

LAHORE HIGH COURT

Shankri

Vs

Milkha Singh

(Beckett, J.)

10.07.1941

JUDGMENT

Beckett, J.

1. The facts which have given rise to this appeal can be briefly stated. On 28th June 1936, the defendants-appellants made over the land now in suit to the plaintiff under a written instrument of transfer. In exchange, they received an equal area of land from the plaintiff, who also discharged a debt of ₹ 200 originally due from the husband of one of the defendants. On the strength of this transaction, the plaintiff applied to be entered in the revenue records as owner of the land in suit. This application was resisted, the transaction being denied, and mutation was refused on 8th September 1936. On 20th March 1937 the plaintiff brought the present suit for a declaration of his title as owner. His application for mutation of the revenue entries was subsequently accepted on appeal by the Collector. Both the Courts below have held that the instrument of transfer in question was executed and that possession passed under it; but they have held the instrument to be invalid for want of registration, inasmuch as it relates to property worth more than ₹ 100.

2. In spite of this, they have held that the plaintiff is entitled to a declaration of ownership by virtue of what is generally known as the doctrine of part performance, and his claim has accordingly been decreed. The defendants have again appealed. On behalf of the defendants, Mr. Achhru Ram contends that the English equitable doctrine of part performance, which was evolved to meet certain conditions arising out of the Statute of Frauds, cannot be used to defeat statutory conditions of quite a different kind prevailing in India, more particularly those contained in Section 49, Registration Act, 1908. Even if the provisions with regard to part performance contained in Section 53-A, Transfer of Property Act, be regarded as applicable to the Punjab, he still contends that it is not open to the plaintiff to make use of these provisions for the purpose of maintaining a suit of this kind in view of recent observations made by their Lordships of the Privy Council, according to which they are only available to a transferee for purposes of defense against a transferor. The applicability of the doctrine of part performance in the Punjab is the principal question involved in this appeal.

3. The history of the Indian case-law on the subject has already been given at some-length in the

order of reference, and need now be only briefly recapitulated. In *Mahomed Musa v. Aghore Kumar*¹ certain observations were made by Lord Shaw on behalf of the Privy Council to the effect that, when action has been taken upon an agreement which remained inchoate for want of a requisite document, there might be certain resulting equities, not inconsistent with the law of India, which would allow one of the parties to be charged upon those equities. In such circumstances, it was said, a transaction clothed imperfectly in legal forms could be treated as binding on the parties and carried into further execution as such in equity. As reference was made in this connection to the decision of the House of Lords in *Maddison v. Alderson*² one of the leading cases on the English doctrine of part performance, it was supposed for some time that this was sufficient authority for treating the doctrine as one which should be enforced in India. In *Ram Lal v. Mt. Sita Rai*³ a Division Bench of this Court made use of the doctrine to allow the plaintiff to regain possession of property which had come to her husband through an instrument which was invalid for want of registration.

4. There are other cases in which the doctrine has also been applied. The position has since been altered by the decision of the Privy Council in *Ariff v. Jadunath Mujumdar*⁴, In the judgment delivered by Lord Russell of Killowen, the remarks made by Lord Shaw in *Mahomed Musa v. Aghore Kumar A.I.R. 1914 P.C 27(Supra)* were held to be only in the nature of obiter dicta; and it was further held to be impossible to apply an English equitable doctrine affecting the provisions of an English statute by way of analogy to such a statute as the Transfer of Property Act, with the result of creating without any document an interest which the statute says can only be created by means of a registered document. This view was subsequently affirmed by their Lordships in *Pir Bux v. Mahomed Tahar*⁵,

5. The doctrine of part performance has, in the meantime, been given statutory recognition in some parts of India by means of the addition of Section 53-A, to Transfer of Property Act. This provides that, in certain conditions, the transferor under an unregistered document may be debarred from enforcing against his transferee any right in respect of the property of which the transferee has taken possession, other than a right expressly provided by the terms of the contract. In *Probodh Kumar Das v. Dantmara Tea Co. Ltd.*⁶, however, it was held by their Lordships that the new section conferred a right available only to a defendant to protect his possession and did not confer any active title on the transferee. Before an attempt is made to apply the law on the subject of part performance to the present case, it is necessary to refer to the position in the Punjab with regard to the applicability of particular provisions of the Transfer of Property Act.

