Shankar Gopinath Apte

Vs

Gangabai Hariharrao Patwardhan

Civil Appeal No. 467 of 1976

(Y.V. Chandrachud, P.K. Goswami, A.C. Gupta JJ)

25.08.1976

JUDGMENT

CHANDRACHUD, J. -

1. This appeal by special leave arises out of an order dated February 6, 1975 of the Bombay High Court dismissing First Appeal 13 of 1975 summarily. That appeal was filed by the appellant Shankar Gopinath Apte, against the decree passed by the learned Joint Civil Judge, Senior Division, Poona in Special Civil Suit 107 of 1968. That suit was filed by the respondent, Gangabai Hariharrao Patwardhan to recover the amount that may be found due to her on taking accounts from the appellant and for an injunction to restrain the appellant from obstructing her in the enjoyment of the suit property. Alternatively, the respondent prayed for a decree for possession of the suit lands.

2. The suit property consists of three agricultural lands bearing survey nos. 98/1-1, 98/1-2 and 99, admeasuring in all 54 acres and 20 gunthas. The lands are situated in a village called Kiwale in Pune district.

3. These lands belonged originally to the respondent's husband who died on February 20, 1960 leaving her as his sole heir. On December 29, 1961 a power of attorney was prepared for being executed by the respondent in favour of Western India Trustee and Executor Co. Ltd., Satara. The object the power of of attorney, as expressed therein, was inter alia to authorize the company to collect the income of the land and to take steps for disposing of the land by sale. But for some reason or the other the document remained unexecuted. On February 1, 1963 the respondent executed a power of attorney in favour of appellant. The true nature of this document and its real purpose are both in dispute but ex facie, the document was to be effective for a period of one year and was executed in order to enable the appellant to manage the respondent's lands and to arrange to cultivate them. By a letter dated March 3, 1963 addressed to the respondent, the appellant agreed to undertake the duties specified in the power of attorney and to pay to her a sum of Rs. 2000 annually from the net income of the lands. The rest of the income, according to the letter, was to be retained by the appellant for his "honorarium".

4. Within two or three weeks of the execution of the powers of attorney, the appellant succeeded in obtaining possession of the lands from one Nathuram Agarwal on payment of a sum of Rs. 9300. Nathuram, it appears, had come to be in possession of the lands through one Motiram who was a tenant of the respondent but who was unable to meet his commitments under the terms of the tenancy. The appellant continued in possession of the property from year to year on payment, at intervals of the agreed sum of Rs. 2000 per annum. On January 1, 1967 the appellant's name, on an application made by him, was entered in the record of rights as a tenant of the respondent. In

February, 1968 appellant gave a notice to the respondent under Section 32-O of the Bombay Tenancy and Agricultural Lands Act stating that, being a tenant of the lands, he had acquired a statutory right to purchase the lands and that he was willing to exercise that right. Respondent disputed the appellant's claim by her reply of February 26 and after an exchange of further notices, respondent filed the present suit on May 3, 1968.

5. By his written statement dated October 16, 1968 the appellant raised various technical contentions but his main defence to the suit was that he was in possession of the lands as a tenant of the respondent and in view of the provisions of the Bombay Tenancy Act, the civil court had no jurisdiction to entertain the suit. The appellant contended that the power of attorney was executed by the respondent in his favour solely in order to enable him to obtain possession of the lands from Nathuram and that, otherwise, it was a sham document, a mere cloak for inducting him on the land by evicting an unauthorised occupant.

6. Several issues were struck by the trial Court on these pleadings but it is only necessary to state at this stage that since the main issue in the suit was whether the appellant was in possession of the lands as tenant of the respondent, the civil court had no jurisdiction to decide the respondent's claim for possession and had to refer the issue of tenancy to the tahsildar under Section 85-A of the Bombay Tenancy Act.

7. The tahsildar decided the issue against the appellant holding that he was not a tenant of the respondent. That finding was confirmed in appeal by the Collector but the Maharashtra Revenue Tribunal, allowing a revision application filed by the appellant, differed from the concurrent finding of fact recorded by the authorities below and held that the appellant was in possession of the lands as a tenant of the respondent. The judgment of the tribunal was set aside by the Bombay High Court in Special Civil Application 1430 of 1971. The High Court held that the appellant was in possession of the lands as an agent of the respondent under the power of attorney and that the tribunal was in error in upsetting the finding of the Collector and the tahsildar that the appellant was not a tenant of the respondent. The appellant's application for leave to appeal to this Court was dismissed by the High Court and the petition for special leave filed in this Court met with the same fate. The proceedings under Section 85-A of the Bombay Tenancy Act ended sometime late in 1972.

