

CASE NO.:
Appeal (civil) 4610 of 2000

PETITIONER:
Rambhau Namdeo Gajre

RESPONDENT:
Narayan Bapuji Dhotra (dead) through Lrs.

DATE OF JUDGMENT: 25/08/2004

BENCH:
Ashok Bhan & S.H. Kapadia

JUDGMENT:
J U D G M E N T

BHAN, J.

Defendant/appellant (hereinafter referred to as "the appellant") has filed this appeal against the judgment of the High Court in Second Appeal No. 205 of 1984 whereby the High Court reversing the judgment and decree passed by the first Appellate Court has restored the order passed by the Civil Court, Jalna in Suit No. 184 of 1974. The Trial Court had decreed the suit filed by the Narayan Bapuji Dhotra, (deceased) now represented through his Legal representatives (hereinafter referred to as "the respondent").

The property in dispute is agricultural land bearing Survey No. 94 admeasuring 18 acres and 23 gunthas situated at Village Jambwadi, Taluka Jalna in the State of Maharashtra. Respondent who was the owner of the suit land filed the Suit for possession of the land with the averment that the appellant had wrongfully dispossessed him of the suit land in April, 1965. According to him, he was the owner of the suit land which was his self-acquired property. It was averred that in the Special Civil Suit No. 20 of 1962 filed by his brother for partition and possession of the ancestral property, the suit land along with other lands was left to his share.

Appellant resisted the suit contending, inter alia, that under an agreement of sale dated 16.6.1961 Narayan Bapuji Dhotra, original plaintiff, and his brother Manohar agreed to sell the suit land to Pishorrilal Punjabi who paid the entire amount of consideration and was put in possession of the land in part performance of the agreement of sale. That Pishorrilal executed an agreement of sale of the suit land in favour of the appellant on 1.9.1961. That he paid the entire amount of the consideration to Pishorrilal and was put in possession of the suit land by Pishorrilal in part performance of the agreement dated 1.9.1961. It was contended that since he was in possession of the suit land in part performance of the agreement, he was entitled to protect his possession in terms of Section 53-A of the Transfer of Property Act (hereinafter referred to as "the Act").

Trial Court upon consideration of the evidence on record came to the conclusion that a mere contract of sale is incapable of creating any right or title in favour of the transferee. That no right or interest was created in the suit land in favour of Pishorrilal by virtue of the agreement of sale dated 16.6.1961. That the original agreement of sale between Narayan Bapuji Dhotra and Pishorrilal was not placed on the record and the certified copy produced as Exhibit 16/1D had not been proved. That the appellant had failed to exercise due care in ascertaining the title of Pishorrilal before entering into an

agreement of sale with him. It was highly improbable that the appellant had no knowledge about the pendency of the suit between the plaintiff and his brother and Pishorrilal. It was also held that the appellant could not defend his possession under Section 53-A of the Act as against the plaintiff/respondent. In view of the findings recorded the trial Court proceeded to pass the decree for possession in favour of the respondent.

Aggrieved against the judgment and decree passed by the Trial Court, the appellant filed an appeal. The first appellate Court taking a different view set aside the judgement of the trial Court and dismissed the suit filed by the plaintiff/respondent. The first Appellate Court came to the conclusion that the appellant had acquired an equitable/possessory title to the suit land on the basis of the agreement of sale executed in his favour by Pishorrilal and was, therefore, entitled to protect his possession under Section 53-A of the Act.

Original plaintiff/respondent died. His Legal representatives (now the respondent) filed a second appeal in the High Court. Although, a number of questions of law were framed at the time of admission of the second appeal but at the time of final disposal the only substantial question of law worth consideration was found to be: "Whether the defendant, who is in possession of the suit land on the basis of an agreement of sale dated 1.9.1961 executed by Pishorrilal Punjabi, who himself, in turn, had come in possession of the suit land on the basis of a similar agreement dated 16.6.1961 executed by the plaintiff, can claim benefit of the equitable doctrine of part performance as stated in Section 53-A of the Transfer of Property Act to protect his possession."

