

Swapnil

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO. 1391 OF 2004

1. Pushpa Omkar Dusane
Age 48 yrs, Occ : Household,
R/o. Government Quarters.
 2. Alka Abhimanyu Ghodake
Age 28 Yrs, Occ : Household,
R/o. Hundiwala Lane, Nashik.
 3. Durga Omkar Dsane Age 24 Yrs.
 4. Nalini Bharat Ahirrao
Age 27 Yrs, Occ : Household,
R/o. Devkinandan Society,
Kamthwade, Nashik.
 5. Santosh Omkar Dusane, Age 22 Yrs.
 6. Rohini Omkar Dusane, Age 19 Yrs,
All R/o. Golf Club, Behind 3 Bunglow
Near LIC Office, Nashik.
- ...Appellants
(Org. Plaintiffs)

VERSUS

Vijay Vitthal Dusane

Age : Major, Occ : Service,

R/o. H.No.27, Devkinand Co-op.

Society, Kamathwade, Nashik.

...Respondent

(Original Defendant)

Mr. B. K. Barve a/w. Mr. Sandeep Barve, Ms. Sonali Patil, Ms. Diksha Gaikwad and Ms. Simmy Sebastian i/b. B. K. Barve and Co. for the appellants.

Mr. Sanjay P. Shinde a/w. Mr. Prathmesh T. B. for the respondent.

CORAM : GAURI GODSE J

RESERVED ON: 29th JANUARY 2026

PRONOUNCED ON: 8th JUNE 2026

JUDGMENT:

1. This second appeal is preferred by the original plaintiffs to challenge the judgment and decree passed by the first appellate court allowing the respondent's appeal and setting aside the trial court's decree in favour of the appellants. The trial court decreed the suit, declaring the agreement dated 19th November 1992 null and void. The respondent was directed to hand over the possession of the suit property to the plaintiffs.

2. The second appeal was admitted on 12th December

2008 on the following substantial questions of law :-

“1. Whether the document at Exh.46 i.e. agreement to sale allegedly executed by the husband of the present appellant no.1 in favour of the present respondent can be said to be valid one in the absence of signature of the respondent ?

2. Whether the respondent can claim any right in the suit property on the basis of document at Exh.46 which is not signed by him ?”

FACTS IN BRIEF:

3. The appellants filed the suit seeking a declaration that the premises in the defendant's possession are owned by the plaintiffs and that they are entitled to possession. The plaintiffs further prayed for a declaration that the agreement executed by the deceased husband of plaintiff no.1 was null and void as the defendant got the same executed by cheating the deceased husband of plaintiff no.1. The plaintiffs described the suit premises as two rooms out of the four rooms constructed on the plot of land of 1500 square feet along with the road to approach the suit premises. The plot of

land was allotted to the deceased Omkar as he was a member of the Devkinandan Cooperative Housing Society. The deceased Omkar constructed the four rooms by availing a loan while in government service. The loan was repaid in 1994. Plaintiff nos. 2 to 6 are the children of plaintiff no.1 and deceased Omkar.

4. Out of the four rooms, constructed by Omkar, two rooms are occupied by plaintiff no.4 and her husband. Deceased Omkar, along with his family, was to start residing in the suit premises on the occasion of Gudi Padwa in 1993; however, as the defendant had a dispute with his brother, and, in view of the domestic quarrels, the defendant requested permission to temporarily reside in the two rooms. Since the defendant was a distant relative, the deceased Omkar permitted him to temporarily reside in the two rooms. Thereafter, Omkar expired on 25th May 1994. The plaintiffs requested the defendant to vacate the suit premises; however, he refused to vacate. Hence, the plaintiffs issued a notice dated 30th July 1994 calling upon the defendant to hand over the possession. The defendant refused to comply with the notice by contending that the deceased Omkar had

executed an agreement to sell the land to him and that he had constructed the rooms on the said land. Hence, the suit for declaration and possession was filed on the ground that the plaintiffs are the owners of the suit premises and that the defendant was unlawfully occupying the same.

