in possession of the said area. One wrongful act on the part of the defendants to store heaps of rubble in an area occupied by the owners of the property cannot be accepted as any proof of them being in possession of the suit property.

31. In the present case, none of the conditions contemplated under Section 53A of the Transfer of Property Act are fulfilled by the defendants. Thus, the legal principles settled by the Hon'ble Apex Court in the decision of ***Nanjegowda*** and the decisions of this Court in the cases of ***Vijay Gaikwad*** and ***Lalitkumar Grover*** squarely apply in favour of the respondents (plaintiffs).

32. I do not find any illegality or perversity in the reasons recorded by both the Courts. The findings recorded by both the Courts on possession of the plaintiffs on the eastern side of the suit property amounts to correct appreciation of the entire evidence on record. Both the Courts also considered the admissions given by PW 1 and have

arrived at the correct conclusion on possession of the eastern side of the suit property. In the second appeal, re-appreciation of evidence is not permissible for arriving at a different conclusion unless any perversity is found in the reasons recorded by both the Courts. Hence, the question of law is accordingly answered in favour of the respondents (plaintiffs). I do not see any reason to interfere in the concurrent findings of facts recorded by both the Courts.

33. The second appeal is accordingly dismissed. The impugned judgments and decrees in favour of the plaintiffs are thus confirmed.

[GAURI GODSE, J.]

IRESH
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