Sardar Govindrao Mahadik and Another

Vs

Devi Sahai and Others

Civil Appeals Nos. 1144-1145 of 1969

(D.A. Desai, R.B. Misra JJ)

15.12.1981

JUDGMENT

DESAI, J. –

1. What constitutes part performance within the meaning of the expression in Section 53-A of the Transfer of Property Act ('Act' for short) so as to clothe a mortgagee in possession with the title of ownership which would defeat the suit suit of the erstwhile mortgageo for redemption, is the question canvassed in these two appeals by common certificate.

2. Facts first, Sardar Govindrao Mahadik original plaintiff 1 (now deceased prosecuting these appeals through his legal representatives) and Gyarsilal original plaintiff 2 (appellant 2) filed Civil suit No. 14 of 1951 in the Court of the District Judge, Indore, for redemption of a mortgage in respect of house No. 41 more particularly described in plain paragrahp 1, dated February 22, 1951. A loan of Rs. 10,000 was secured by the mortgage. The mortgage was mortgage with possession. Plaintiff 1 was the mortgagor and the sole defendant Devi Sahai was the mortgagee. Plaintiff 2 is a purchaser of the mortgaged property from plaintiff 1 under a registered sale deed Ex. P-1, dated October 14, 1950. Plaintiff 1 will be referred to as mortgagor. Defendant Devi Sahai as a mortgagee and plaintiff 2 Gyarsilal as subsequent purchaser in this judgment. Even though the mortgage was mortgage with possession, it was not a usurauctuory mortgage but an anomalous mortgage in that the mortgagor had agreed to pay interest at the rate of 12 per cent and the mortgagee was a liable to account for the income of the property earned as rent and if the mortgagee himself occupied the same he was bound to account for the rent at the of Rs. 515 per annum. Mortgagor served notice dated October 5, 1945, calling upon the mortgagee to render true and full account of the morgage transaction. The mortgagee failed to comply with the notice. Subsequently it appears that there were some negotiations between the mortgagor and the mortgagee which according to the mortgagee, culminated in a sale of the mortgaged property in favour of mortgagee for Rs. 50,000. Account of the mortgage transaction was made and the consideration of Rs. 50,000 for the sale of the house which would mean sale of equity of redemption was worked out as under :

> # Rs. 25,000 : Principal mortgage money plus the amount found due as interest on taking accounts of mortgage. Rs. 17,735 : Given credit for the amounts taken from time to time by the mortgagor from the mortgagee for domestic expenses. This is disputed as incorrect and it was suggested that the entry be read as amount retained to pay off other creditors of the mortgagor. Rs. 1000 : Taken in advance for purchasing stamps and incurring registration expenses. Rs. 6265 : To be paid in cash at the time of registration before the Sub-Registrar. ---------- Rs. 50,000 ----------##

Requisite stamps were purchased and the draft sale deed was drawn up on October 10, 1950, but it was never registered. On October 14, 1950, 1st plaintiff-mortgagor sold the suit houses by a registered sale deed to plaintiff 2 Gyarsilal for Rs. 50,000 with an agreement for resale. Thereafter the mortgagor and the subsequent purchaser as plaintiffs 1 and 2 respectively filed a suit on February 22, 1951 against mortgagee-defendant Devi Sahai for taking accounts of the mortgage transaction and for a decree for redemption.

3. The mortgagee Devi Sahai defended the suit on diverse grounds but the principal and the only defence canvassed was one under Section 53-A of the Act, namely, that even though the sale deed purporting to sell equity of redemption having not been registered would not clothe the mortgagee with title of owner to the mortgaged-property, yet he could defen his possession as transfer-owner under the doctrine of part performance inasmuch as not only is the mortgagee in possession in part performance of the contract of sale but has continued in possession in part performance of the contract and has done several acts unequivocally referable or attributable to the contract and that the mortgagee as transfer has not only performed but is willing to perform his part of the contract and, therefore, the mortgagor is debarred from enforcing against the mortgagee any right in respect of the mortgaged property. As a necessary corollary, it was also contended that plaintiff 2 has acquired no right, title or interest in the mortgged property under the alleged sale deed October 14, 1950, in view of the fact that the transferor, viz., original mortgage had no subsisting title to the property on the date of the sale which he could have transferred to the 2nd plaintiff.

4. Arising from the pleadings of the parties, trial court framed five issues. The trial court held that plaintiff 1 executed a sale deed of the mortgaged property in favour of the defendant-mortgage but as the sale deed was registered the transaction of sale is not complete. On the issue of protection of Section 53-A claimed by the defendant mortgagee the trial court held against him. It was held that the mortgage being mortgage with possession, continued possession of the mortgagee after the date of the contract dated October 10, 1950, would not be in part performance of the contract. The trial court further held that no payment was made which could remotely be said to be in part performance of the contact. With regard to the payment of Rs. 1000 for purchase of stamps and expenses of registration, it was held that the same was paid before the execution of the contract, and therefore, could not be said to be in furtherance of the contract. On these finding the trial court held that Section 53-A of the Act was not attracted and the mortgage was accordingly held to be consisting and a preliminary decree for taking accounts was passed. A Commissioner was appointed for taking accounts.

5. Defendant-mortgagee Devi Sahai preferred Civil First Appeal No. 14 of 1966 of the Indore Bench of the Madhya Pradesh High Court. When this appeal was pending, appellant Motilal in cognate Civil Appeal No. 1145 of 1969 applied under Order 22, Rule 10, Code of Civil Procedure, for being joined as a party to the appeal claiming that under the sale certificate dated March 25, 1953, issued by the Additional City Civil Judge First Class, Indore, he had purchased the equity of redemption in respect of the mortgaged property and that he has a subsisting interest in the property involved in the dispute and, therefore, he would contest the rights of the plaintiff as well as of the mortgagee defendant to claim any right, title or interest in the No. 243 of 1947 dated November 3, 1947 for recovering acertain amount against the 1st plaintiff-mortgagor and had secured attachment before judgment of the mortgaged property on November 6, 1947. His suit was decreed to the extent of Rs. 2500 by the trial court. He filed execution application No. 216 of 1951 and in this proceeding the mortgaged property was sold subject to mortgage and he purchased the same Rs. 300. The auction-sale was confirmed on September 25, 1953. It may also be mentioned that the mortgagor 1st plaintiff had preferred appeal against the decree of the trial court and the appellate court by its

judgment dated March 27, 1953, allowed the appeal and dismissed the suit of Motilal in entirety. Against the appellate decree Motilal filed Second Appeal No. 78 of 1953 in the High Court and by its judgment dated September 4, 1958, Motilal's claim to the tune of Rs. 500 against the 1st plaintiff-mortgagor along with proportionate interest and costs was decreed. The application of Mortilal for being impleade as a party was contested by the 1st and 2nd plaintiff as as well as by the defendant-mortgagee. The High Court allowed the application of Motilal for being jointed as party to the appeal and examined the contention advanced on his behalf on merits.

6. The only contention canvassed by the mortgagee in his appeal in the High Court was that he is entitled to the protection conforred by Section 53-A of the Act. In only such act pleaded was payment of Rs. 1000 and no other act or circumstance was reliev upon. The High Court was of the opinion that official mortgagee Devi Sahai was entitled to the benefit of the doctrine of partb performance as against the 1st plaintiff-mortgagor Govindrao Mahadik and his subsequent transfer Gyarsilal because he was in possession and contained to be inn possession and paid Rs. 1000 in furtherance of the contract. While so holding the High Court imposed a condition that the mortgagee must pay or deposit in the court an amount of Rs. 24,000 with intereste at the rate of four per cent annum from the date of delivery of possession to him as vendee till the date of payment or deposit on the footing that was the balance consideration promised but not paid by the mortgagee. The deposit was directed to be made in the trial court within three months from the date of the judgment of the High Court for payment to the 2nd respondent which would enable the mortgagee to retain possession of the mortgaged property. The High Court have a further direction that if the payment or deposit as directed in the judgment was not made, the appeal of the mortgagee would stand dismissedand if the amount directed in the judgment of the High Court was paid or deposited in the trial court within the stipulated time the appeal of the mortgagee would stand allowed and in that even the suit of the mortgagor would stand dismissed. In respect of Motilal's claim the High Court directed that in either event he shall be of four percent per annum from the date of the auction-sale till the date of realisation and to the extent of that amount there shall be a charge on the mortgaged property enforceable at the instance of Motilal. In the circumstances of the case the High Court did not award costs to either side.

