

MARCH 31, 2003

[R.C. LAHOTI AND BRIJESH KUMAR, JJ.]

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Transfer of Property Act, 1882—Section 53:

Eviction suit by subsequent transferee—Plea of part performance—Raising of by transferee—Availability of—Held: such plea is not available since transferee's suit for specific performance is dismissed, he has failed to prove that he has taken possession of property in part performance of contract, and subsequent transferee who is transferee for consideration has no notice of the contract or of the part performance thereof in favour of transferee—It cannot be said that transferee has performed or is willing to perform his part of the contract—Thus transferee not entitled to protect his possession under Section 53A and is liable to be evicted—Karnataka Rent Control Act, 1961.

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Part performance—Plea—Availability of when suit for specific performance barred by limitation—Held: If all other requisites of Section 53A are present such plea can be raised.

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Part performance—Essential features—Discussed.

Constitution of India—Article 136—Plea—Raising of—For the first time at the time of hearing of appeal—Availability of—Held: Such plea cannot be raised, more so when it is contrary to the stand taken by appellant in courts below.

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Original owner of the suit premises inducted appellant as tenant. Thereafter original owner and his wife transferred their right, title and interest in the property including suit premises to the respondents by way of sale deed. According to the appellant he entered into an agreement to purchase the suit property from the original owner whereafter he is holding the suit premises as prospective vendor. Appellant then filed suit for injunction to protect his possession which was later amended by adding relief for specific performance. Trial Court held that though there was an agreement to sell in favour of the appellant, however, suit was barred

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A by limitation; that respondent was a transferee without notice of
agreement in favour of the appellant, having purchased the property *bona*
fide and for consideration; and that the conduct of the appellant was
inconsistent, thus appellant was not entitled to relief of specific
performance. Thereafter respondent claiming himself to be owner-landlord
B filed eviction suit against appellant alleging him to be tenant in the suit
premises which was allowed. High Court upheld the order. Hence the
present appeal.

Appellant contended that there is no registered sale deed in favour
of the respondent and therefore, he cannot be held to be a transferee
C having acquired ownership rights in the property.

Dismissing the appeal, the Court

HELD: 1.1. The essential features of the equitable doctrine of part
performance as statutorily modified and incorporated in Section 53A of
D the Transfer of Property Act, 1882 are 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 and has done some act in
furtherance of the contract; that the transferee has performed or is willing
E to perform his part of the contract; and that the plea of part performance
is not available to be raised against a transferee for consideration who
has no notice of the contract or of the part performance thereof.

[202-E-G]

2.1. In the instant case, appellant cannot be permitted to raise the
F plea of part performance as the civil suit which was filed by the appellant
was initially filed in the year 1989 as a suit for injunction seeking to protect
his possession. After about four years from the date of institution of the
suit the relief of specific performance was also added by way of
amendments. Thereafter, the suit was dismissed in its entirety. Not only
G was the plaintiff's claim for specific performance and monetary relief in
the alternative denied, but even the relief of injunction was not allowed
to him. Thus in view of his suit for specific performance having been
dismissed, it cannot be said that he has performed or was willing to
perform his part of the contract. [203-C-D; 204-D]

H 2.2. The appellant has failed to allege and prove that he was delivered
possession in part performance of the contract or he, being already in

possession as lessee, continued in possession in part performance of the agreement to purchase, i.e. by mutual agreement between the parties his possession as lessee ceased and commenced as that of a transferee under the contract. On the contrary, there is a finding recorded in the earlier suit that in spite of his having entered into a contract to purchase the property he had not disowned his character as lessee and he was treated as such by the parties. The judgment in the civil suit notes the conduct of the appellant inconsistent with his conduct as vendee in possession. When a person already in possession of the property in some other capacity enters into a contract to purchase the property, to confer the benefit of protecting possession under the plea of part performance his act effective from that day must be consistent with the contract alleged and also such act cannot be referred to the preceding title. [203-D-G]

Bhagwandas Parsudilal v. Surajmal and Anr., AIR (1961) M.P. 237, approved.