The above noted question was answered by the High Court in the negative. It was held that the appellant was not entitled to protect his possession claiming benefit of equitable doctrine of part performance enshrined in Section 53-A of the Act. Title in the suit property had not been conveyed in favour of Pishorrilal by executing a registered sale deed. In the absence of title in the property Pishorrilal could neither enter into an agreement of sale nor transfer possession of the property to the appellant in part performance of the agreement under Section 53-A of the Act. That the appellant failed to take due care and pre-caution to ascertain the title of Pishorrilal to the suit land before entering into transaction with him.

Section 53-A was enacted in 1929 by the Transfer of Property (Amendment) Act, 1929, and imports into India in a modified form the equity of part performance as it developed in England over the years. Doctrine of part performance as stated in Section 53-A of the Act is an equitable doctrine which creates a bar of estoppel in favour of the transferee against the transferor.

It is seen that many a times a transferee takes possession of the property in part performance of the contract and he is willing to perform his part of the contract. However, the transferor some how or the other does not complete the transaction by executing a registered deed in favour of the transferee, which is required under the law. At times, he tries to get back the possession of the property. In equity the Courts in England held that it would be unfair to allow the transferor to take advantage of his own fault and evict the transferee from the property. The doctrine of part performance aims at protecting the possession of such transferee provided certain

conditions contemplated by Section 53-A are fulfilled. The essential conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under Section 53-A of the Act have been culled out of this Court in *Shrimant Shamrao Suryavanshi & Anr. Vs. Pralhad Bhairoba Suryavanshi*, 2002 (3) SCC 676, are:

- "(1) There must be a contract to transfer for consideration of any immovable property;
- (2) the contract must be in writing, signed by the transferor, or by someone on his behalf;
- (3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;
- (4) the transferee must in part performance of the contract take possession of the property, or of any part thereof;
- (5) the transferee must have done some act in furtherance of the contract; and
- (6) the transferee must have performed or be willing to perform his part of the contract."

If these conditions are fulfilled then in a given case there is an equity in favour of the proposed transferee who can protect his possession against the proposed transferor even though a registered deed conveying the title is not executed by the proposed transferor. In such a situation equitable doctrine of part performance provided under Section 53-A comes into play and provides that "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."

Protection provided under Section 53-A of the Act to the proposed transferee is a shield only against the transferor. It disentitles the transferor from disturbing the possession of the proposed transferee who is put in possession in pursuance to such an agreement. It has nothing to do with the ownership of the proposed transferor who remains full owner of the property till it is legally conveyed by executing a registered sale deed in favour of the transferee. Such a right to protect possession against the proposed vendor cannot be pressed in service against a third party.

The question which falls for our consideration is: "Whether the doctrine of part performance could be availed of by the defendant with whom the respondent had never entered into an agreement of sale?" It is an admitted case of the parties that the plaintiff/respondent had entered into an agreement of sale with Pishorrilal on 16.6.1961 and who had taken possession of the suit land in part performance thereof. Sale deed had not been executed and registered in his favour. Pishorrilal did not take any steps for getting the agreement of sale specifically enforced and obtain a registered sale deed in respect of the suit land. Within a period of 2-1/2 months Pishorrilal executed a similar agreement of sale dated 1.9.1961 in favour of the appellant and put him in possession of the suit land. Pishorrilal did not have any right to enter into an agreement of sale with the appellant as he was not the owner of the suit land. The appellant did not care to ascertain the title of Pishorrilal to the

suit land before entering into the transaction with him.

There was no agreement between the respondent and the appellant in connection with the suit land. The doctrine of part performance enshrined in Section 53-A of the Act could have been availed of by Pishorrilal against the plaintiff/respondent subject to the fulfillment of certain conditions but the same could not be availed of by the appellant against the plaintiff/respondent with whom he has no privity of contract. The doctrine of part performance as contemplated by Section 53-A can be availed of by the transferee or any person claiming under him. The appellant not being the transferee within the meaning of Section 53-A of the Act could not invoke the equitable doctrine of part performance to protect his possession as against the plaintiff/respondent.