5. The defendant filed his written statement and denied the suit claim. He contended that the deceased Omkar had agreed to sell the land to him by executing an agreement dated 19th November 1992 for a total consideration of Rs. 22,000/-. By the said agreement, the deceased Omkar agreed to transfer an area of 350 square feet from the total plot admeasuring 1150 square feet. The defendant was accordingly put in possession of the open area in lieu of the agreement for sale. The defendant, at his own cost of Rs. 1,32,000/-, constructed the two rooms. Hence, the defendant claims ownership over the suit premises, i.e. the constructed area, on the ground that he was put in possession of the open area by the deceased Omkar by executing an agreement for sale.

6. The trial court decreed the suit, holding that the defendant was permitted to occupy the suit premises, i.e.,

two rooms, as he was in urgent need due to a dispute in his family. The trial court further held that the defendant was in permissive occupation of the suit premises for a short period and was unable to prove that he was put in possession of the open area under an agreement for sale. The defendant was, therefore, held to be in unauthorised occupation of the suit premises and was directed to hand over possession. The agreement for sale dated 19th November 1992 relied upon by the defendant was held to be null and void and not binding upon the plaintiffs.

7. The first appellate court, however, reversed the trial court's findings on the ground that the plaintiffs were unable to prove that the defendant was occupying the suit premises as a gratuitous licensee. It was further held that the agreement in favour of the defendant, executed by Omkar, would be binding upon the plaintiffs, as they were unable to prove that the defendant obtained the document by fraud. The first appellate court further held that the defendant succeeded in proving that he was put in possession of the suit premises pursuant to the agreement for sale in his favour, the defendant was always ready and willing to

perform his part of the contract, and therefore, he was entitled to protect his possession under Section 53A of the Transfer of Property Act, 1882. The first appellate court, therefore, allowed the defendant's appeal and dismissed the suit by reversing the trial court's findings in favour of the plaintiffs.

SUBMISSIONS ON BEHALF OF THE APPELLANTS:

8. Learned counsel for the appellants (plaintiffs) submits that the first appellate court failed to record any valid reasons for reversing the trial court's findings disbelieving that the construction was carried out by the defendant. The agreement for sale relied upon by the defendant to contend that he was put in possession of the suit premises was an unregistered and unstamped document. Hence, the defendant would not be entitled to claim protection under Section 53A of the Transfer of Property Act, 1882, on the basis of an unregistered and unstamped document. There was no dispute that the plot on which the suit premises are constructed was allotted to Omkar on the ground that he was a government employee. By obtaining a loan, the deceased Omkar had constructed the suit premises.

9. The plaintiffs specifically pleaded that the agreement relied upon by the defendant was a forged and fabricated document and was never signed by the deceased Omkar. The defendant failed to prove that the signature on the document was of deceased Omkar. The respondent is not entitled to claim any protection of possession based on an unstamped and unregistered document. Hence, in the absence of any evidence to support the valid execution of the agreement, the defendant was not entitled to claim any protection under Section 53A of the Transfer of Property Act. Although the defendant contended that he constructed the two rooms at his own expense, he was unable to prove it. Hence, the trial court rightly concluded that the defendant was not entitled to retain possession of the suit premises on the ground that he had constructed it on the land handed over to him by Omkar under an agreement for sale.

10. Learned counsel for the plaintiffs submits that the defendant failed to take any steps to get the document specifically performed in his favour. Hence, there was no question of permitting the defendant to retain possession on the ground of protection under Section 53A of the Transfer of

Property Act. He submits that it is a well-established legal principle that unless a suit for specific performance of the alleged agreement is prayed for, the purchaser would not be entitled to continue in possession of the property on the ground of protection under Section 53A of the Transfer of Property Act.