G.H.C. Ariff v. Jadunath Majumdar Bahadur, AIR [1931] PC 79; *Dakshinamurthi Mudaliar (Dead) and Ors. v. Dhanakoti Ammal*, AIR (1925) Madras 965 and *A.M.A. Sultan (deceased) By Lrs. and Ors. v. Seydu Zohra Beevi*, AIR (1990) Kerala 186, referred to.

2.3. The respondent is a transferee for consideration who has no notice of the contract or of the part performance thereof in favour of the appellant. Where a person claiming benefit of part performance of a contract was already in possession prior to the contract, the Court would expect something independent of the mere retention of possession to evidence part performance and some act done in furtherance of the contract. [204-E, G]

Sardar Govindrao Mahadik and Anr. v. Devi Sahai and Ors., AIR (1982) SC 989, referred to.

3. Bar of limitation alone does not bar the plea of part performance being raised if all other requisites of Section 53A of the Act are available. [205-D]

Shrimant Shamrao Suryavanshi and Anr. v. Pralhad Bhairoba Suryavanshi (Dead) by Lrs. and Ors., [2002] 3 SCC 676, distinguished.

4. The fact that the respondent is a transferee under registered deed of sale having acquired ownership in the property was not disputed upto

A the High Court. At no point of time the appellant ever requested for the original sale deed being brought on record before the Court. A new plea which is essentially a plea of fact cannot be allowed to be urged for the first time at the hearing of appeal under Article 136 of the Constitution before this Court, more so when it is contrary to the stand taken by the appellant himself in the High Court and the Court below. [205-E, F]

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1527 of 2000.

From the Judgment and Order dated 15.6.1998 of the Karnataka High Court in H.R.R.P. No. 822 of 1998.

C S. Ravindra Bhat, Ms. Smitha Inna, Naveen R. Nath, Mrs. Lalit Mohini Bhat, Ms. Hetur Arora and S.R. Setia for the Appellant.

P.R. Ramasesh and Ms. Vandana Jalan for the Respondent.

The Judgment of the Court was delivered by

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R.C. LAHOTI, J. The suit premises forming part of the building No.25, 5th Cross, Annamma Temple Extension, Ramakrishnapuram, Bangalore, measuring 8x20 sq. ft. are the subject matter of these proceedings initiated under the provisions of the Karnataka Rent Control Act, 1961, (hereinafter 'the Act', for short) by the respondent claiming himself to be owner-landlord and seeking eviction of the appellant alleging him to be tenant in the suit premises. Eviction has been ordered under Clauses (a) and (h) of sub-Section (1) of Section 21 of the Act by the Rent Controller and upheld by the High Court in exercise of revisional jurisdiction under Section 50(1) of the Act.

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F The singular issue surviving for decision at this stage and around which the learned counsel for the parties have centered their submissions is: whether the appellant is entitled to protect his possession under Section 53A of the Transfer of Property Act, 1882 and hence not liable to suffer eviction based on landlord-tenant relationship which has ceased to exist on account of subsequent events.

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The plea arises for determination in the background of the facts briefly stated hereinafter. The suit premises were initially owned by one N. Shamanna. The appellant was inducted in the suit premises as a tenant w.e.f. 1.11.1967. According to the appellant, he entered into an agreement to purchase the suit property from the original owner in the year 1970, whereafter he has been

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holding the suit premises as a prospective vendor and in part performance of

agreement to purchase the property, which relationship has superseded the erstwhile tenancy relationship and altered the nature and character of appellant's possession over the suit premises from that of tenant to that of a purchaser in possession in part performance of agreement to sell the property within the meaning of Section 53A of T.P. Act. The factum of there being any agreement to sell the property entered into by the original landlord with the appellant has been denied and has been a subject matter of controversy in these proceedings. What is not disputed is that under a deed of sale dated 18.4.1983 the original owner N. Shamanna and his wife Smt. Nanjamma have transferred their right, title and interest in the property, including the suit premises, to the respondent herein. These proceedings were initiated by the respondent herein after serving a notice on the appellant.