The agreement to sell does not create an interest of the proposed vendee in the suit property. As per Section 54 of the Act, the title in immovable property valued at more than Rs. 100/- can be conveyed only by executing a registered sale deed. Section 54 specifically provides that a contract for sale of immovable property is a contract evidencing the fact that the sale of such property shall take place on the terms settled between the parties, but does not, of itself, create any interest in or charge on such property. It is not disputed before us that the suit land sought to be conveyed is of the value of more than Rs. 100. Therefore, unless there was a registered document of sale in favour of the Pishorrilal (proposed transferee) the title of the suit land continued to vest in Narayan Bapuji Dhotra (original plaintiff) and remain in his ownership. This point was examined in detail by this Court in *State of U.P. Vs. District Judge & Ors.*, 1997 (1) SCC 496, and it was held thus:

"Having given our anxious consideration to the rival contentions we find that the High Court with respect had patently erred in taking the view that because of Section 53-A of the Transfer of Property Act the proposed transferees of the land had acquired an interest in the lands which would result in exclusion of these lands from the computation of the holding of the tenure-holder transferor on the appointed day. It is obvious that an agreement to sell creates no interest in land. As per Section 54 of the Transfer of Property Act, the property in the land gets conveyed only by registered sale deed. It is not in dispute that the lands sought to be covered were having value of more than Rs. 100. Therefore, unless there was a registered document of sale in favour of the proposed transferee agreement-holders, the title of the land would not get divested from the vendor and would remain in his ownership. There is no dispute on this aspect. However, strong reliance was placed by learned counsel for Respondent 3 on Section 53-A of the Transfer of Property Act. We fail to appreciate how that section can at all be relevant against the third party like the appellant-State. That section provides for a shield of protection to the proposed transferee to remain in possession against the original owner who has agreed to sell these lands to the transferee if the proposed transferee satisfies other conditions of Section 53-A. That protection is available as a shield only against

the transferor, the proposed vendor, and would disentitle him from disturbing the possession of the proposed transferees who are put in possession pursuant to such an agreement. But that has nothing to do with the ownership of the proposed transferor who remains full owner of the said lands till they are legally conveyed by sale deed to the proposed transferees. Such a right to protect possession against the proposed vendor cannot be pressed in service against a third party like the appellant-State when it seeks to enforce the provisions of the Act against the tenure-holder, proposed transferor of these lands."

[Emphasis supplied]

There was no agreement between the appellant and the respondent in connection with the suit land. The doctrine of part performance could have been availed of by Pishorrilal against his proposed vendor subject, of course, to the fulfillment of the conditions mentioned above. It could not be availed of by the appellant against the respondent with whom he has no privity of contract. Appellant has been put in possession of the suit land on the basis of an agreement of sale not by the respondent but by Pishorrilal, therefore, the privity of contract is between Pishorrilal and the appellant and not between the appellant and the respondent. The doctrine of part performance as contemplated in Section 53-A can be availed of by the proposed transferee against his transferor or any person claiming under him and not against a third person with whom he does not have a privity of contract.

Doctrine of part performance is rooted in equity and provides a shield of protection to the proposed transferee to remain in possession against the original owner who has agreed to sell to the transferee if the proposed transferee satisfies other conditions of Section 53-A. It operates as an equitable estoppel against the original owner to seek possession of the property which was given to the proposed vendee in part performance of the contract. Appellant being a third party and not a privy to the transaction on which the estoppel rests can take no advantage of it.

Pishorrilal did not have a transferable interest which he could convey to the appellant by entering into an agreement of sale with the appellant. The appellant under the circumstances does not have the equitable right to protect his possession as against the owner of the land, i.e., the respondent. Appellant is not the transferee within the meaning of Section 53-A. The appellant did not get the possessory or equitable title to the suit land through Pishorrilal as Pishorrilal himself did not have any right in the property. The only right possessed by the Pishorrilal under Section 53-A was to protect his possession as against his proposed vendee. He did not have conveyable interest in the property which he could transfer to a third party including the possession of the property. For the reasons stated above, we do not find any merit in this appeal and dismiss the same with costs.