7. Both the original plaintiffs and Motilal made separate applications for certificate under Article 133 (1) (a) and (b) of the Constitution which were granted. Hence these two appeals.

8. The appeal (C. A. No. 1144 of 1969) preferred by the original plaintiffs-plaintiff 1 being the morgagor, may be dealt with first. In this appeal 1st defendant (mortgagee) seeks to non-suit the plaintiff on the only ground that he is entitled to the benefit of equitable doctrine of part performance as enacted in Section 53-A of the Act. According to the defendant mortgagee the mortgagor agreed to sell the mortgaged property to the mortgage for consideration of Rs. 50,000 made up in the manner set out in the sale deed Ex. D-1 dated October 10, 1950 and purusuan to the agreement he has given Rs. 1000 being part of the consideration for purchasing stamps and for expenses of registration and after stamps were purchased, sale deed Ex. D-1 was drawn up and executed and since then he being in possession retained the same as a vendee and accordingly he is entitled to the protection of Section 53-A of the Act.

9. This necessitates focusing of the attention on the requirements of what constitutes part performance as enacted in Section 53-A. Even though at the hearing of the appeals what was the state of law prior to the introduction of Section 53-A in the Act by the Transfer of Property (Amendment) Act, 1929, was canvassed at length, we would like to steer clear of this confusing mess of legal squabbles and, proceed to analyse the contents of Section 53-A, subsequently referring

to legislative-cum-legal history so far as it is relevant for interpretation of the section. Section 53-A reads as under :

> Where any person contracts to transfer for consideration any immovable property by writing signed by him or no his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty.

and the transfer has, in part performance of the contract, taken possession of the property or any part thereof, or the transfer 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 transfer has performed is willing to perform his part of the contract,

then, notwithstanding that the contact, 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 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 transfer and persons claiming under him any right in respect of the property of which the transfer 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 transfer for consideration who has no notice of the contract or of the part performance thereof.

10. In order to qualify for the protection conferred by the equitable doctrine of part performance as enacted in Section 53-A, the following facts will have to be established : (SCC p. 123, para 9).

> (1) That the transferor has contracted to transfer for consideration any immovable property by riting signed by him or no his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainly; (2) That the transfer has, in part performance of the contract, taken po ssession 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. (See Nathulal v. Phoolchand).

There was no dispute that the aforesaidtioned conditions have to be satisfied to make good the defence of part performance. The controversy is no their application to the facts of the case.

11. The High Court accepted the defence of part performance as canvassed on behalf of the mortgagee who claimed to have purchased the property under a sale deed Ex. D-1 dated October 10, 1950, found that payment of Rs. 1000 for purchase of stamps was an unequivocal act in furtherance of the contract. The defendant-mortgagee did not invite the High Court to consider any other act as having been done by him under the contract or in furtherance of the contract or unequivocally referable to the contract. However, when the matter was heard in this Court, Mr. V. S. Desai, learned counsel appearing for the respondent-mortgagee urged the following acts as having been done by the mortgagee in furtherance of the contract which would constitute part performance :

> (a) payment of Rs. 1000 as agreed to under the contract for purchase of stamps for drawing up and registering the sale deed; (b) discharge of a debt of Rs. 541 which was included in the amount of Rs. 17,735 retained by the mortgagee from the total

consideration payable for discharging other debts; (c) mortgagee agreed to discharge the mortgage subsisting on the proper ty in his favour on settlement of accounts; (d) all dues owed by the mortgagor to the mortgagee may have to be taken as cleared on completion of the contract; (e) nature and character of possessionchanged as recited in the contract;

A few more circumstances were relied upon to show that the mortgagee was willing to perform his part of the contract and the omissions pointed out are not fatal to his case. They are :

(f) failure to offer the amount agreed to be paid before the Registrar and/or not discharging debts agreed to be discharged as having been given credit in the consideration for the sale would not detract from part performance because they have to be evaluated in the facts and circumstances of the case;

(g) conduct of the 1st plaintiff mortgagor in executing and registering a sale deed in respect of the mortgaged property in favour of the 2nd plaintiff Gyarsilal and thereby frustrating the contract of sale in favour of the defendant mortgagee evidences that the 1st plaintiff mortgagor was aware of the contract in favour of the defendant mortgagee and he was retaining possession in furtherance of the contract;

(h) defendant-mortgagee made all attempt to get the deed registered by approaching the Sub-Registrar;

(i) the defendant mortgagee initiate criminal proceedings against the 1st plaintiff mortgagor for misusing the stamp papers.

12. Ordinarily this Court would be loath to examine contentions of facts based on evaluation of evidence advanced for the first time before this Court without any attempt at inviting the adjudication of the same by the High Court. However, as all the contention arise from the record and proceedings, we propose to examine them on merits more so because we do not propose to rest this judgment on a technical ground and also because we are inclined to reverse the decision of the High Court which is in favour of 1st defendant mortgagee.

13. Section 4 of the Statute of Frauds, 1677 of United Kingdom provided that no person shall be charged upon any contract for sale of lands or any interest in land etc. unless the agreement or some memorandum of some note thereof shall be in writing and signed by the party to be charged thereunder or some other person thereunto by him lawfully authorised. This provision has been substantially re-enacted in Section 40 (1) of the Law of Property Act, 1925 with this departure that sub-section (2) specifically provides that the substantive provision in sub-section (1) does not affect the law relating to part performance or sales by the court. As no action could be brought on oral agreement the doctrine of part performance was devised by the Chancery Court with a view to mitigating the hardship arising out of an advantage taken by a person under an oral contract and failure to enforce it would permit such person to retain the undeserved advantage by the Equity Court enforcing the contract. The situation must be such that not to nforce the contract in face of the defence of Statute of Frauds after taking advantage of oral contract would perpetuate the fraud which the statute sought to prevent. The party who altered its position under the contract must have done some act under the contract and it would amount to fraud in the opposite party to take advantage of the contract not being in writing. Such a situation arose where on of the parties to the oral agreement alteredits position and when specific performance was sought after taking advantage

under oralcontract, set up the defence available under the Statute of Frauds. The Chancery Court while granting relief of specific performance wanted to be wholly satisfied that the pleaded oral contract exists and is established to its utmost satisfaction and in order to ascertain the existence of the oralcontract before granting a relief of specific performance the court wanted to be satisfied that some such act has been done which would be unequivocally referable to the oral contract as would prove the existence beyond suspicion, meaning part performance of the contract. The eparture under our law is that when giving it a statutory form in Section 53-A of the Act the existence of a written contract has been made sine qua non and simultaneously the statute also insists upon prof of some act having been done in futherance of the contract. The act relieved upon as evidencing part performance must be of such nature and character that its existence would the contract and its implementation. Each and every act subsequent to contract by itself may not be sufficient to establish part performance. The act must be of such a character as being one unequivocally referable to the contract and having been performed in performance of the contract. In Lady Thynne v. Earl of Glengall, it was observed that "part performance to take the case out of the Statute of Frauds, always supposes a completed agreement. There can be no part performance here is no completed agreement in existence. It must be obligatory, and what is done must be under the terms of the agreement and by force of the agreement". This approach would necessitate that the act relied upon as being in the part performance of the contract as such as by its own force would show the very same contract as it alleged by the person seeking the protection of part performance.

14. In the fact situation as it unfolds itself in this case, continued possession of the mortgagee hardly offers any clue to the question of part performance. Defendant-mortgagee was in possession of the mortgaged property. therefore, physical possession having not changed hands, it would be for the mortgage to show that he continued to retain possession in part performance of the contract and has done some act in furtherance of the contact. Where physical and actual possession was already with the person claiming the benefit of the doctrine of part performance its continued retention by itself without anything more would hardly be indicative of an act unequivocally referable to part performance of the contract. He must further establish that he has done some act in furtherance of the contract. This was not disputed and, therefore, the mortgagee defendant urged before the High Court and retierated before us that, payment of Rs. 1000 inter alia to the 1st plaintiff mortgagor for purchase of stamps and for expenses incidental to registration was an Act uneuivocally done in furtherance of the contract.