The controversy centering around the principal issue arising for decision in this appeal stands mellowed down to the extent of the findings arrived at in the judgment dated 1.9.1999 passed by VII Addl. City Civil Judge, Bangalore. It was a suit instituted by the appellant herein against N. Shamanna - the original owner, Nanjamma - wife of the original owner and A. Sreenivasan, the present owner and the respondent herein (respectively impleaded as defendant nos. 1, 2 and 3 in the suit) seeking specific performance of the alleged agreement to sell of the year 1970 in his favour. The respondent herein was impleaded as subsequent transferee. The Trial Court held that though there was an agreement to sell in favour of the appellant, however, the suit filed by him was barred by limitation and also suffered from gross delay and laches. The respondent was held to be a transferee without notice of agreement in favour of the appellant, having purchased the property *bona fide* and for consideration. It was held that the appellant was not entitled to a decree of specific performance of the agreement to sell in his favour nor, looking to his conduct, was he entitled to the alternative relief of refund of consideration with or without damages. One of the findings arrived at is that in spite of the alleged agreement to sell of the year 1970, the appellant had not disowned his character as tenant in the suit premises. There is no finding arrived at in the judgment that the appellant was in possession of the suit premises in part performance of the agreement of the year 1970. The suit was held liable to be dismissed and was dismissed. The judgment and decree have achieved a finality as the appellant herein did not pursue the matter further.

Section 53A of the Transfer of Property Act reads as under:-

“53A. Part Performance. - Where any person contracts to transfer

A 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,

B 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 the transferee has performed or is willing to perform his part of the contract,

C then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him 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:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.”

E The essential features of the equitable doctrine of part performance as statutorily modified and incorporated in Section 53A abovesaid, to the extent relevant for the purposes of this case, are: (i) 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 and has done some act in furtherance of the contract, (ii) that the transferee has performed or is willing to perform his part of the contract, and (iii) that the plea of part performance is not available to be raised against a transferee for consideration who has no notice of the contract or of the part performance thereof.

G In *G.H.C. Ariff v. Judunath Majumdar Bahadur*, AIR (1931) PC 79, their Lordships held that a prospective vendee already in possession of the property as lessee since before having allowed his right to enforce his contract to become barred can resist the claim to possession by seeking to establish a title, the acquisition of which is forbidden by the statute he being a lessee.

H Though Ariff's case deals with English equitable doctrine and not with Section

53A of the Transfer of Property Act, 1882 yet the basic principle remains the same. The transferee must have performed or be willing to perform his part of the contract. If a suit for specific performance of the contract filed by the transferee has been dismissed on merits and his disentitlement to seek enforcement of the contract has been adjudicated upon by a judicial verdict it cannot be said that the transferee has performed or is willing to perform his part of the contract. It would be a contradiction in terms. On the suit for specific performance of contract having been dismissed, such a plea is not available to be raised.

There are reasons more than one why the appellant cannot be permitted to raise the plea of part performance and seek shelter thereunder. The civil suit which was filed by the appellant was initially filed in the year 1989 as a suit for injunction seeking to protect his possession. After about four years from the date of institution of the suit the relief of specific performance was also added by way of amendments in the year 1993. On 1.9.1999, the suit was dismissed in its entirety. Not only was the plaintiff's claim for specific performance and monetary relief in the alternative denied, but even the relief of injunction was not allowed to him.

Secondly, the appellant has failed to allege and prove that he was delivered possession in part performance of the contract or he, being already in possession as lessee, continued in possession in part performance of the agreement to purchase, i.e. by mutual agreement between the parties his possession as lessee ceased and commenced as that of a transferee under the contract. On the contrary, there is a finding recorded in the earlier suit that in spite of his having entered into a contract to purchase the property he had not disowned his character as lessee and he was treated as such by the parties. The judgment dated 1.9.1999 in the Civil Suit notes the conduct of the plaintiff inconsistent with his conduct as vendee in possession. When a person already in possession of the property in some other capacity enters into a contract to purchase the property, to confer the benefit of protecting possession under the plea of part performance his act effective from that day must be consistent with the contract alleged and also such act cannot be referred to the preceding title. The High Court of Madhya Pradesh had an occasion to deal with the facts very near to the facts before us in *Bhagwandas Parsadilal v. Surajmal and Anr.*, AIR (1961) M.P. 237. A tenant in possession entered into an agreement to purchase the house forming subject matter of tenancy. However, he failed to show his nature of possession having altered from that of a tenant into that of a transferee. In a suit of ejectment based on

