

Mohanlal (Deceased) Through his Lrs. Kachru and Others

Vs

Mirza Abdul Gaffar and Another

Civil Appeal No. 4485 of 1986

(K. Ramaswamy, B. L. Hansaria JJ)

12.12.1995

ORDER

1. This appeal by special leave arises from the judgment and decree of the Madhya Pradesh High Court in Second Appeal No. 460 of 1975 made on (sic) 30, 1986.

2. It is not necessary to elaborate all the facts in detail. Suffice it to state that the appellant had come into possession of the suit-lands pursuant to an agreement of sale dated 8-3-1956. He paid part consideration of Rs. 500 and obtained possession of the lands. Subsequently, the respondent purchased the lands by sale deed dated 23-3-1960. In the meanwhile, the appellant's suit for specific performance of the contract for sale was dismissed and became final. The respondent filed the suit for possession which has given rise to this appeal. The trial court decreed the suit. On appeal, it was reversed and dismissed. In second appeal, the High Court set aside the judgment and decree of the appellate court and restored the decree of the trial court. Thus this appeal by special leave.

3. The only question is whether the appellant is entitled to retain possession of the suit property. Two pleas have been raised by the appellant in defence. One is that having remained in possession from 8-3-1956, he has perfected his title by prescription. Secondly, he pleaded that he is entitled to retain his possession by operation of Section 53-A of the Transfer of Property Act, 1882 (for short 'the Act').

4. As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., up to completing the period of his title by prescription *nec vi, nec claim, nec precario*. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of the land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant.

5. The question then is whether he is entitled to retain possession under Section 53-A. It is an admitted fact that suit for specific performance had been dismissed and became final. Then the question is whether he is entitled to retain possession under the agreement. Once he lost his right under the agreement by dismissal of the suit, it would be inconsistent and incompatible with his right to remain in possession under the agreement. Even otherwise, a transferee can avail of Section 53-A only as a shield but not as a sword. It contemplates that where any person contracts to transfer for consideration any immovable property by writing, signed by him or on his behalf, from which

the terms necessary to constitute the transfer can be ascertained with reasonable certainty and the transferee has performed or is willing to perform his part of the contract, he would be entitled to retain possession and to continue in possession which he has already received from the transferor so long as he is willing to perform his part of the contract. Agreement does not create title or interest in the property. Since the agreement had met with dismissal of the suit his willingness to perform his part of the contract does not arise.

6. Even otherwise, in a suit for possession filed by the respondent, a successor-in-interest of the transferor as a subsequent purchaser, the earlier transferee must plead and prove that he is ready and willing to perform his part of the contract so as to enable him to retain his possession of the immovable property held under the agreement. The High Court has pointed out that he has not expressly pleaded this in the written statement. We have gone through the written statement. The High Court is right in its conclusion. Except vaguely denying that he is not ready and willing to perform his part, he did not specifically plead it. Under Section 16(c) of Specific Relief Act, 1963, the plaintiff must plead in the plaint, his readiness and willingness from the date of the contract till date of the decree. The plaintiff who seeks enforcement of the agreement is enjoined to establish the same. Equally, when the transferee seeks to avail of Section 53-A to retain possession of the property which he had under the contract, it would also be incumbent upon the transferee to plead and prove his readiness and willingness to perform his part of the contract. He who comes to equity must do equity. The doctrine of readiness and willingness is an emphatic way of expression to establish that the transferee always abides by the terms of the agreement and is willing to perform his part of the contract. Part performance, as statutory right, is conditioned upon the transferee's continuous willingness to perform his part of the contract in terms covenanted thereunder.

7. In the earlier proceedings before the Taluk Board the appellant had admitted that he paid only Rs. 500. He pleaded in the written statement that consideration is Rs. 1000. In other words, he did not discharge his part of the contract to the owner, i.e., did not pay Rs. 1000 before the land was sold to the respondent nor did he deposit the amount when the suit was filed nor did he offer payment.

8. We are, therefore, of the view that the High Court is right in its conclusion that the appellant is not entitled to retain possession. However, since the appellant has remained in possession under the agreement of sale, the respondent is not entitled to claim any damages from him.

9. The appeal is accordingly dismissed but in the facts and circumstances of the case without costs.