11. To support his submissions, learned counsel for the appellants relied upon the decisions of the Apex Court in (i) ***Ramesh Chand (D) Thr. Lrs. Vs. Suresh Chand and Anr¹***, (ii) ***Suraj Lamp and Industries Private Limited (2) Through Director Vs. State of Haryana and Anr²***, (iii) ***Tajender Singh Gambhir and Anr. Vs. Gurpreet Singh and Anr³***, (iv) ***Vinod Infra Developers Ltd. Vs. Mahaveer Lunia and Ors⁴*** and the decision of the High Court in (v) ***Mahadeo Nathuji Patil Vs. Surjabai Khushalchand Lakkad and Ors⁵***.

12. Learned counsel for the appellants, therefore, submitted that in the absence of any proof that the agreement relied upon by the defendant was signed by the

1 2025 SCC OnLine SC 1879.

2 (2012) 1 SCC 656.

3 (2014) 10 SCC 702.

4 2025 SCC OnLine SC 1208.

5 1993 SCC OnLine BOM 385.

deceased Omkar, the same cannot be accepted as a validly executed document, as it was not signed by even the respondent. Hence, the agreement relied upon by the respondent cannot be said to be a concluded contract between the defendant and the deceased Omkar for the purpose of seeking protection under Section 53A of the Transfer of Property Act. Hence, in the absence of any right to retain the possession of the suit premises, the defendant would not be entitled to seek any protection. Both the questions of law, therefore, must be answered in favour of the appellants and the first appellate court's decree be set aside, and the trial court's decree be confirmed.

SUBMISSIONS ON BEHALF OF THE RESPONDENT:

13. Learned counsel for the respondent (defendant) supported the impugned judgment and decree. According to the learned counsel for the respondent, the issue of admissibility of the document on the ground that it is unstamped and unregistered cannot be raised for the first time in the second appeal. It is a well-established legal principle that the objection on admissibility of a document has to be raised at the threshold at the time of trial, and it

cannot be raised for the first time in the second appeal. To support his submissions, learned counsel for the respondent relied upon the decision of the Apex Court in ***Shamlal Kumar Roy Vs. Sushil Agarwal***⁶.

14. Learned counsel for the respondent submits that the appellate court has rightly dealt with the evidence on record to accept the plea of protection under Section 53A of the Transfer of Property Act. He relied upon the findings recorded by the first appellate court in paragraph 13 of the impugned judgment. He submits that the first appellate court has rightly held that the burden was upon the plaintiffs to prove that the defendant had no right to retain possession. Since the defendant had raised the defence that he was in possession based on the agreement executed by the deceased Omkar and not a gratuitous licensee, the burden was upon the plaintiffs to prove that the defendant was occupying the suit premises as a gratuitous licensee.

15. So far as the validity of the agreement for sale relied upon by the defendant is concerned, learned counsel for the respondent submits that the document is signed by the deceased Omkar. The plaintiffs denied Omkar's signature.

⁶ (2006) 11 SCC 331.

Hence, the burden was upon the plaintiffs to prove that the document was not validly signed by Omkar. The document is not signed by the defendant; however, the absence of his signature would not affect the agreement's validity, as it is signed by the deceased Omkar, who was the original owner of the open plot of land, who agreed to sell it to the defendant and handed it over to the defendant for construction.

16. Learned counsel for the defendant relied upon the admissions given by the plaintiffs, which, according to the learned counsel for the defendant, would amount to admitting the execution of the agreement in favour of the defendant. Learned counsel for the defendant submits that the question of law framed in the second appeal is only on the ground of the absence of the defendant's signature on the document. The document was signed by Omkar, who was the original owner of the property. Hence, the absence of the signature of the purchaser, i.e., the defendant, cannot be a ground to hold that the document is invalid. Hence, based on the agreement to sell executed by the deceased Omkar, the defendant was entitled to seek protection in view of Section 53A of the Transfer of Property Act, as the possession was handed over

to the defendant in furtherance of the contract between the defendant and the deceased Omkar. Hence, both the questions of law must be answered in favour of the respondent, and the impugned judgment and decree deserve to be confirmed.