15. Before evaluating the submission a few relevant fact may be noticed. Be lettr Ex. P-3 dated October 9, 1950, 1st plaintiff wrote to defendant-mortgagee, portion of which may be extracted as it has some bearing on the question under consideration :

> ..... it is requested that we have entered into a contract with you for the sale condition of our house No. 12 situated in Kalai Mohalla. therefore to buy stamps etc. for the sale you should pay Rs. 1000 (rupees one thousand only) to out Mukhtar Shri Madhavraoji Vishnu Joshi, 82, Ada Bazaar, indorewale. I agree for the same and shall deduct the amount at the time of registration.

16. Pursuant to this letter defenat-mortgagee paid Rs. 700 to the Mukhtar and an endorsement to that effect is found as Ex. p-4. On the next day, that is, October 10, 1950, a further amount of Rs. 300 was given and stamps were purchased and no the same day sale deed Ex. D-1 was drawn up. While reciting the considering for the sale deed acredit was given for Rs. 1000 paid by the mortgage for purchase of stamps. So far there is no dispute. The grievance is that according to the 1st plaintiff mortgagor he had agreed to sell the house to the mortgagor but the ale was to be conditional sale

with a right to repurchase and that was agreed to between the parties. Subsequently when the sale deed Ex. D-1 was drawn up he found it was an absolute sale in breach of the agreement and therefore he did not complete the transaction and sold the house subsequently on October 14, 1950 to the 2nd plaintiff, under Ex. P-1 which is a conditional sale with a right to repurchase.

17. It would thus transpire hat payment of Rs. 100 consisting of two separate payments - one of Rs. 700 on October 9, 1950, and an amount of Rs. 300 on October 10, 1950, by the defendant-mortgagee to 1st plaintiff-mortgagor for purchasing stamps for execution of a sal deed is not in dispute. What is in dispute is whether the payment was made towards some contact anterior to the letter Ex. P-3 dated October 9, 1950, or it was in pursuance to the contract dated October 10, 1950, as reflected in the unregistered sale deed. In this connection the stand taken by the mortgagee defendant is both equivocal and fluctuating. In the written statement fieled on his behalf on April 10, 1951, there is no specific, clear and unambigous plea of part performance. Under the heaing "Additional plea" in para 9 it is contended that the sale deed having been executed in favour of the mortgagee in settlement of mortgage transaction mutually between the parties and that the mortgaged property having been given to the mortgagee as an owner, the mortgage transaction does not subsist in law. This has been understood to mean a plea for the protection of the doctrine of part performance. Be that as it may, it is not suggested that there was any oral contract anterior to the one as found in the unregistered sale Ex. D-1. Nor is there any suggestion of any draft agreement prior to the drawing up of the sale deed Ex. D-1. What transpires from the diverse rectial is that there was some oral discussion between the parties prior to the latter Ex. P-3 dated October 9, 1950, at which the understanding was that there was to be aconditional sale with a right of repurchase by the mortgagor and that becomes evident from the rectial in Ex. P-3, "sale Condition" which is contemporaneous evidence having its intrinsic worth and a stamp of truthfulness because at that time no dispute had risen and the mortgagor was seeking to work out and implement the agreement by seeking a loan of Rs. 1000 for purchase of stamps and or expenses incidental to registration so as to complete the transaction. But there was no writeen contract. It must be stated that there was dispute about the nature of transaction is also borne out by the parol evidence. Mortgage Devi Sahai DW 1 has deposed in para 6 that mortgagor in chit P-3 proposed a conditional sale of which he did not agree whereupon morgagor agreed to give absolute sale. This estabilishes postulates a written contract from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty. There was no concluded contract prior to Ex. D-1. The only written contract which is relied on is the unregistered sale deed Ex. D-1 of October 10, 1950. on the admission of the mortgagee himself it is crystal clear that out of Rs. 1000, an amount of Rs. 700 was paid on October 9, 1950, and hat was prior to the agreement. As for the payment of Rs. 300 it is not specifically claimed that was payment in furtherance of the contract. In any event, stamps were purchased prior to the drawing up of Ex. D-1 which is the contract relied upon for the purposes of Section 53-A. And it must be shown that the act has been down in furtherance of the contract, i.e. subsequent to the contract or at best simultaneously with the contract but unequivocally attributable or referable to the contract. It must follow that acts anterior to and done previous to the agreement cannot be presumed to be done in pursuance of it and cannot, therefore, be considered as acts of part performance (see Whitbread v. Brockhursl quoted by White and Tudor, Leading Cases on Equity, 8th Edn., p. 416).

18. The High Court while evaluating the probative value of the circumstances of payment of Rs. 1000 started on a wrong premise when it observed that the act envisaged by the phrase 'in furtherance of the contract' in Section 53-A should be in pursuance of the contract and not that it should either precede or follow the agreement or the contract. If a written contract is a sine a non for seeking coverage of the umbrella of the equitable doctrine of part performance any act preceding the

contract could conceiveably never be in furtherance of that contract which was to materialise. Negotiations for a contract and a concluded contract stand apart from each other. Anything at the negotiating stage cannot be claimed as contract unless the contract is concluded between the parties, i.e. the parties are ad idem. Coupled with this is the further requirement that it should be a written contract in that the contract which would purport to transfer for consideration the immovable property must be by writing and the writing must be such that the necessary ingredients to constitute the transfer can be ascertained with reasonable ingredients to constitute the transfer can be ascertained with reasonable certainty. The High Court overlooking the very important fact situation that the only contract relied upon by the mortgagee defendant was on contained in the unregistered sale deed Ex. D-1 dated October 10, 1950, committed an error in holing that the payment of Rs. 1000 prior to October 10, 1950, would undoubtedly be n act in pursuance of the contract which is evidenced by the writing Ex. D-1 duly signed by the 1st respondent. This approach overlooks a vital dispute between the parties and the High Court could not have utilised this circumstances without resolving the dispute inasmuch as unquestionably there were some negotiations between the parties either no October 9, 1950, or some time prior thereto but there was no concluded contract because the very letter Ex. P-3 by which the 1st plaintiff mortgagor sought a loan of Rs. 1000 for purchasing the stamps etc. Was a pursuance to a conditional sale and that is totally denied and repudiated by the morgagee as shown hereinabove. Accordingly, when the amount of Rs. 1000 was paid it was the stage of negotiations and not a concluded contract. And when the contract was drawn up as evidenced by Ex. D-1 being the unregistered sale deed dated October 10, 1950 the parties were not ad idem, because the mortgagor declined to agree to registration of the sale deed as it was contrary to the understanding arrived at between the parties though no doubt he had executed the sale deed. The contention therefore that the amount of Rs. 1000 was paid in furtherance of the contract does not bear scrutiny.

19. However, assuming the finding of fact recorded by the High Court that the amount of Rs. 1000 was paid in furtherance of the contract, is a finding of fact recorded on appreciation and evaluation of evidence and ordinarily not interfered with by this Court unless shown to be perverse, the alternative contention that payment of part of even whole of the consideration could not be said to be in furtherance of the contract and, therefore, not sufficient to constitute part performance may now be examined.

20. How far payment of part or even whole of the consideration would constitute part performance so as to take the case out of Section 4 of the Statute of Frauds may now be examined with reference first to the English decisions because Section 53-A enacts with some modifications the English equitable doctrine of part performance.

21. In order to mitigate the hardship arising out of the rigorous provisions of the Statute of Frauds equitable doctrine of part performance was devised by the Court of Chancery. Commenting upon Section 4 of the Statute of Frauds, 1677, Lord Redesdale observed in Foxcraft 4 v. Lister - quoted in White & Tudor's Leading Cases on Equity, 8th p. 413 as under :

> The Statute of Frauds says that no action or suit shall be maintained on an agreement relating to lands, which is not in writing, signed by the party to be charged with it; and yet the Court is in the daily habit of relieving, where the party seeking relief has been put into a situation which makes it against conscience in the other party to insist on the want of writing so signed, as a bar to his relief. The first case (apparently) of this kind was Foxcraft v. Lister, which was decided on a principle acted upon on Courts of Law, but not applicable to the particular case. It was against conscience to

> suffer the party who had entered and expended his money on the faith of a parol agreement to be treated as a trespasser, and the other party to enjoy the advantage of the money he had laid out.

