

Patel Natwarlal Rupji

Vs

Kondh Group Kheti Vishayak and Another

SLP (C) No. 11280 of 1989

(K. Ramaswamy, B. N. Kirpal, Faizanuddin JJ)

06.12.1995

ORDER

1. This special leave petition is directed against the judgment and order dated 18-6-1988 of the Division Bench of the Gujarat High Court rendered in First Appeal No. 11 of 1976.

2. A sum of Rs 1,31,596.07 was due from one Nagindas Tarachand as Secretary of the first respondent-Society and an award for recovery thereof was made against him. An extent of 58 acres, 13 gunthas of land bearing Survey No. 467 situated in Kondh Village of the debtor in Surendranagar in Gujarat State was attached on 1-2-1969 to recover the said dues. A public notice (Exh. 123) was published in Gujarat Samachar in March 1969. The petitioner filed Special Civil Suit No. 69 of 1971 in the Court of the Senior Civil Judge at Surendranagar for a declaration that the suit land was not liable to attachment and sale by public auction to execute the award made in favour of the first respondent-Society and also for permanent injunction restraining the second respondent (Sale Officer) from selling the land and also for perpetual injunction restraining them from interfering with the petitioner's possession and enjoyment of the land. According to the petitioner, Bai Leelawati, wife of Nagindas, as General Power of Attorney had executed an agreement on 29-6-1969 to sell the said land in his favour for a consideration of Rs 35,000. On the even day, he paid a sum of Rs 15,000 as part consideration and a further sum of Rs 15,000 was paid on the following day, i.e., 30-6-1969. The balance amount was agreed to be paid on or before 29-6-1971. Pursuant thereto, he was put in possession and ever since he was in enjoyment thereof in his own right as owner. The proclamation of sale dated 22-6-1971 of the land by the second respondent (Sale Officer) was illegal. Consequently, he filed the suit for a declaration and injunction on 19-11-1971. According to the petitioner, he having been inducted in possession and remained in enjoyment of the land in his own right under the agreement, the land is not liable to attachment and he could not be proceeded with to realise the amount due under the award. The respondents resisted the case set up by the petitioner. It was averred in the written statement that the agreement dated 29-6-1969 (Exh. 55) is not a true and genuine agreement. It was brought into existence to defeat the claim of the first respondent. No consideration has been paid under the agreement. It is only a collusive agreement brought by Leelawati with the assistance of the petitioner.

3. The trial court after framing appropriate issues conducting trial of the suit and on consideration of evidence found that the agreement was genuine, true and valid and that the petitioner was inducted into possession under the said agreement. The respondents obtained a decree against Nagindas on 19-5-1970. The proclamation of sale was issued on 22-1-1971. The agreement of sale had by the petitioner is dated 29-6-1969. Therefore, the petitioner, having been in possession of the land under the agreement, is entitled to retain possession of the land and he could not be proceeded with against the said property. Accordingly, the suit was decreed on 31-7-1975. On appeal, the Division Bench

by the aforesaid judgment and order dated 11-6-1988 allowed the appeal and dismissed the suit.

4. Shri Mehta, learned Senior Counsel for the petitioner, contended that by operation of Section 53-A of the Transfer of Property Act (for short, "the Act") the petitioner is entitled to retain possession of the land; that he had already performed his part of the contract except payment of a sum of Rs 5000 which was to be paid at the time of registration of the document; he having had lawful agreement is entitled to the declaration as prayed for and the consequent injunctions; the attachment of the property being subsequent to the agreement the petitioner is entitled to resist the action of the respondents; and that the High Court without going into the question whether the agreement was prior to the date of the attachment and whether on that basis he was entitled to the declaration as sought for, committed an error of law in reaching the finding that the agreement itself was not valid. In support of his contentions, he placed strong reliance on V.K. Sreedharan v. Chandramaath Balakrishnan [(1990) 3 SCC 291 : JT (1990) 1 SC 390]. Though the respondents had been severed, no one appeared for them. Having given out anxious consideration to the contentions raised by Shri Mehta, we find that there is no force in the contentions raised by him.

5. Section 53-A of the Act provides that where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf which constitutes 'transfer', and the transferee has, in part performance of the contract, taken possession of the property of the transferor, the transferee being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then notwithstanding that the contract, though required to be registered, has not been registered, 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.

6. Though the doctrine of part performance embodied in Section 53-A of the Act is part of equitable doctrine in English law, Section 53-A gives statutory right which is available to the transferee for consideration in possession of the property had under the contract. In terms of the section, so long as the transferee has done and is willing to perform his part of the contract or, in other words, is always ready to abide by the terms of the contract and has performed or is always ready willing to perform his part of the contract, the transferee is entitled to avail of this statutory right to protect his possession as a shield but not as a sword. The right to retain possession of the property rests on the express provisions of the Act and on his compliance thereof. A person who pleads equity must come to the court with clean hands and he alone is entitled to the benefit of this section. The section does not create a right or title in the defendant. It merely operates as a bar to the plaintiff to assert his title. The transferor is barred from enforcing his rights other than those expressly provided by the contract. The section, therefore, imposes a bar on the transferor, when the conditions mentioned in the section are fulfilled by the transferee, and the section also bars the transferor to enforce his rights against such transferee or person deriving right, title and interest from such transferee. It would, therefore, be clear that Section 53-A confers a right on the transferee, to the extent it imposes a bar on the transferor, to protect the transferee's right to retain possession of the property had under the contract. It would thus be clear that Section 53-A confers no title on the transferee but imposes a statutory bar on the transferor to seek possession of the immovable property from the transferee. Equally, Section 53-A does not confer any title not the defendant in possession nor can he maintain a suit on title.