6. The provisions which require certain transfers to be in writing have only been applied to areas within municipal and cantonment limits, and outside those areas on oral sale, gift or exchange of any value is permissible. In the provinces to which the

¹ A.I.R. 1914 P.C 27

³ A.I.R. 1933 Lah. 648

²(1883) 8 A.C. 467

⁴ AIR 1931 PC 79 : 1931-33-LW 586

⁵ AIR 1934 PC 235 : ILR 1934 58 NULL 650 : 1934-40-LW 492

⁶ AIR 1940 PC 1 : 1939 AWR (P.C.) 9 186 : 1940-51-LW 11 : 1940-51-LW 1

Act has been applied as a whole, a sale or exchange of land worth more than ₹ 100

can only be effected in writing; and by virtue of the provisions of the Registration Act, the instrument would have to be registered. In the Punjab, such a sale or exchange could be made

orally; but, if a transfer is made by way of a written instrument, then the instrument could not take effect unless it was registered. *Ariff v. Jadunath Mujumdar, AIR 1931 PC 79 : 1931-33-LW 586* (Supra) arose in a province to which the Act has been applied as a whole, and the transfer in question could only have been made by a registered instrument. In the present case, the land in dispute is situated outside municipal limits and could have been transferred orally, so that the point is not exactly the same. The question, however, still remains as to whether there is any equitable doctrine which can be used to defeat the provisions of Section 49, Registration Act, according to which the instrument on which the plaintiff bases his title, not having been registered, cannot affect any immovable property or be received as evidence of any transaction affecting such property unless it has been registered.

7. If we now return to the circumstances of the present case, certain propositions appear to make themselves clear: (1) In the first place, the English doctrine of part performance has no direct bearing on the plaintiff's case. Section 4, Statute of Frauds of 1677 provided that no action should be brought to charge a person upon any contract or sales of land unless the agreement was in writing. It did not render oral agreements void, but took away the ordinary means of enforcing them.

8. In certain circumstances, it was held that effect could still be given to such agreements in equity, but the application of the doctrine was limited to cases in which the party concerned could claim specific performance. In the Punjab, outside municipal areas, there is no bar to the enforcing of an oral transfer or exchange of land. The plaintiff in the present case is not suing on the strength of any oral sale or exchange nor is he seeking specific performance. (2) The application of the doctrine by way of analogy to suits based on an invalid instrument of transfer is contained in Section 53-A, Transfer of Property Act. This section is not a reproduction of the English doctrine, though it may be taken as based on the application of that doctrine in *Mahomed Musa v. Aghore Kumar A.I.R. 1914 P.C 27(Supra)* Unless this section can be taken as embodying some general rule of equity which would prevail in India, apart from the provisions of the Act, it can have no force in the Punjab, to which it has not been applied. In any case, stress cannot be laid upon the wording of the section, but the rule would have to be applied on general grounds. (3) As laid down in *Ariff v. Jadunath Mujumdar, AIR 1931 PC 79 : 1931-33-LW 586(Supra)* no merely equitable doctrine can be used to override the specific terms of a statute.

9. In the Punjab, these would be the provisions of Section 49, Registration Act; and no equitable doctrine could operate so as to make an unregistered document create title if it requires registration, (4) "When the terms of a transfer have been reduced to writing, Section 91, Evidence Act, bars the production of any other evidence of the transfer. Since the law in the Punjab permits oral transfers, it has been suggested that the present transaction might be treated as an oral exchange or sale; but this does not seem possible when the transaction was, in fact intended to be a transfer in writing. Delivery of possession is not in itself conclusive evidence of an oral transfer, since possession may be granted pending the execution of a conveyance, and in some cases the price may also be paid before the title has been finally transferred.

10. From these considerations it appears impossible to hold that the plaintiff can be declared to have become the legal owner of the land on the strength of the unregistered instrument which has been put forward. On the other hand, there are circumstances which distinguish the position of the plaintiff from that of a person who has no legal claim to occupy the land of which he has been put in possession. For the purpose of understanding this distinction, it is necessary to

consider the ordinary class of written instruments by means of which title is transferred in this province. As a general rule, there is no written agreement to sell pending examination of title deeds, but only an oral agreement to sell is reached. The parties then proceed to the execution of a written instrument of transfer by way of conveyance, which is distinct from the oral agreement, and does not generally purport to incorporate the terms of the preceding agreement. The preceding oral agreement is a separate transaction, which does not require to be in writing or registered and is in itself quite legal.