22. The question often arises whether payment of part of even whole of the consideration can be unequivocally attributed to the contract. At page 416 the authors observe :

> Payment of part of even of all the purchase-money will not be considered an act of part performance to take a parol contract out of the Statute of Frauds. Nor will payment of the auction duty.

23. The payment of a part of even a whole of the consideration was not treated unequivocal act of part performance because it was believed that money can be repaid or can be reclaimed and, therefore, it is not an unequivocal act evidencing an act in furtherance of the contract (see Hanbury & Maudsley, Modern Equity, 10th Edn., p. 37). Similarly, Story's Equity Jurisprudence, 14th Edn., para 1046 p. 424, neatly sets out the history of the approach to payment as evidence of part performance. It may be extracted.

> ..... It seems formerly to have been thought that a deposit, or security, or payment of the purchase-money, or of a part of it, or at least of a considerable part of it, was such a part performance as took the case out of the statute. But that doctrine was open to muchcontroversy, and is now finally overthrown. Indeed the distiction taken in some of the cases between the payment of a small part and the payment of a considerable part of the purchase-money seems quite too refined and subtle, for independently of the difficulty of saying what shall be deemed a small and what a considerable part of the purchaser-money, each must, upon principle, stand upon the same reason, namely, that it is a part performance in both cases, or not in either. One ground why part payment is not now deemed a part performance, sufficient to take a case out of the statute, is that the money can be recovered back again at law, and therefore the case admits of full and direct compensation.

24. Equity by G. M. Keeton and L. A. Sheridan, 2nd Edn., p. 366 sets out chronologically and approach of the Court to payment of money as evidencing part performance. Attitude to the payment of money as an act of part performance had varied from time to time. In Maddison v. Alderson, Lord Selborne, L. C. pointed out :

> ..... the payment of money is an equivocal act not (in itself) unless connection is established by parol testimony indicative of a contract consisting of land.

25. In Snell's Principles of Equity, 20th Edn., p. 587, under the heading "Insufficient acts to bring the case out of the doctrine of part performance", it is noted that payment of a part of the purchase-money, or even apparently the whole, is not sufficient for part performance of a contract for the sale of land for the payment of money is an equivocal act (not in itself), until the connection is established by parol testimony, indicative of a contract concerning land. Maddison v. Alderson is relied upon in support of this statement.

26. A few cases to which our attention was drawn may now be referred to. In Clinan v. Cooke, Cooke inserted an advertisement in the public papers inviting offers to let a piece and parcel of land for the period set out in the advertisement. In response to this advertisement the plaintiffs applied to

Edmund Meagher to whom the application was to be addressed and entered into a treaty with him for lease of land. A memorandum of agreement was entered into between the parties and the intending tenant deposited 50 guineas which the advertiser received in consideration of the lease on the recommendation of Meagher who also appeared to have received a sum of 20 guineas from the plaintiffs for which no receipt was given. Subsequently Mr. Cooke refused to perform the agreement and he granted a new term of lease of the defendant who entered into the same with the knowledge of the agreement with the plaintiffs. An action was brought by the plaintiffs for specific performance. Declining to grant that relief Lord Redesdale held as under :

> But I think this is not a case in which part performance appears. The only circumstance that can be considered as amounting to part performance is the payment of the sum of fifty guineas to Mr. Cook. It has always been considered that the payment of money is not to be deemed part performance to take a case out of the statute.

27. In Maddison case Earl of Selborne, L. C. in unequivocal terms observed hat it may be taken as now settled that part payment of purchase-money is not enough, and judges of high authority have said the same even of payment in full. Clinan v. Cooke, Hughes v. Morris and Britain v. Rossitter were relied upon in support of this. Again at page 484 Lord O'Hagan taking note of the conflict of decisions pertinently observed as under :

> I confess I have found it hard to follow the reasoning of the judges in some of the cases to which the Lord Chancellor has referred to reconcile the rulings, in others of them - and to regard as entirely satisfactory the state of the law in which the taking of possession or receipts of rent is dealt with as an act of part performance, and the giving and acceptance of any amount of purchase-money, confessedly in pursuance and affirmance of a contract of sale, is not. As to some of the judgments prompted no doubt by a desire to defeat fraud and accomplish justice, I am inclined to concur with the present Master of the Rolls in Britain v. Rossiter, when he called them "bold decisions".

It may be noted that in that case an intestate induced a woman to serve him as his housekeeper without wages for many years and to give up other prospects of establishment in life by a verbal promise to make a will leaving her a life estate in land and afterwards signed a will, not duly attested, by which he left her the life estate. It was contended on behalf of the woman who worked as housekeeper that she had wholly performed her part by serving the intestate as housekeeper till the intestate's death without wages yet the Court in its equity jurisdiction declined to hold such an act as referable to any contract and was no such a part performance as to take the case out of the operation of Section 4 of the Statute of Frauds. This case is being referred to to show how firmly established and entrenched the view was that part payment is not enough. Offer to work without wages was treated as evidencing some payment not enought to sustain the plea of part performance. That equity should take such a view of human service and sacrifice is difficult to appreciate. Modern notions of equity, fair play and just approach would stand rudely shaken by the view taken in that case and quoting the case is not be interpreted to mean sharing the view.

28. In Chaproniere v. Lambert, the Court of Appeal reinforced the view which held the filed till then that the mere payment of rent is not such part performance to take the case out of the statute and even payment of whole of the purchase money has been not to be sufficient to taken the case out of the statute. In so doing it reiterated the view taken in Maddison v. Alderson.

29. In England the law took a sharp U-turn in Steadman v. Steadman, Lord Simon of Glaisdale under the heading "Payment of money" observed as under :

> It has sometimes been said that payment of money can never be a sufficient act of part performance to raise the required equity in favour of the plaintiff or, more narrowly, that payment of part of even the whole of the purchase price for an interest in land is not a sufficient act of part performance. But neither of the reasons, put forward for the rule justifies it as famed so absolutely. The first was that a plaintiff seeking to enforce an oral agreement to which the statute relates needs the aid of equity; and equity would not lend its aid if there was an adequate at law. It was argued that a payment could be recovered at law, so that was no call for the intervention of equity. But the payee might not be able to repay the money (he might have gone bankrupt), or the land might have a particular significance for the plaintiff (of the equitable for specific delivery of a chattel of particular value to the owner : Duke of Somerset v. Cookson), or it might have greatly risen in value since the payment, or money may have lost some of its value. So it was sought to justify the rule, alternatively, on the ground that payment of money is always an equivocal act : it need not imply a pre-existing contract, but is equally consistent with many other hypothesis. This may be so in many cases, but it is not so in all cases. Oral testimony may not be given to connect the payment with a contract : but circumstances established by admissible evidence (other acts of part performance, for example) may make a nexus with a contract the probable hypothesis. In the instant case, for example, what was said (i. e. done) in the magistrates' court in part performance of the agreement makes it plain that the payment of the L 100 was also in part performance of the agreement and not a spontaneous act of generosity or discharge of a legal obligation or attributable to any other hypothesis.

30. To some extent, therefore the statement of law in Maddison case that it may be taken as well settled that payment of part of purchase-money or even the hole of the consideration is not sufficient act of part performance can be taken to have been shaken considerably from its foundation.