8. Thereafter, on December 4, 1972 the appellant filed an application in the trial Court for amendment of his written statement seeking leave to plead that he was in possession of the lands in lands in part performance of an agreement of sale between himself and the respondent and that therefore he was entitled to defend his possession under Section 53-A of the Transfer of Property Act. That application was opposed by the respondent and was dismissed on April 13, 1973. The appellant filed a civil revision application in the High Court against that order. After admitting the revision, the High Court heard both sides and confirmed the order of the trial Court rejecting the amendment application. The High Court held that the revision application raised no question of jurisdiction and that the application for amendment made by the appellant was mala fide.

9. At long last, the suit which was filed by the respondent in May, 1968 was taken up for hearing in January, 1974. On November 30, 1974 the suit was decreed by the trial Court. On February 6, 1975 the appeal filed by the appellant therefrom was dismissed summarily by the High Court. On the very next day the respondent obtained possession of the suit lands from the appellant, which in the long context, must go on the record as a matter of refreshing promptitude. This Court granted special leave to the appellant in April, 1976.

10. We would have been saved the futile exercise of looking at the pleadings and considering the evidence for ourselves if only the High Court had given us the benefit of its views while dismissing the appeal summarily. A brief statement of reasons would have served that purpose. The unspeaking under "Dismissed" which the High Court has passed affords no indication whatsoever as to the reasons which impelled the court to deal with the appeal before it as unworthy of any serious consideration. In matters involving construction of written instruments where rival interpretations have more than mere plausibility, the High Court ought to give a brief statement of reasons while dismissing the appeal summarily. In the instant case the High Court had called for the record before dismissing the appeal which only shows that it thought it necessary to verify certain matters from the record in order to find whether the decree passed by the trial Court was legal and proper. But since on a full consideration of the appeal and on hearing both sides we have come to the conclusion that the appeal is devoid of merit, we propose to dispose it off ourselves instead of remanding it to the High Court.

11. The main plank, and perhaps the only one, of the appellant's defence is the trial Court was that he was in possession of the lands as a tenant of the respondent. Having carried that point from the tahsildar to the Supreme Court and having failed to established it, the appellant set up an entirely new and inconsistent case at the hearing of the suit that he was in possession of the lands under Section 53A of the Transfer of Property Act. The application for amendment of the written statement seeking leave of the trial Court to raise this plea was rejected by it and the order was confirmed in revision by the High Court. Apart from the fact that the application for amendment was made at a late stage of the proceedings, on merits, there is no substances whatever in the contention that the appellant is entitled to protect his possession under Section 53A. That section provides, in so far as material, that if any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee being already in possession continues in possession in part performance of the contract and has done some act in furtherance of the contract and is willing to perform his part of the contract, then, even though the contract is required to be registered but has not been registered, the transferor is debarred from enforcing against the transferee any right in respect of the particular property except a right expressly reserved by the terms of the contract. The first and foremost difficulty in the appellant's way is that there is no written contract at all under which the respondent can be said to have agreed to sell the property to the appellant. Counsel for the appellant relied on a letter (Ex. 147) dated January 4, 1968 which was written by the respondent's brother to the appellant as constituting a written contract of sale. Even assuming that the respondent's brother was authorized to write the letter on her behalf, it only refers to an oral agreement between the appellant and the respondent under which the latter had agreed to sell the lands to the former. By that letter, the respondent's brother complained that though the appellant had agreed to purchase the lands for a sum of rupees one lakh and to pay the full consideration within a period of six months, he did not take any steps in fulfilment of these terms. At best, the letter is written contract itself. On this narrow ground the contention of part performance is liable to fail. Besides, many a condition of Section 53A of the Transfer of Property Act is unfulfilled. The terms necessary to constitute the transfer cannot be ascertained with reasonable certainty from the letter, the respondent obviously was unwilling to perform his part of the contract, and the appellant was not put in possession in part performance of the contract. Admittedly, he obtained possession under the power of attorney executed by the respondent in his favour and there is nothing on the record to show that the character of his possession ever changed as a result of the contract of sale. The appellant continued to remit, off and

on, the agreed annual sum of Rs. 2000 to the respondent, which was entirely inconsistent with his character as a potential purchaser of the land. In this background, we are not surprised that the trial Court dismissed the appellant's application for amendment of the written statement and the High Court, while confirming that order in revision, characterized the application as mala fide.