11. The position of the plaintiff in this case is that of a purchaser who has been let into possession by his vendor under an unregistered and consequently inoperative sale deed after there has first been an oral agreement to sell and after the whole of the consideration has been made good, under the mistaken belief on both sides that the transaction is complete, whereas in fact it has remained incomplete for want of registration of the instrument purporting to effect the transfer. The question to be determined is whether such person occupies any legal position in relation to the property in his possession, and if so what that position is. It is not easy to determine the position of the parties to the contract when a situation arises which was outside their contemplation at the time of entering into the contract; and the difficulties are certainly not made easier when it becomes necessary to apply various legal principles having their origin in England to a set of circumstances which could not apparently arise in that country. In order to ascertain the true position, I think it is necessary to examine the elements of the situation one by one, more particularly with reference to the position of the Indian Registration Act, from which the difficulties arise.

12. If the parties had simply entered into an agreement for sale, but had simply failed as yet to carry out the contract, their position would be governed by a definite set of legal principles. The first subsidiary question, it seems to me, is whether the position is in any way changed when the parties believe themselves to have completed the contract by executing an instrument which is declared by Section 49, Registration Act, not to affect the property to which it relates. I think the answer must be in the negative. Ordinarily, when a contract of sale is completed, the contract comes to an end with the transfer; but when there is in fact no transfer, can it be said that the contract is ended, the intention of the parties being manifestly that the sale should be completed? *Gibson v. Kirk*⁷ shows that the English Courts were willing to close their eyes to the existence of a written demise, though there was no legal necessity for them to do so, or even to rely upon a supposed personal contract, when a written demise was before them. It seems to me that this is more or less what the Courts in India are now required by statute to do.

⁷(1811) 1 Q.B. 850

13. In cases of this kind, they are not allowed to take any notice of the supposed transfer by which it was intended that the contract should be completed; and if the instrument in question is not to affect the property to which it is concerned, it can hardly affect any contract relating thereto. Even though the parties may not be aware of it, the effect of Section 49 is to leave the parties as they were before. From this I conclude that the position of the purchaser should still be regarded as that of a purchaser under a contract for sale which has not yet been completed or rescinded with the consent of both parties, with the added circumstances that the consideration has been made good and the property has been delivered to the purchaser.

14. In England, the purchaser under a contract of sale is sometimes described as the equitable owner of the land, though only against any other party to the contract. In India, however, the law

recognizes no distinction between legal and equitable estates in this sense, as was laid down by the Privy Council in *Juttendro Mohua Tagore v. Ganendra Mohun Tagore*⁸ *Chhatra Kumari Devi v. Mohan Bikram Shah*⁹. One thing that seems certain in the present case is that the purchaser cannot claim any title as owner in the property, whether as legal or as equitable owner. Moreover, as laid down in Section 54, Transfer of Property Act, a contract for the sale of immovable property does not, of itself, create any interest in or charge on the property. This does not, however, mean that the purchaser has no rights whatever with reference to the property which the vendor placed himself under contract to sell. It is to be observed that Section 54, Transfer of Property Act, only lays down that no interest or charge is created by the contract of itself, and the position may be altered by supervening circumstances, such as the delivery of the property and payment of the price. When the purchaser has paid the purchase money in anticipation of delivery, Section 55(6)(b), Transfer of Property Act, lays down that he has a charge on the property not only as against the seller but also against all persons claiming under him for the amount of the purchase money. This refers to the price that he has paid in anticipation of completion. It has no application after a valid conveyance has been executed and possession given; but there seems to be no reason why the position of the purchaser as regards his lien should be worsened because possession has been given, if there has been no valid conveyance. Nor is the position materially different when other land has been made over in exchange, in anticipation of a transfer of ownership.

15. Although the Transfer of Property Act is not in force in this province, the principle enunciated in Section 55(6)(b) is nothing new, but is a general rule of English law which can be followed in provinces where the Act is not in force, as being in accordance with justice, equity and good conscience. The following remark, which occurs in the judgment of Mansfield Order, J. in *Kirtland v. Pounsett*¹⁰ seems pertinent to the present case:

If a man pays part of his money and is so unwise as to take possession without a title, is it not just that the one party should take back his money, and the other take back his house?

16. This principle is quite independent of the doctrine evolved by the English Courts

⁸(72) I.A. Sup Vol 47

¹⁰(1809) 127 E.R. 1032

⁹AIR 1931 PC 196

of equity to meet a peculiar set of circumstances resulting from the English statute law and forms part of the general law of contract, which also recognizes the obligations arising out of part performance. The position is explained in the following passage which occurs in *Williams on Vendor and Purchaser*, 4th Edn., page 1006:

As any party rescinding the contract for the other's breach is entitled to be restored to his former position, so, it is conceived, he is in general bound to return to the other any property or profit which he has himself received under the partial execution of the agreement. It is thought that in every case in which a party to a contract lawfully rescinds it, whether for the other party's breach of some stipulation which goes to the root of the whole consideration, for the other's renunciation of the contract, for non-fulfilment of some condition subsequent, under an express power to rescind, or for misrepresentation, duress, or undue influence, the rule is that he shall not enjoy the advantage of rescission without yielding up every benefit he has taken by the previous part-performance of the

contract.