31. While testbook writers and English decisions may shed some light to illuminate the blurred areas as to whether part payment of purchase money or even the whole of the consideration would not be sufficient act of part performance, it is necessary that this aspect may be examined in the background of statutory requirement as enacted in Section 53-A. To qualify for the protection of the doctrine of part performance it must be shown that there is a contract to transfer for consideration immovable propery and the contract is evidenced by a writing signed by the person sought to be bound by it and from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty. These are prerequisites to invoke the equitable doctrine of part performance. After establishing the aforementioned circumstances it must be further shown that a transferee hads in part performance of the contract either 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 furthereance of the contract. The acts claimed to be in part performance must be unequivocally referable to the pre-existing contract to be in part performance mst be unequivocally referable to the pre-existing contract and the acts of part performance must unequivocally point in the direction of the existance of contract and evidencing implementation or performance of contract. There must be a real nexus between the contract and the acts done in pursuance of the contract or in contract. When series of acts are done in part performance, one such may be payment of consideration. Any one act by itself may or may not be of such a conclusive

nature as to conclude the point one way or the other but when taken with others payment of part of the consideration of the whole of the consideration may as well be shown to be in furtherance of the contract. The correct approach would be, what Lord Reid said in Steadman case that one must not first look at the oral contact and then see whether the alleged acts of part performance are consistent with it. One must first look at the alleged acts of part performance and see whether they prove that there must have been a contract and it is only if they do so prove that one can bring in the oral contract. This view may not be wholly applicable to the situation in India because an oral contract is not envisaged by Section 53-A. Even for invoking the equitable doctrine of part performance there has to be a contract in writing from which the terms necessary to constitute the transfer can be ascertained with reasonable certainly. Therefore, the correct view in India would be, look at that writing that is offered as a contract for transfer for consideration of any immovable property and then examine the acts said to have been done in furtherance of the contract and find out whether there is a real nexus between the contract and the acts pleaded as in part performance so that to refuse relief would be perpetuating the fraud of the party who after having taken advantage or benefit of the contract backs out and pleas non-registration as defence, a defence analogous to Section 4 of the Statute of Frauds.

32. We may recall here that the acts preliminary to the contract would be hardly of any assistance in ascertaining whether they were in furtherance of the contract. Anything done in furtherance of the contract postualtes the pre-existing contract and the acts done in furtherance thereof. Therefore, the acts interior to the contract or merely incidental to the contract would hardly provide any evidence of part performance.

33. The contention of Mr. Desai that payment of Rs. 1000 for purchase of stamps is an act of part performance uneuivocally attributable or referable to the contract dated October 10, 1950, cannot be accepted for two reasons, one being that Rs. 700 out of the amount of Rs. 1000 was paid on October 9, 1950, that is prior to the date of contract. Then there is a serious dispute as to the nature of contract which was negotiated on October 9, 1950, the day on which payment of Rs. 700 was made. Mortgagor was insisting upon a conditional sale and defendant-mortgagee declines to accept the conditional sale and that is borne out by his evidence also. There was thus no concluded contract on October 9, 1950, and, therefore, the payment of Rs. 700 out of Rs. 1000 in any case could not said to be part performance and the same reasons would mutails mutaindis apply to the payment of Rs. 300 also. In the facts of this case this payment would not be an act of part performance. In our opinion, therefore, the High Court recorded an utterly unsustainable finding without minutely examining the relevant evidence coupled with the requirements of law and erred in holding that the payment of Rs. 1000 in furtherance of the contract. We would also add that in the facts and circumstances of the case payment of Rs. 1000 was not such an act of part performance which would help defendant mortgagee in any manner.

34. Mr. Desai next contended that the mortgagee discharged a debt of Rs. 541 which was included in the amount of Rs. 17,735 retained by the mortgagee from the total consideration payable for discharging other debts and that this payment was in furtherance of the contract. This contention is being put forward for the first time in this Court and should be negatived on that account alone. Even apart from this there is no sufficient evidence to uphol this contention. In fact, the defendant mortgagee himself has to some extent prevaricated on the question of retention of Rs. 17,735 out of the total consideration for the sale transaction agreed at Rs. 50,000. Consideration of Rs. 50,000 was made up, inter alia, by retaining Rs. 17,735 in discharge of debts owed by mortgagor to mortgagee by borrowing loans on different occasions for domestic expenses. It is so stated in Ex. D-1 which has been extracted earlier.

35. Mortgagee in his evidence gaasve a go-by to this rectial and deposed that the amount of Rs. 17,735 from the total consideration payable by him was retained by the mortgagee for payment to other creditors of the mortgagor. Even apart from this he has not stated a word that out of the amount of Rs. 17,735 he paid Rs. 541 to any particular creditor. In his written statement he has stated that the amount of Rs. 17,735 was kept in deposit for payment to other creditors of the mortgagor. One such creditor was to be paid a sum of Rs. 541. This creditor is non other than the mortgagee himself. This would mean that he himself was creditor to whom he paid Rs. 541. Assuming that he could have reimbursed himself, there is nothing to show that he has a discharge or that he gave credit in his books of account. Further, there is no statement in his evidence to that effect. That aspect was never canvassed before the trial court as well as the High Court and we find no material evidence to substantiate this contention. The contention, has, therefore, to be negatived.

36. The third act of part performance pleaded on behalf of the mortgagee is that the mortgagee agreed to discharge the mortgage subsisting on the property in his favour on settlement of account. The mortgage a deed admittedly was not returned to the mortgagor even after the mortgagor executed Ex. D-1 the sale deed which was not ultimately registered. But that is not enough. the mortgagee admitted in his evidence that even after Ex. D-1 was executed he maintained the accounts of mortgage and in that account he debited Rs. 1000 paid to the mortgagor for purchase of stamps. Could it be said that he had discharged or agreed to discharge the mortgage subsisting on the property ? There is however a piece of evidence which completely belies the claim and demonstrably establishes that mortgagee never claimed but till a later date continued to regard himself as a mortgagee with subsisting mortgage. Mortgagee made an application on June 23, 1952 nearly two years after the contract of sale in the execution proceedings filed by Motilal seeking to bring mortgage property to court-auction for realising his decretal amount, which decree he had obtained against the mortgagor. In this application dated June 23, 1952 mortgagee has stated that till that date Rs. 27792-2-3 were due under the morgage from the mortgagor and that fact must be noted in the sale proclamation and thereafter property should be sold. Now if on October 10, 1950 accounts were made, mortgage was satisfied and mortgage debt was discharged, how is it that on June 23, 1952 he retained the mortgage account, worked out the amount due and sought its mention in the sale procla mation. This conduct of mortgagee is sufficient to negative this contention. In any event mere oral agreement to discharge a mortgage could hardly be said to be an act or part performance unless in fact such an act was done and that could have been done by a dishcarged mortgage deed bring returned to the mortgagor.

37. The next act of part performance pleaded by the mortgagee is that all dues owed by the mortgagor to the mortgagee have to be taken as cleared on completion of the contract. Now, even here his stand is equivocal. In the written statement it was stated that at the time of filing the written statement a sum of Rs. 29,000 was found to be due from the mortgagor. If on October 10, 1950, all accounts were made up, how could he continue a mortgage account which mortgage according to him came to be satisfied when he took the sale deed and continued in possession in part performance of the contract ? Therefore, the submission is without merits.

38. The next act of part performance pleaded by the mortgagee is that the nature and character of possession changed as recited in the contact. Mortgagee was in possession as mortgagee. Now, according to him since the date of execution of the sale deed the nature of possession changed. For this he relies upon a statement in the sale deed Ex. D-1 wherein it is stated that he is being put in possession as owner. This mere recital is hardly indicative of the change in the nature of possession. There is no evidence to show that he moved the authorities that he would be liable to pay taxes as owner. There is no over act on his part to so assert possession as owner. A mere recital in the

disputed sale deed is of dubious evidentiary value and hen it would be pointed out that he was never willing to perform his part of the contract which is a prerequisite for claiming protection of the doctrine of part performance it will be shown that he believed himself to be a mortgagee and acted as such even at a date much later than October 10, 1950, from which date he claims to be the owner.

39. Induction into possession of an immovable property for the first time subsequent to the contract touching the property, may be decisive of the plea of part performance. Mere possession ceases to be of assistance when as in this case the person claiming benefits of part performance is already in possession, prior to the contract and continues to retain possession. However a reference to a statement of law in Halsbury's Laws of England, 3rd Edn., Vol. 36, para 418 would be instructive. It reads as under :

> Where possession is given to a "tenant" before a tenancy agreement has been concluded and the possession is retained after the conclusion of the agreement, the possession, if unequivocally referable, to the agreement, is a sufficient part performance but subject to this, acts done prior to, or preparatory to, the contract will not suffice.