ANALYSIS AND CONCLUSIONS:

17. I have carefully perused the agreement, pleadings, evidence and both the judgments. The suit is filed for the two constructed rooms on the plot of land allotted to the deceased Omkar. The plaintiffs are claiming the title on the plot of land and the constructed area on the ground that they are the heirs and legal representatives of the deceased Omkar. The original ownership of Omkar over the entire plot of land, and the plaintiffs being the heirs and legal representatives of the deceased Omkar, are not in dispute. The plaintiffs have described the plot of land and the constructed area of the house, which was built during Omkar's lifetime from his own income. Thus, the plot of land and the entire construction were owned by Omkar. Out of the constructed area, two rooms are occupied by the defendant. The plaintiffs have thus pleaded ownership of the entire plot

of land and the entire constructed area. According to the plaintiffs, the defendant's source of possession was not as a gratuitous licensee but as a permissive possessor.

18. In response, the defendant claimed right over the suit premises, i.e. two rooms, based on an agreement for sale dated 19th November 1992, executed by Omkar. Even according to the defendant, the agreement was executed by the deceased Omkar in respect of an open space of 350 square feet out of the total plot owned by Omkar. Thus, the defendant claims his source of possession under the agreement in respect of the open space. According to the defendant, he constructed the two rooms he occupies in the area that the deceased Omkar agreed to transfer to him.

19. The defendant claims to have constructed the two rooms on the land, which was handed over to him in furtherance of the contract for the sale of an open area. Thus, the defendant claims to be in possession of the open area as part performance of the agreement in his favour, and to own the constructed area as he constructed it. Thus, the protection claimed by the defendant under Section 53A of the Transfer of Property Act would not apply to the suit premises,

as even according to the defendant, the agreement was for the open area and not for the constructed area. So far as the construction is concerned, the plaintiffs have produced the record of the loan obtained by the deceased Omkar for the purpose of construction and its repayment.

20. The first appellate court has not recorded any findings to the effect that the suit premises, i.e., the two rooms, were constructed by the defendant, and therefore the defendant was the owner of the suit premises. The first appellate court recorded findings on assumptions and presumptions to believe the respondent's contention that he constructed the two rooms. No valid reasons are recorded by the first appellate court to set aside the trial court's findings that the construction on the plot owned by Omkar was carried out by the deceased Omkar and that there was no cogent and satisfactory evidence that the construction was carried out by the respondent.

21. The first appellate court has referred to the provisions of Section 53A of the Transfer of Property Act to hold that the defendant would be entitled to protect his possession as he was put in possession of the suit premises in furtherance of

the contract in his favour. The execution of the document in favour of the defendant is accepted as valid on the ground that it was seen to have been signed by the deceased, Omkar, and the plaintiffs failed to prove that it was not signed by Omkar. The defendant was held to be in valid possession of the suit premises under the agreement executed in respect of the open space. The first appellate court has failed to record any findings for granting protection under Section 53A of the Transfer of Property Act in respect of the constructed area, relying on the contract for the open space.

22. The ground of admissibility of the document in view of its non-registration and non-payment of stamp duty is not required to be discussed, as no such question of law is either framed or arises in the second appeal. The issue of the document's admissibility need not be examined as no such objection was raised in the trial court. The document was admitted in evidence because it was confronted during the respondent's cross-examination.

23. The second appeal is admitted on the questions of law as to whether the defendant would be entitled to claim any right in respect of the suit premises based on the document

that is not signed by him. According to the defendant, the document is executed in respect of the open space. The suit is filed for two rooms constructed on the open space. There is no dispute that the entire plot of land, including the open space, which is the subject matter of the agreement relied upon by the defendant, was originally owned by Omkar. The plaintiffs are admittedly the heirs and legal representatives of the deceased Omkar. Hence, they would be entitled to the absolute ownership of the entire open space through Omkar.