12. It is urged on behalf of the appellant that the power of attorney is a sham and colourable document, its object was to arm the appellant with a written authority to evict unauthorised occupants from the lands and that its real purpose was to put the appellant in possession as a potential purchaser. To an extent, it is correct that the real object of the power of attorney was different from that which is expressed in the document. The real object was to enable the appellant to obtain possession of the lands from Nathuram Agarwal and others who were in possession thereof unauthorisedly. The power of attorney recites that the respondent herself was in possession of the lands but that was an untrue statement of which the explanation may be sought in the notorious unwillingness of a true owner to acknowledge in writing the possession of a trespasser. But though the recital that the respondent was herself in possession of the property was not consistent with the true facts, it is wrong for that reason to say that the power of attorney was a sham and colourable document. Admittedly, immediately after the execution of the power of attorney, the appellant wrote a letter (Ex. 155) dated February 2, 1963 to the respondent accepting the power of attorney in terms, agreeing to pay to her a sum of Rs. 2000 per year from the net income of the lands and reserving the rest of the income as his own "honorarium". Unquestionably the letter was written by the appellant in furtherance and in fulfilment of terms of the power of attorney. Then again, in the absence of a concluded sale, the appellant continued in possession under the power of attorney and indeed he used to make the annual payment of Rs. 2000 to the respondent, which by reason of the letter Ex. 155, had become a part and parcel of the power of attorney itself. It is therefore impossible to accept the appellants contention that the power of attorney was not intended to be acted upon and was a sham.

13. The appellant having failed to establish that he was a tenant the respondent or that he was put in possession of the lands in part performance of an agreement of sale, we are unable to appreciate the drive of a persistent argument that the power of attorney is a sham and colourable document. Assuming that it is so, appellant can claim no right apart from that document except the two rights which stand negatived. It then is inconsequential whether the power of attorney was or was not intended to be acted upon.

14. Faced with this difficulty, learned Counsel for the appellant was given to raise points on which there is no pleading, no issue and naturally no satisfactory evidence. The first of such contentions raised by Mr. Bal is that the appellant must be a licensee of the respondent and since he has executed work of a permanent character on the land involving heavy expenses, the licence would be irrevocable under Section 60(b) of the Easements Act, 1882. This argument was made expressly on the assumption that power of attorney was a nominal document and therefore inoperative. In view of our finding that the document was intended to be acted upon and was in fact acted upon, the argument of irrevocable licence does not survive for consideration. But having spent some time in chasing the argument, we are constrained to say that such evidence as there is on the record seems inadequate to prove the improvements made or the expenses incurred by the appellant. He has admitted in his evidence that the figures which he gave in his examination-in-chief as regards the amount spent on improvements were stated from memory and that he had not produced his accounts to corroborate the oral word. Only one more thing need be stated : even assuming that the appellant has executed work of a permanent character on the land it cannot be said that he has done so "acting upon the licence", as required by Section 60(b) of the Easements Act. If he really improved the land

by executing a work of a permanent character, he did so in the belief that being a tenant he will become a statutory purchaser of the land, or that the oral agreement of sale will one fine day be implemented. The execution of work would therefore be in his capacity as a tenant or a prospective purchaser and not in his capacity as a licensee.

15. Mr. Bal also challenged the decree for the payment of Rs. 4390 which has been passed in favour of the respondent by the trial Court. It is true that there was no accountability as such between the appellant and the respondent but in substance the contention of the respondent was that the appellant had failed to pay the agree amount of Rs. 2000 to her for certain years and should therefore be held accountable to pay the same. There is, on merits, no infirmity in the finding of the trial Court that sum of Rs. 4390 is due to the respondent in pursuance of the letter of consent, Ex. 155.

16. Finally, Mr. Bal urged that the trial Court was in error in awarding possession of the suit lands to the respondent along with the valuable improvement made by the appellant. No issue was sought on this question and indeed no argument was made in the trial Court that it could not award possession of the lands together with the improvements. Originally, the sole defence of the appellant to the suit was that he was a tenant. That contention having failed he attempted to urge that he was in possession of the lands in part performance of a contract of sale. In neither of these two capacities could he claim the value of improvements alleged to have been made by him. That explains why he did not urge the contention which he is now urging as an argument of last resort.

17. Counsel for the appellant attempted to draw some sustenance from the provisions of Section 221 of the Contract Act in support of the claim for the value of improvements but that section has nothing to do with the case. It gives to the agent a lien over the principal's which is received by the agent, until the amount due to the agent as commission, disbursements and services in respect of the property has been paid or accounted for to him. The amount said to have been spent by the appellant for improving the property without any reference whatsoever to the respondent cannot be recovered under Section 221 of the Contract Act, as it does not fall within its terms.

18. In the result, the unspeaking order of dismissal passed by the Bombay High Court can seek its justification in the reasons given by us above. The appeal is accordingly dismissed with costs.

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