If a person claiming benefit of part performance is inducted into possession for the first time pursuant to the contract it would be strong evidence of the contract and possession changing hands pursuant to the contract. In Hedson v. Heuland, it was held that although the entry into possession was antecedent to the contract, yet the subsequent continunace in possession being, under the circumstances, unequivocally referable to the contract, constituted a part performance sufficient to take the case out of the Statute of Frauds.

40. In Nathulal case, the fact that Nathulala parted with possessions after receiving part payment of the sale consideration was held sufficient to constitute part performance. This Court observed that in part performance of contract Phoolchand has taken possession of the property and he had in pursuance thereof paid a part of the consideration and thereby the first three conditions for making good the defence of part performance had been satisfactorily shown to exist. But greater emphasis was laid on the decision of Somnath Iyer, Acting C.J. in Babu Murlidhar v. Soudagar Mohammad Abdul Bashir. In that case where an unregistered agreement of sale executed by the mortgagor in favour of the mortgagee in possession recited that after the date of the agreement the mortgagee who had been in possession as such would become the owner of the property and that he could get his name mutated into mutation register of the municipality and in implementation of this agreement of sale, the mortggor himself made an application for mutation to the municipal authorities and the name of the mortgagee was mutated as owner of the property, it was held sufficient to cloth the mortgagee with the protection of Section 53-A in a suit for redemption of the morgage and the mortgagor's suit was dismissed. The Court attached considerable importance to the provision in the unregistered agreement for mutation in favour of the mortgagee as owner and the subsequent conduct of the mortgagor in making an application for mutation was held to be the clearest indication which is essential for invoking the doctrine of part performance. The decision can be said to depend more or less on the facts of the case. However, in this connection a reference was also made to Thota China Subba Rao v. Mattapalli Raju. That decisions is hardly of any importance because an extreme contention was advanced on behalf of the mortgagee resisting a suit for redemption that has is in possession and that he continued to be in possession in part performance of the agreement which argument was repelled by the Court on the observation that the mortgagee had never been in possession and the contention that he was always in constructive possession could hardly assist him. In Jahangir Begum v. Gulam Ali Ahmed, the Court after holding that the

defendant was in possession and had put up a structure on it, came to the conclusion that he was not entitled to the benefit of doctrine of part performance because he was already in possession before the contract to transfer the property, relied upon by him, was entered into, therefore, it was obligatory upon him to show that he had done some at in furtherance of the contract in order to constitute a part performance of the contract. In Kukaji v. Basantilal the facts found were that A mortgaged with possession his house with B. Subsequently A sold the house to B in consideration of the mortgage debt and the amount spent by A on improvements and repairs of the house. The deed was not registered. Subsequently A sold the same property to C under a registered sale deed. C sued B for redemption. B relied on the equitable doctrine of part performance in defence. Negative the defence of part performance the Court held that as B was laready in possession as a mortgagee, unless he shows that he did some act in furtherance of the contract, over and above being in possession, mere continuance in possession would not, constitute part performance. The case is very near to the facts disclosed in the case under discussion. There is an understandable and noteworthy difference in the probative value of entering into possessio for the first time and continuing in possession with a claim of change in character. Where person claiming benefit of part performance of a contract was laready in possession prior to the contract, the Court would expect something independent of the ere retention of possession to evidence part performance. Therefore mere retention of possession, quite legal and valid, if mortgage with possession is not discharged, could hardly be said to be in act in part performance unequivocally referable to the contract of sale.

41. Section 53-A requires that the person claiming the benefit of part performance must always be shown to be ready and willing to perform his part of the contract. And if it is shown that he was not ready and willing to perform his part of the contract he will not qualify for the protection of the doctrine of part performance. Reverting to the consideration recited in Ex. D-1 the sale deed, even according to the mortgage is was agreed that he had retained an amount of Rs. 17,735 out of the total consideration of Rs. 50,000 for payment to the other creditors of the mortgagor. Barring a claim made in the written statement that he paid himself Rs. 541 which was included in the amount of Rs. 17,735 which allegation itself is unconvincing, there was not been the slightest attempt on his part to pay up any of the creditors of the mortgagor. There is nothing to show that he had the list of all the creditors of the mortgagor or that he made any attempt to procedure the list or that he issued a public notice inviting the creditors of the mortgagor to claim payment from him to the next of the consideration retained by him. Not a single creditor has been paid is an admitted position. But the more inequitous conduct of the mortgagee is that he had not made the slightes attempt to contact any of the creditors of the mortgagor or to pay even the smallest sum. There is no such statement in the written statement but even in his evidence at the trial he has not been able to show that he had paid any creditor or made any attempt to pay any of the creditors including those whose names were admittedly known to him such as Ramkaran Ghasilal, Kajidimal, Motillal Bhagirath and Kanhaiyalal Chagganlal. further shifting stand of mortgagee to suit his convenience is discreniable here. In Ex. D-1, the entry of Rs. 17,735 is described as "have been taken from you from time to time for domestic expenses". In his evidence mortgagee states that this recital is incorrect and the correct position according to him is that the amount of Rs. 17,735 from total consideration payable by him was retained to pay to other creditors of mortgagor. According to him the only amount due to him from mortgagor outside the mortgage transaction was a debt of Rs. 541 only. Mortgagee neither paid himself nor other creditors and thereby did not perform his part of the contract. He even did not pay a small decretal amount of Rs. 500 plus interest and costs to Motilal in 1952 but allowed the property to be sold. Coupled with this is the fact that according to the recital in Ex. D-1 he had agreed to pay the balance of the consideration of Rs. 6265 to the mortgagor at the time of registration of the sale deed. Now, undoubtedly the mortgagor did not agree to get the sale deed

registered because there was a dispute between the parties as to the nature of the transaction. But the defendant mortgagee made unilateral attempt to get the sale deed registered by offering it for registeration. Thus while attempting to complete his title both legally and even in equity he was under an obligation to pay Rs. 6265 to the mortgagor. This liability is not disputed yet in this behalf he has not stated anything in his examination-in-chief that he made any attempt to pay that amount to the mortgagor. Add to this his failure to return the discharge deed and his further averment that he used to maintain the mortgage account even after October 10, 1950. All this would conclusively show that the mortggor himself was not willing to perform his part of the contract. In this view of the matter Mr. Desai's contention that failure to pay the amount agreed to be paid before the Registrar and/or not discharging debts agreed to be discharged as having been given credit in the consideration for the sale would not detract from part performance because they have to be evaluated in the facts and circumstances of the case acannot be upheld.

42. It was next contended on behalf of the morgagee that the conduct of the 1st plaintiff mortgagor in executing and registering a sale deed in respect of the mortgaged property in favour of 2nd plaintiff Gyarsillal and thereby frustrating the contract of sale in favour of the defendant-mortgagee evidences that the 1st plaintiff was aware of the contract in favour of the defendant mortgagee and he was retaining possession infurtherance of the contract. The submission does not constitute ant independent act on the part of mortgagee but it is merely another facet of the fact of permission (sic possession) being retained by the defendant-mortgagee. Retention of possession of on consequence in this case because the mortgage was not discharged and was subsisting and the mortgage being a mortgage with possession is of no consequence in this case because the mortgage was not discharged and was subsisting and the mortgage being a mortgage with possession the mortgagee was entitled to retain possession. The fact that immediately a sale deed was executed in favour of 2nd plaintiff by 1st plaintiff would show that he was unwilling to accept the contract as offered by the mortgagee. The subsequent purchaser Gyarsilal has taken a conditional sale and this reinforces the stand of the mortgagor. The existence of the dispute about the nature of the transaction, namely, according to the mortgagor he wanted an absolute sale and this dispute between the parties as on October 10, 1950, is not in dispute. Therefore the conduct of the mortgagor is consistent with this case.

43. It was next contended that defendant-mortgagee made all attempts to get the deed registered by approaching the Sub-Registrar, and that the defendant mortgagee initiated criminal proceedings against the 1st plaintiff mortgagor for misusing the stamp papers need not detain us, as they have no probative value.