Since the Transfer of Property Act is in force throughout the large part of India, the doctrine of the purchaser's lien has generally been applied with reference to the provisions of that Act; but it was applied without any reference to the statute law in *Vir Chand Lal Chand v. Kumaji*¹¹ when the following remark was made by Sargent C.J.:

It is a well established rule of an English Court of equity, and which is equally applicable to the circumstances of this country, that the unpaid purchase money is a charge on the property in the hands of the vendee.

17. The purchaser's lien usually arises when he has good grounds for rescinding the contract before completion; but it has been allowed to a person who has paid the money under a bona fide mistaken belief that he is entitled to the benefit of the contract, a situation which has some points of similarity with those arising in the present case and even though a purchaser may have lost his right of specific performance, he may still retain his lien: see Dart on Vendors and Purchasers, 8th Edn., p. 449. In *Mating Po Maung v. Maung Kaing*¹² it was held that, although the unregistered sale transaction in question was invalid, the vendee who had paid the purchase money and had been in possession under the contract of sale, had a charge on the property for the amount paid by him in advance as purchase money.

18. As regards the nature of the lien, reference may be made to Williams on Vendor and Purchaser, at the page already mentioned. The lien, it may be observed, is not created by any agreement between the parties, but arises by operation of law, on payment of the purchase money. It may be that in a suit brought by the vendors for the recovery of the land it might be open to the purchaser to resist such a suit on various grounds, such as grounds arising out of the ordinary law of estoppel or limitation; but with these possibilities we are not now concerned. The plaintiff is suing for a declaration as to his legal position in regard to the land. On the facts so far

¹¹(94) 18 Bom. 48

¹²A.I.R. 1914 L.B. 53

disclosed he cannot be granted a declaration of legal or equitable ownership. But if he can show that he has made good the consideration in return for which the defendants undertook to convey to him a good title in the land, it would appear, for the reasons given above, that he has at least acquired something in the nature of a purchaser's lien which has arisen independently of the exchange deed on which his claim to full ownership is based.

19. There are two other questions of some difficulty which have still to be decided. The first is whether the unregistered instrument can be used in evidence for the purposes of showing that the plaintiff entered upon the property under a contract of exchange and further obtained a lien by passing of the consideration. As regards the plaintiff's position under the contract, it is generally taken as settled law that a document of this kind can be accepted in evidence for the purpose of proving the character of the possession of the person who holds under it, although it may not be admissible for want of registration to prove a transfer of title: see *Varada Pillai v. Jaeverathnammal*¹³ So far as this Court is concerned, reference may be made to *Qadir Bakhsh v. Mangha Mal*¹⁴ and *Ata Muhammad v. Bhankar Das*¹⁵ As already stated, the contract of sale does not of itself create any interest in the property; and even if the contract to sell has been reduced to

writing, it would have been exempt from registration under Section 17(2)(v), Registration Act.

20. As regards the use of the instrument to prove the making good of the consideration, by which a lien is created, the law also seems to be fairly well settled. The earliest decision on the point is that of the Calcutta High Court in *Shib Pershad Das v. Unnopurna Dayee* ('69) 12 W.R. 435. It was there held that a deed of sale consists of two parts, namely, an acknowledgment of the receipt of the purchase money and a conveyance of the property; and though the deed may not be admissible to establish a title to the property, it is admissible in evidence as an acknowledgment of the receipt of the purchase money. The same view was taken by the Bombay High Court in *Shambu v. Nama*¹⁶ following *Mahadnappa v. Bari*¹⁷ and *Waman Ramohandra v. Dhondiba Krislmaji*¹⁸ This decision was followed by the Patna High Court in *Sri Mahabirji v. Ramnath Kasarwani*¹⁹ In Mulla's Commentary on the Indian Registration Act, 4th Edn., p. 195, an example is given which seems to show that, in the opinion of the commentator, the sale deed could be used for the purpose of proving a charge of this kind on the property. In this connexion it may be noted that the explanation to Section 17(2) provides that a contract for the sale of immovable property should not be deemed to require registration by reason only of the fact that it contains a recital of the payment of the whole or part of the purchase money. It does not appear to have been the intention of the Act therefore that such entries should be excluded from consideration merely by reason of the fact that they create a lien on the property.