24. Admittedly, the defendant never got the contract enforced in his favour in respect of the land. Hence, the defendant has no title over the land. He has not pleaded and proved the ingredients envisaged under Section 53A of the Transfer of Property Act in respect of the land. To claim protection under Section 53A, the respondent is under an obligation to plead and prove that, in furtherance of the contract, he was put in possession of the land. Therefore, even if the agreement at Exhibit 46 is accepted as a validly exhibited document, the contents of the same are not proved by the respondent to seek protection under Section 53A by any satisfactory pleadings and evidence that he was put in

possession of the land in furtherance of the contract.

25. The respondent seeks protection under Section 53A for his possession of the constructed area, on the basis of an agreement that, according to him, was executed in respect of open land. Hence, the document at Exhibit '46' relied upon by the respondent would not be of any assistance to him in claiming any protection under Section 53A in respect of the constructed area. Hence, the respondent has no right, title or interest in any nature, either in respect of the land or the constructed area, that is, the suit premises.

26. The only right claimed by the defendant is based on the agreement for sale, which is admittedly not signed by him. The defendant has neither prayed for any declaration of ownership of the constructed area nor has he proved that he constructed it at his own cost, and therefore, has any ownership of the constructed area. The defendant seeks protection of the constructed area by relying upon Section 53A of the Transfer of Property Act, based on the agreement relied upon by him, which was only in respect of the open land. Hence, there would be no question of granting protection under Section 53A to the constructed area on the

basis of an agreement for open land.

27. The plaintiffs have specifically pleaded that the defendant was in permissive use of two rooms. Hence, the burden was upon the defendant to prove his ownership or any valid source of possession of the constructed area. In the absence of any such proof of ownership by the defendant, the trial court has rightly held that the defendant was not entitled to retain possession. Based on the evidence on record, the trial court had rightly held that the defendant was in permissive use of the two rooms.

28. The first appellate court has not recorded any reasons to reverse the trial court's findings that the defendant was in permissive use of the two rooms, i.e., the suit premises. The findings recorded by the first appellate court, based on the respondent's pleadings that he was the owner of the rooms, would not be sustainable in the absence of any title document or satisfactory evidence that he constructed them at his own cost with the permission of Omkar and the society. The first appellate court has not recorded any finding of fact that the defendant has pleaded and proved that the constructed area, i.e. the suit premises, was owned by him.

The findings recorded by the first appellate court on the ground of gratuitous licensee would not be sustainable, as it was nobody's case that the defendant was occupying the suit premises as a gratuitous licensee.

29. The document at Exhibit '46, which, even according to the defendant, was executed in respect of the open land, would not give any right to the defendant to claim any title over the constructed area. The document is admittedly not signed by the respondent. The document is admitted in evidence as the respondent was confronted with it during the cross-examination. The respondent has not led any evidence to prove the correctness of the contents of the document. However, since the document is only an agreement to sell open land signed by the vendor, its validity would not be affected solely on the ground that it is not signed by the respondent, that is, the purchaser. Hence, the first question of law is answered accordingly. However, even if the validity of the execution of the document at Exhibit 46 is not affected on the ground that it is not signed by the respondent, it does not create any right, title or interest of whatsoever nature in his favour either in respect of the land or the suit premises.

30. In ***Ramesh Chand***, the well-established legal principles governing the application of the protections under Section 53A are reiterated by the Apex Court. It is held that the essential conditions for invoking the doctrine of part-performance as envisaged under Section 53A of the Transfer of Property Act have been enunciated by the Apex Court in ***Nathulal v. Phoolchand***⁷ as under:

“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.”

31. In the present case, admittedly, the respondent has not taken any steps in furtherance of the contract executed by the deceased Omkar in his favour. Even otherwise, according to the respondent, the agreement he relied upon

⁷ (1969) 3 SCC 120

was executed in respect of the open land. Therefore, even as per the pleaded case of the respondent, he was never put in possession of the suit premises, that is, the constructed area in part performance of the agreement for sale. Hence, the respondent is not entitled to seek protection envisaged under Section 53A in respect of the suit premises, i.e., the two rooms, on the basis of the agreement for the open land.