44. Having, therefore, examined all the contentions canvassed on behalf of the mortgagee we unhesitatingly reach the conclusion that the mortgagee has failed to prove that he did any act in furtherance of the contract, continued retention of possession being acircumstance of neutral character in the facts and circumstances of the case and it being further established to our satisfaction that the mortgagee was not willing to perform his part of the contract, it is clear that the mortgagee is no entitled to the benefit of the equitable doctrine of part performance.

45. On the conclusion hereby indicated the appeal preferred by the plaintiff (C. A. No. 1144 of 1969) must be allowed and the judgment of the High Court has to be set aside and the one rendered by the trial court is restored with costs throughout.

46. That takes us to the second appeal preferred by Motilal being C. A. No. 1145 of 1969. First a synopsis of the facts relevant to the dispute raised by appellant Motilal. Motilala filed Civil Suit No.

243 of 1947 on November 3, 1947, for receiving his debt from mortgagor Govindrao Mahadik. In this suit he obtained attachment before judgment of the suit property on November 6, 1947. The Suit of Motilal ended in a decree in the amount of Rs. 2500 on March 5, 1951. On March 27, 1951, execution application No. 216 of 1951 was made by Motilal. On April 3, 1951, the executing court made an order that as the suit property of the judgment debtor has already been attached by an order of attachment before judgment, steps should be taken for drawing up a proclamation of sal under Order 21, Rule 66, Code of Civil Procedure. The Court directed auction-sale of the suit property to be held on December 9, 1951. It appears that the auction-sale was stayed. There was some defaut on the part of the judgment debtor to comply with the conditional stay order and on his failure auction-sale was directed to be held on March 23, 1952. After correcting the amount due on the mortage of mortgagee in the proclamation of sale, a fresh auction was held on August 23, 1952. In the meantime, in the absence of any bidder at the auction Motilal the decree-holder himself obtained permission of the court to bid at the auction, his bid in the amount of Rs. 300 was accepted and the sale in favour of Motilal was confirmed on September 23, 1952.

47. In the meantime mortgagor Govindrao Mahadik the judgment debtor in Motilal's suit filed Regular Appeal No. 125 of 1951 which was allowed by the Additional Dstrict Judge as per his judgment dated March 27, 1953 and thereby the suit of Motilal was dismissed in entirety. Motilal preferred Second Appeal No. 78 of 1953 in the High Court of Madhya Bharat and by its judgment dated September 1, 1958, Motilal's appeal was allowed and a decree in his favour in the amount of Rs. 500 with interest and proportionate costs was passed.

48. Motilal made an application on April 2, 1962 purporting to be under Order 22, Rule 10 of the Code of Civil Procedure alleging that he came to know about the suit filed by the mortgagor for redemption of the mortgage in December 1961 and as the decision in the suit is likely to have an impact on his rights and that as he is the purchaser of the equity on redemption, the mortgagor and the subsequent purchaser from the mortgagor cannot now maintain the action for redemption of the suit property and he should be substituted in place of the plaintiffs and be permitted to prosecute the suit for redemption against mortgagee. This application was contested on behalf of the parties to the suit.

49. The High Court was not fully satisfied about the explanation of delay in making the application by Motilal and was not even inclined to accept the suggestion that he became aware of the suit in 1961 and that on the ground of gross delay the application was liable to be dismissed. The High Court ultimately made an order as under :

> Therefore, although ordinarily we might not be inclined to allow Motilal's request to be impleaded in this Court at the appellate stage, we are of opinion that it would be desirable to have a final decision about the various points of dispute between all the parties in order to avoid further unnecessary litigation. From this point of view only, we would allow Motilal to be impleaded in the present litigation by addition of his name, and not by allowing him to replace both the plaintifs.

50. Having thus directed Motilal to be impleaded as a party respondent, the High Court proceeded to as certain, evaluate and adjudicate the right claimed by Motilal and ultimately held that in any event the auction-purchaser Motilal shall be entitled to recover the balance of his decretal amount and interest at the rate of four percent annum from the date of his auction-sale till the date of realisation or deposit as the case may be either from the appellant or from the mortgagor or subsequent purchaser, as the case may be, and that there shall be a charge on the suit property for

the aforementioned amount which shall be enforceable at the instance of Motilal by a sale of the property, Motilal was held disentitled to costs on account of the delay in filing the application.

51. Mr. Ray, learned counsel for the 1st plaintiff-mortgagor contended that the High Court was in error in allowing the application of Motilal to be impleaded as a party because according to Mr. Raay Motilal could not be said to be claiming under the mortgagor and that, therefore, he could not maintain the application under Order 22, Rule 10, Code of Civil Procedure.

52. Rule 10 of Order 22 provides for continues by or against a person of any action who acquires any interest either by assignment, creation or devolution during the pendency of suit, with the leave of the court. In ascertaining whether Motilal can maintain the application his averments in the application will have to be taken as the basis for invoking the Court's jurisdiction under Order 22, Rule 10. The question that will have to be posed would be whether Motilal acquired any interest by assignment, creation or devolution during the pendency of the suit and would, therefore, be entitled to continue the suit. The suit is primarily a suit for redemption of mortgage. A suit for redemption of mortgage can be brought by a person holding the equity of redemption. Motilal contends that the suit property was sold a court auction with subsisting mortgage thereon and the right, title and interest of the mortgagor was sold at the court auction and on the sale being confirmed and the sale certificate being issued he acuired the interest either by assignment or devolution of the original mortgagor. Now this assertion is controverted on behalf of the original mortgagor and the subsequent purchaser contending that much before the confirmation of the sale on September 23, 1952, the subsequent purchaser had purchased the equity of redemption by the sale deed Ex. P-1 dated October 14, 1950, and that the original mortgagor had no subsisting right, title and interest in the suit property on August 23, 1952, being the date of the sale in favour of Motilal. This was countered on behalf of Motilal by his learned counsel Mr. G. L. Sanghi asserting that Motilal and obtained an attachment before judgment of the suit property by order dated November 6, 1947, and that this was subsisting till March 5, 1951, when the trial court decreed the suit of Motilal against the mortgagor in the amount of Rs. 2500 and till the application for execution was filed on March 27, 1951, and no reattachment was necessary. These facts are incontrovertible but one aspect of law has to be examined as to what is the effect of the judgment of the appellate court in the appeal fieled by original mortgagor Govindrao Mahadik, the decree obtained by Motilal, to writ, the appeal was appeal was allowed, and Motilal's suit was dismissed on March 27, 1953. Between March 27, 1953 and till the High Court allowed the of Motilal on September 4, 1958, there was no subsisting attachment but it must be recalled tat by September 23, 1952, the sale was confirmed and the sale certificate was issued on March 25, 1953, that is two days before the appeal of mortgagor preferred against the decree obtained by Motilal was allowed on March 27, 1953.

53. The averments of Motilal in his own application would prima facie be sufficient to sustain an application under Order 22, Rule 10. The question whether he has acuired an interest or not in the property either by assignment or devolution which is the subject-matter of dispute in this appeal would have to be answered on merits but the narration of chronological events as delineated hereinabove would clearly show that Motilal has more than a mere semblance of title which this Court will have to investigate. And even if strictor sensu the application would not fall under Order 22, Rule 10, CPC, yet Section 146 of the Code of Civil Procedure would certainly enable Motilal to maintain the application (see Smt. Saila Bala Dassi v. Smt Nirmala Sundari Dassi, referred to with approval in Shew Bux Mohata v. Bengal Brewerier Ltd.) Undoubtedly the High Court was reluctant to overlook the gross delay in preferring the application but even after this reluctance the High Court granted the application we would consider it imprudent to reject the application on the ground of delay.

54. Once Motilal becomes a party, two contentions advanced on his behalf will have to be examined : (a) has he become, under the sale certificate obtained by him, a purchaser of equi of redemption so as to disentitle the original mortgagor from bringing the present action; (b) what is the effect of the attachement before judgment secured by him on November 6, 1947, on the sale of equity of redemption in favour of the subsequent purchaser under the sale deed Ex. P-1 dated October 14, 1950 ?