7. In Ram Gopal Reddy v. Addl. Custodian Evacuee Property [AIR 1966 SC 1438 : (1966) 2 MLJ

(SC) 90], a Constitution Bench of this Court had held that the benefit of Section 53-A cannot be taken aid of by the plaintiff to establish his right as owner of the property. Therefore, Section 53-A can be used as a shield but not as an independent claim either as a plaintiff or as a defendant. In *Delhi Motor Co. v. U.A. Basrurkar* [(1968) 2 SCR 720 : AIR 1968 SC 794], a Bench of three Judges had held that Section 53-A is meant only to bring out a bar against the enforcement of a right by a lessor in respect of the property of which the lessee had already taken possession but does not give any right to the lessee to claim possession or to claim any other right on the basis of an unregistered lease. Section 53-A is available only as a defence to a lessee and not as conferring a right on the basis of which the lessee can claim rights against the lessor. In that case the appellants had put forward certain documents as a lease which was admittedly beyond 11 months and, therefore, it was held that the company was not entitled to avail of the statutory right under Section 53-A. In *Sardar Govindrao Mahadik v. Devi Sahai* [(1982) 1 SCC 237], this Court had held that the court would look at the writing that is offered as a contract for transfer for consideration of any immovable property, 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 a 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 pleads non-registration as a defence, a defence analogous to Section 4 of the Statute of Frauds. In that case it was held that the mortgagee in possession was not entitled to claim title of ownership against suit of mortgagor for redemption. Therefore, the doctrine of part performance in Section 58(3) was held not available to establish title to the property. In *Sheth Maneklal Mansukhbhai v. Hormusji Jamshedji Ginwalla & Sons* [1950 SCR 75 : AIR 1950 SC 1], this court had held that Section 53-A of the Act is only a partial importation of English doctrine of part performance.

8. The contract for sale of immovable property does not create any title except when covered under Section 54 of the Act and registered under Section 17 of the Registration Act. Equally, it does not create an interest in the property. It merely gives a right to enforce it specifically as an equitable relief in a court of law. In *Technicians Studio (P) Ltd. v. Lila Ghosh* [(1977) 4 SCC 324 : (1978) 1 SCR 516] [SCR at 520], this Court had held that it is well settled that Section 53-A confers no active title on the transferee in possession; it only imposes a statutory bar on the transferor.

9. The High Court after exhaustive consideration of the evidence and unerring circumstances emerging therefrom has concluded that the petitioner is a resident of a different village at a distance of about 50 miles and his son was working as a doctor in Kondh Village. The evidence established that he did not have the consideration of Rs 30,000 said to have been paid to Bai Leelawati whose husband was absconding at the relevant time. They had intimacy with Bai Leelawati and her husband. With a view to save the property of Bai Leelawati, the agreement was brought into existence. It is a fraudulent agreement and no consideration has been passed thereunder. The agreement (Exh. 55) was executed after the attachment but before judgment was made on 1-2-1969. For vast property of 53 acres of wet land and 5 acres and odd dry land, the consideration mentioned in the document is inadequate. It was brought into existence to defeat the right of the respondents to proceed against the property. In view of these facts though the agreement was in writing, the petitioner is not a genuine transferee but a privy to the fraud. The contract is a sham and nominal document fraudulently brought into existence. In the State of Gujarat by virtue of local amendment to the Stamp Act, agreement of sale is a registerable document but was not registered. The attachment before judgment prevails over the agreement. That apart it cannot be used as a title for the declaration in the suit but the benefit of Section 53-A can be availed of as a shield to retain possession. Instead agreement is sought to be used as a sword to defeat the rights of the respondents who have obtained lawful award. An order of attachment before judgment was issued pending

making of the award. The attempt of the petitioner is to defeat the rights of the first respondent to proceed against the property of the debtor. Thus, it would be clear that the petitioner has not come to the court with clean hands. He is a party to the fraud and his alleged possession is only a ruse to protect the rights of Bai Leelawati and her husband Nagindas, the judgment-debtor. The fraudulent documents were brought into existence by the petitioner and Bai Leelawati. It would be clear from the further finding recorded by the High Court that Exh. 55, agreement of sale, was sought to be corroborated through the petitioner's evidence that a stamp paper purchased on 2-5-1968 was used to execute the document (Exh. 112) dated 1-5-1968 to show that there was an interior writing pursuant to which agreement of sale (Exh. 55) dated 29-6-1969 was executed. The fact that it was not pleaded nor did it find mention in Exh. 55, would amount to fabrication of record to buttress the cause. The court would look into the conduct of the parties, the respective interests had under the contract and attending facts and circumstances. It would thus be clear that the statutory rights of part performance under Section 53-A cannot be used for the declaration sought in the suit. In view of these findings it is unnecessary to go into the question whether the agreement prevails over the attachment nor the ratio in V.K. Sreedharan case [(1990) 3 SCC 291 : JT (1990) 1 SC 390] helps the petitioner. The trial court, therefore, committed manifest error in decreeing the suit. The High Court had rightly adverted to all the relevant facts and the petitioner was denied the right to avail of the statutory rights under Section 53-A. The case, therefore, does not warrant interference. The petition is accordingly dismissed.