21. The last question is whether the plaintiff, having sued for a declaration of his title as owner, can be granted any lesser form of declaration in the present suit. At first sight the recent decisions of the Privy Council may seem to be against the view that

¹³ A.I.R. 1919 P.C. 44

¹⁵ A.I.R. 1925 Lah. 491

¹⁷(75) 1875 P.J. 299

¹⁴ A.I.R. 1923 Lah. 495

¹⁶(11) 35 Bom. 438

¹⁸(79) 4 Bom 126 (F.B)

¹⁹ A I R 1936 Pat 634

he can be granted any form of relief at all in a suit so framed; but I do not think that this necessarily follows from any principles laid down in those decisions that the plaintiff must be altogether non suited when those principles are applied to the circumstances of the present case. It is true that the right of relying on the doctrine of part performance, when this is given by Section 53-A, Transfer of Property Act, can be only used as a shield in defence and not as a weapon of attack; but this depends upon the wording of the section and the application of that particular doctrine is not now in question in the present case.

22. In *Probodh Kumar Das v. Dantmara Tea Co. Ltd*²⁰, it was held by the Privy Council that the plaintiff, suing for a declaration of ownership under an invalid document had no cause of action in that particular case. The circumstances were however quite different. It does not appear that any question of ousting the transferee from possession had arisen, but the plaintiff only wished to be declared the owner because of certain advantages attaching to the person in whom legal title vested. Such a declaration could not be granted in view of the provisions of the Transfer of Property Act, which contains an express bar to any transfer of title on the strength of such an instrument. In the present instance the position of the plaintiff has been assailed on the ground that there is no such transaction at all as would entitle him to legal possession of the land in suit. His real cause of action is thus quite different from that in *ILE Probodh Kumar Das v. Dantmara Tea Co. Ltd.*, AIR 1940 PC 1 : 1939 AWR (P.C.) 9 186 : 1940-51-LW 11 : 1940-51-LW 1(Supra) and there does not seem to be any particular reason why a person, the legality of whose possession has been denied, should wait for an action to be brought against him as a trespasser

before seeking to establish the legality of his possession, even though he may have been under some misapprehension as to the full nature of his rights.

23. The real objection to the grant of relief in a case of this kind would be that the plaintiff has now been forced to change his cause of action from one based on an actual transfer of title to one based on part performance under a personal contract. There are cases however in which the Courts have allowed rent for use and occupation in suits based upon invalid instruments of lease; and when such relief has been refused merely by reason of the way in which the suit was originally framed, it has generally been on the ground that this would alter the whole course of the trial. That objection would not apply in the present case. I certainly think that it might be advisable for the parties in a case of this kind to apply for an amendment of pleadings as soon as the defect is discovered, in order that all outstanding questions may be cleared up; but I do not think that the absence of such an amendment has ever been regarded as a fatal defect, if the main facts are sufficiently clear. *Gaya Prasad v. Baij Nath*²¹ has already been mentioned as a case in which relief was allowed in a suit brought upon an invalid assignment.

24. There is another reason why I think that some form of declaratory relief should be granted in the present case. The dismissal of the suit as a whole would probably be misunderstood by the parties and if it did not actually lead to a physical dispute over possession, it would almost certainly lead to further protracted litigation. Such

²⁰ AIR 1940 PC 1 : 1939 AWR (P.C.) 9 186 : 1940-51-LW 11 : 1940-51-LW 1

²¹(92) 14 All. 176

litigation may not be at an end yet, but it should at least be reduced if some of the preliminary ground is cleared; and if the position of the parties is made plain, it may be found possible for them to settle their differences-on a proper footing. The position in this respect is not essentially different from that which arises when a reversioner sues under customary law for a declaration that an alienation is wholly void as against him, or actually sues for possession, and it is found that the transaction is only partially valid.

25. In the latter case, at least, the plaintiff is suing as full owner; but it has long since been the practice in the Courts in the Punjab to grant a lesser relief in the form of a declaration entitling him only to take possession of the property on payment of a specified sum. For these reasons, I would, accept the appeal and grant the plaintiff the declaration that he is lawfully in possession of the property in dispute which was delivered to him by the defendants and, over which he has a lien for the value of, the property which the plaintiff handed over to the defendants in exchange and for the money paid by the plaintiff to the defendants. In the circumstances, I would, leave the parties to bear their own costs throughout.

Tek Chand, J.

26. I agree.

Monroe, J.

27. I agree.

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