55. Looking to the proclamation of sale it is crystalclear hat the property was sold subject to subsisting mortgage in favour of Devi Sahai, mortgagoee. At a court auction what is sold is the right, title and interest of the judgment-debtor. The judgment-debtor in the decree obtained by Motilal was original mortgagor Sardar Govindrao Mahadik. Subject to other conditions, his right, title and interest would be one of a mortgagor, that is the right to redeem the mortgage styled as equity of redemption. According to Motilal this equity of redemption was sold at the court auction and it was purchased by him. Subjct to the decision on the second contention so (sic) as to the effect of attachment before judgment, there is no sub-stance in this contention because much before even the proclamation of sal was issued the equity of redemption held by the mortgagor was sold by him under sale deed Ex. P-1 dated October 14, 1950, in favour of 2nd plaintiff Gyarsilal. Therefore, even on the date of the decree as also on the date of filing of the execution application mortgagor had no subsisting interest in the property which could be sold at the court auction. On this short ground it can be held that Motilal did not acquire under the sale certificate equity of redemption of the mortgage.

56. But Mr. Sahai, learned counsel for Motilal contended that the transfer in favour of subsequent purchaser under the sale deed Ex. P-1, dated October 14, 1950, by the morgagor is void against Motilal because in the suit filed by Motilal he had obtained an order attachment before judgment of the suit property and this attachement before judgment would cover the right, title and interest of the mortgagor defendant in that suit and that any private sale inter vivos of the attached property would under Section 64 of the Code of Civil Procedure be void against the attaching creditor. Proceeding further along this line it was contended that as acorollary if the sale in favour of subsequent purchaser is void against Motilal then the equity of redemption contained to remain vested in the original mortgagor and at the court auction the same was sold and purchased by Motilal. This necessitates examination of the effect of an order of attachment before judgment in a suit.

57. Order 38, Rule 5, enables the Court to levy attachment before judgment at the instance of a plaintiff if the conditions therein prescribed are satisfied. What is the nature of attachment levied in this case is not made known save and except saying that the suit property was attached and the sale proclamation mentioned therein the subsisting mortgage. Taking the best view in favour of Motilal, one can say that what was attached was the equity of redemption. The attachment was levid and continued to subsist till the date of the decree. It would, therefore, not be necessary to reattach the property.

58. What is the effect of attachment before judgment ? Attachment before judgment is levied where the court on an application of the plaintiff is satisfied that the defendant, with intent to obstract or delay the execution of any decre that may be passed against him (a) is about to impose of the hole or any part of his property, or (b) is about to remove the whole or any part of his property from the local limis of the jurisdiction of the court. The object behind the order levying attachment before judgment is to give an assurance to the plaintiff that his decree if made would be satisfied. It is a short of a guarantee against decree becoming infructuous for want of property available from which the plaintiff can satisfy the decree. The provision in Section 64 of the Code of Civil Procedure

provides that where an attachment has been made, any private transfer or delivery of the property attachment or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment. What is claimed enforceable is the claim for which the decree is made. Motilal's suit was a money claim. It finally ended in a decree for Rs. 500 by High Court and in between the first appellate court had dismised Motilal's suit in entirety. There is nothing to show that the attachment which would come to an end on the suit being dismissed would get revived if a second appeal is filed which ultimately succeeds. In fact, a dismissal of the suit may terminate the attachment and the same would not be revived even if the suit is restored and this becomes manifestly clear from the newly added provision in sub-rule (2) of Rule 11-A of Order 38, CPC which provides that attachment before judgment in a suit which is dismissed for default shall not be revived merely because by reason of the fact that the order for the dismissal of the suit for default has been set aside and the suit has been restored. As a corollaryit would appear that if attachment before judgment is obtained in a suit which ends in a decree but if in appeal the decree is set aside the attachment of necessity must fail. There should be no difficulty in reaching this conclusion.

59. The question, however, is what happens if at an intermediate stage pursuant to the decree of the trial court the attached property is sold at a court auction ? How would the rights and obligations of the auction-purchaser be adversely affected if the appeal is allowed and the suit is dismissed ? Ordinarily where the appeal is preferred an attempt should be made to obtain stay of the execution of the decree of the trial court. However, it is notorious that the appellate court is loath or reluctant to grant stay of a money decree and the judgment-debtor may not be in a position to deposit the decretal amount and in this situation more often the execution proceeds and before the appeal is disposed of an equity in favour of a third person as auction-purchaser who purchases the property at a court auction may come into existence. If afterwards the appeal is allowed and the suit is dismissed, would the auction-purchaser be adversely affected ? The emerging situation in this case clearly demonstrates the dilemma.

60. Ordinarily, if the auction-purchaser is an outsider or a stranger and if the execution of the decree was not stayed of which he may have assured himself by appropriate enquiry, the court auction held and sale confirmed and resultant sale certificate having been issued would protect him even if the decree in execution of which the auction-sale has been held is set aside. This protected on the footing that the equity in favour of the stranger should be protected and the situation is occasionally reached on account of default on the part of the judgment-debtor not obtaining stay of the execution of the decree during the pendency of the appeal.

61. But what happens if the auction-purchaser is the decree-holder himself ? In our opinion, the situation would materially alterand this decree holder auction purchaser should not be entitled to any protection. At any rate, when he proceeds with the execution he is aware of the fact that an appeal against the original ecree is pending. He is aware of the fact that the resultant situation may emerge where the appeal may be allowed and the decree which he seeks to execute may be set aside. He cannot force the pace by executing the decree taking advantage of the economic disability of a judgment-debtor in a money decree and make the situation irreversible to the utter disadvantage of the judgment-debtor who wins the battle and loses the war. Therefore, where the auction-holder has to point out that there is no bidder at the auction, for a nominal sum of purchases the property, to win, in this case for a final decree for Rs. 500, Motilal purchased the property for Rs. 300, an atrocious situation, and yet by a technicality he wants to protect himself. To such an auction-purchaser who is not a stranger and who is none other than the decree-holder, the court should not lend its assistance. The view which we are taking is not unknown and to some extent it will be borne

out by the observations of this Court in Janak Raj v. Gurdial Singh. This Court made a pertinent observation which may be extracted :

> The policy of the legislature seems to be that unless a stranger auction-purchaser is protected against the vicissitudes of the fortunes of the suit, sales inexecution would not attract customer and it would be to the detriment of the interest of the borrower and the creditor alike if sales were allowed to be impugned merely because the decree was ultimately set aside or modified.

62. Viewed from this angle, the order of the High Court that the auction purchaser-decree holder Motilal would be entitled to recover the decretal amount of Rs. 500 with interest at the rate of four per cent per annum and proportionate costs could be styled as manifestly equitable. However the Court cannot overlook the conduct of the mortagor Govindrao Mahadik, his subsequent purchaser Gyarsilal and even the original mortgagee Devi Sahai in not paying a small debt and allowing the property to be auctioned and forcing Motilal to the logical end of litigation and yet without the slightest recompense to go on investing into this bottomless pit of unending litigation. And at best his attachment before judgment is a security that his decree would be satisfied from the property attached and sale of the extent of recovery of decretal amount from attached property would be, against attaching creditor, void. If we assure him payment of decretal amount and costs the sale in his favour is of on significance. The logical course for us would have been to leave Motilal to his own remedy which we consider inequitous in the facts and circumstances of this case. The order made by the High Court would hardly provide him Rs. 1500 to recover which he must have spent at the inflated rate of litigation costs. In our opinion, while not granting the substantial relief claimed by Motilal and looking to the conduct of all the parties, we direct that Motilal should by paid Rs. 7500 inclusive of decretal amount, interest, proportionate costs and costs of the litigation till today, and for this amount there will be a charge on this property to be cleared by Govindrao Mahadik at the time of redemption of the property which amount will have to be paid by Gyrasilal's heirs in view of the sale deed in favour of Gyarsilal.

63. Accordingly, Civil Appeal No. 114 of 1969 filed by Govindrao Mahadik is allowed and the judgment and decree of the High Court are set aside and those of the trial court are restored with costs throughout.

64. Civil Appeal No. 1145 of 1969 preferred by Motilal is disposed of in accordance with the direction herein above indicated with no order as to costs. C. M. P. No. 9004 of 1980 and C. M. P. No. 10593 of 1980 for substitution are allowed.

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