- A landlord-tenant relationship, the tenant sought to protect his possession by raising the plea of part performance as against subsequent purchaser of the property. Referring to Section 91 of Indian Trust Act, the High Court held that a subsequent purchaser of the property with notice of an existing contract affecting that property must hold the property for the benefit of the person in whose favour the prior agreement to sell has been executed to the extent it is necessary to give effect to that contract. But that does not mean that till a final decision has been reached the contract creates a right in the person in possession, i.e. the tenant, to refuse to surrender possession of the premises even if such possession was obtained by him not in part performance of the contract but in his capacity as a tenant. Having entered into possession as a tenant and having continued to remain in possession in that capacity he cannot be heard to say that by reason of the agreement to sell his possession was no longer that of a tenant. (Also see *Dakshinamurthi Mudaliar (Dead) and Ors. v. Dhanakoti Ammal*, AIP '1925) Madras 965 and *A.M.A. Sultan (deceased by LRs) and Ors. v. Seydu Zohra Beevi*, AIR (1990) Kerala 186)
- D In our opinion the law has been correctly stated by the High Court of Madhya Pradesh in the abovesaid decision.

Thirdly, as already stated hereinabove, in view of his suit for specific performance having been dismissed, it cannot be said that he had performed or was willing to perform his part of contract.

- E Lastly, as held in the civil suit, the respondent is a transferee for consideration who has no notice of the contract or of the part performance thereof in favour of the appellant. In *Sardar Govindrao Mahadik & Anr. v. Devi Sahai and Ors.*, AIR (1982) SC 989, this Court has held that there is a understandably and noteworthy difference in the probative value of entering into possession for first time and continuing in possession with a claim of change in character. Where a person claiming benefit of part performance of a contract was already in possession prior to the contract, the Court would expect something independent of the mere retention of possession to evidence part performance and some act done in furtherance of the contract.
- G Strong reliance was placed by the learned senior counsel for the appellant on a recent decision of this Court in *Shrimant Shamrao Suryavanshi and Anr. v. Pralhad Bhairoba Suryavanshi (Dead) by Lrs. and Ors.*, [2002] 3 SCC 676, wherein this Court has held that a person obtaining possession of the property in part performance of an agreement of sale, can defend his possession in a suit for recovery of possession filed by the transferor or by subsequent
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transferee of the property claiming under him, *even if a suit for specific performance of the agreement of sale has become barred by limitation.* (emphasis supplied) Clearly it was a case where the person in possession was so inducted in part performance of the agreement of sale. Excepting that his suit had gone barred by limitation there was nothing else to deny the benefit of the plea to the person in possession. The court proceeded on the reasoning that the law of limitation barred the remedy but did not bar the defence. The distinguishing features of that case are that: (i) it was admitted that the transferee had taken possession over the property in part performance of the contract, (ii) that the transferee had not brought any suit for specific performance of the agreement to sell, and (iii) the transferee was always and still ready and willing to perform his part of the contract. These three significant factual features are missing in the case before us and therefore the appellant's effort to find support from the authority of *Shrimant Shamrao Suryavanshi's* case (supra) must fail. Bar of limitation alone does not bar the plea of part performance being raised if all other requisites of Section 53A of T.P. Act are available.

Though, the learned counsel for the appellant contended that there is no registered sale deed in favour of the respondent and therefore he cannot be held to be a transferee having acquired ownership rights in the property, such a plea cannot be permitted to be raised at this stage. The fact that the respondent is a transferee under registered deed of sale having acquired ownership in the property was not disputed upto the High Court. At no point of time the appellant ever requested for the original sale deed being brought on record before the Court. A new plea which is essentially a plea of fact cannot be allowed to be urged for the first time at the hearing of appeal under Article 136 of the Constitution before this Court, more so when it is contrary to the stand taken by the appellant himself in the High Court and the Court below.

For the foregoing reasons the appeal is held liable to be dismissed and is dismissed accordingly. The decision of the Rent Controller, as upheld by the High Court, is maintained.

N.J.

Appeal dismissed.