32. In ***Suraj Lamp & Industries***, the Apex Court held that an agreement of sale, whether with possession or without possession, is not a conveyance and that Section 54 of the Transfer of Property Act enacts that sale of immovable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject-matter.

33. In ***Vinod Infra Developers***, the Apex Court held that under sections 17, 23, and 49 of the Registration Act, 1908, an unregistered agreement to sell is inadmissible in evidence for the purpose of transferring title, and such a document has no legal sanctity in establishing ownership or rights in immovable property. It is held that such documents are inadmissible in evidence to convey title or to complete a sale

and can only be admitted for collateral purposes or in a suit for specific performance.

34. In ***Mahadeo Nathuji Patil***, the Full Bench of this Court held that the statutory protection granted under section 53-A of the Transfer of Property Act to a transferee in possession to continue his possession under an unregistered contract or instrument of transfer is not lost by lapse of time to file the suit for specific performance of contract for acquiring title, if he satisfies the essential requirements of the Section 53A, and it is not incumbent upon him to file such a suit within time to protect his possession after the lapse of time.

35. In ***Shyamal Kumar Roy***, the Apex Court held that the party objecting to the admissibility of the document must raise an objection so as to enable the trial Judge to determine the issue upon application of his judicial mind at the appropriate stage. It is further held that if no objection had been taken in regard to the admissibility of the document at the trial stage, the party at a later stage cannot be permitted to turn round and contend that the document is inadmissible in evidence. In the present case, the document at Exhibit '46' is admitted in evidence, as the respondent was

confronted with it during cross-examination. The document is admittedly not signed by the respondent. The respondent did not lead any evidence to prove the correctness of its contents. Hence, even if this second appeal would not raise any question of law on the issue of admissibility of the said document in evidence; however, the said document would not confer any right, title or interest of any nature in favour of the respondent in respect of the open land or the suit premises.

36. In the present case, admittedly, the respondent has not taken any steps in furtherance of the agreement. The agreement was never specifically performed in favour of the respondent. It would give him neither title to the open land nor to the constructed area. Except for the said agreement, no document is produced and relied upon by the respondent for claiming any right in the constructed area, that is, the suit premises. Though the respondent contended that he had carried out the construction, no satisfactory evidence has been produced to prove that he owns it. The first appellate court, which is the last fact-finding court, has not recorded any findings of fact with valid reasons in favour of the

respondent to the effect that the suit premises were constructed by him and therefore owned by him. Thus, the second question of law, whether the defendant is entitled to claim any right in respect of the suit premises, based on the document at Exhibit '46', must be answered in favour of the plaintiffs. The respondent is therefore not entitled to retain the possession of the suit premises, which are owned by the plaintiffs.

37. The second appeal is therefore allowed by passing the following order:

- (i) The judgment and decree dated 19th September 2002 passed by the District Judge, Nashik, in Regular Civil Appeal No. 243 of 1997 is quashed and set aside.
- (ii) Regular Civil Appeal No. 243 of 1997 is dismissed.
- (iii) The judgment and decree dated 25th April 1997 passed by the Joint Civil Judge, J. D. Nashik, in Regular Civil Suit No. 883 of 1994 is modified by passing the following order:
 - (a) It is declared that the agreement dated 19th November 1992, Exhibit '46', confers no right,

title or interest of whatsoever nature in favour of the respondent (defendant) in respect of the land or the suit premises, that is, the two rooms, as described in the plaint.

(b) The respondent (defendant) shall deliver the vacant and peaceful possession of the suit premises, that is, the two rooms as described in the plaint, to the appellants (plaintiffs) within two months from today.

(c) Deficit court fee, as ordered by the trial court, shall be paid by the appellants (plaintiffs) if not yet paid. On payment of the deficit, court fees, if any, a decree be drawn accordingly, in terms of this order.

(d) The enquiry into mesne profit is ordered under Order XX Rule 12, (1) (c) of the Civil Procedure Code, 1980.

(e) The respondent (defendant) shall pay the cost of the proceedings to the appellants (plaintiffs).

[GAURI GODSE, J.]