

CASE NO.:
Appeal (civil) 5920 of 1998

PETITIONER:
MOOL CHAND BAKHRU & ANR.

Vs.

RESPONDENT:
ROHAN & OTHERS

DATE OF JUDGMENT: 29/01/2002

BENCH:
V.N. Khare & Ashok Bhan

JUDGMENT:

Bhan, J.

Point for consideration in this appeal is as to whether:

"A person (claiming to be a proposed vendee) can protect his possession of an immovable property on the plea of part performance under Section 53-A of the Transfer of Property Act on the basis of an oral agreement, the terms of which have not been reduced in writing."

The relevant facts are :

1. Plaintiffs/appellants (hereinafter referred to as "the appellants") Mool Chand and Leela Ram were the owners of the property known as 'Dayal Villa' situated in Khasra Nos. 1195, 1196, 1198, 1200, 1201 and 1202 measuring 613 sq. meters in Solan Town, specifically described in the plaint (hereinafter referred to "the property in dispute"). Leela Ram above-named died during the pendency of the suit before the trial court and his name was substituted by his widow and two sons as plaintiffs. Widow died during the pendency of this appeal. The title of Leela Ram is represented through his two sons as the appellants.

2. The appellants filed the suit with the averments that Late Bhagwan Dass (predecessor in interest of the defendants) was their real uncle (father's brother). Because of the partition of the country in 1947 Bhagwan Dass who was living in Sindh Province migrated to India. The appellants permitted him to occupy their house at Solan as a licensee in 1948-49. In spite of repeated requests to vacate the property Bhagwan Dass failed to handover the possession of the property to the appellants. In 1974 Bhagwan Dass agreed to vacate the property after six months. On his failure to vacate the property he was required to pay damages by way of use and occupation at the rate of Rs. 20/- per day till the date of actual vacation. As Bhagwan Dass failed to vacate the property and to pay the damages as agreed upon, a suit was filed for possession of the property as well as for recovery of Rs. 43,200/- as mesne profits for the use and occupation of the property at the rate of Rs. 1200/- per month.

3. The defendants/respondents (hereinafter referred as 'the respondents') while resisting the suit averred that the appellants agreed to sell the property in dispute to Bhagwan Das in the year 1968 for a consideration of Rs. 30,000/- out of which Rs. 10,000/- was paid to the appellants. A sum of Rs. 1,100/- was kept by Bhagwan Dass with Kishni, mother of the appellants, at their instance. A further sum of Rs. 10,000/- was deposited with one Gulab Singh, brother of the appellants, in the year 1969, as part of the sale consideration. Bhagwan Dass continued to occupy the property till 1968 as a permissive user and thereafter in part performance of the agreement to sell. That the property at the time of lease was in a dilapidated condition. Suitable improvements in the property by reconstructing the walls, floors, roof of Balcony and by providing flush latrines at a cost of Rs. 35,000/- were carried out. No objection was raised by the appellants at any time to the improvements carried out by the respondents. It was further pleaded that they have always been ready and willing to perform their part of the agreement to sell and pay the remaining amount of the sale consideration. Alternatively, it was pleaded that the respondents acquired title to the property in dispute by way of adverse possession as they were continuing in possession since 1968. The claim of the appellants for mesne profits was denied.

4. The appellants in their rejoinder pleaded that plaintiff No. 1 Mool Chand in the year 1968 had agreed to sell his half share in the property in dispute to Bhagwan Dass on the letter's representation that the market value of the entire property in dispute at that time was Rs. 30,000/- The value of half share was Rs. 15,000/-. It was admitted that Mool Chand had received Rs. 10,000/- as part of the sale consideration. It was, however, pleaded that since Bhagwan Dass failed to pay the balance sale consideration, the deal fell through and the amount received as part of the sale consideration, was forfeited and appropriated towards use and occupation charges. It was averred that Leela Ram, the other plaintiff, had no intention to sell his half share in the property in dispute nor any agreement to sell was arrived at between him and Bhagwan Dass. The claim of adverse possession set up by the respondents was controverted. The so-called improvements made by the respondents were also denied.

5. The trial court dismissed the suit of Mool Chand to the extent of his half share. The suit of Leela Ram for possession of his half share and the claim for mesne profits was decreed. He was awarded mesne profit at the rate of Rs. 20/- per day amounting to Rs. 21,600/-. The trial court came to the conclusion that Mool Chand alone had entered into an agreement to sell his half share in the property in dispute in favour of Bhagwan Dass for a consideration of Rs. 15,000/- out of which a sum of Rs. 10,000/- was received by Mool Chand. It was held that Bhagwan Dass was placed in possession of half share of the property in dispute by Mool Chand as part performance of the agreement to sell. Benefit of Section 53-A of the Transfer of Property Act, 1982 (for short 'the Act') was however denied on the ground that the respondents had failed to prove that they were and are ready and willing to perform their part of the agreement. The respondents were found to have perfected their title to the property in dispute by way of adverse possession to the extent of half share of the Mool Chand. So far as the share of Leela Ram is concerned the respondents were held to be in permissive possession as a licensee.

6. Both the parties being aggrieved by the judgment and decree of the trial court preferred two separate appeals before the District Judge. The appeal filed by the respondents was dismissed. The finding recorded by the Trial Court in so far as the same was in respect of the share of Leela Ram was confirmed. The appeal preferred by the appellants was allowed and the finding of the trial court that the respondents had perfected their title to the extent of half share by way

of adverse possession was set aside. Consequently, the suit of the appellants for possession of the entire property in dispute was decreed along with mesne profits to the tune of Rs. 43,200/- at the rate of Rs. 1200/- per month.

7. The respondents filed the second appeal before the High Court. The case projected before the High Court was that as the respondents had been put in possession of the property in part performance of the agreement to sell in the year 1968 on payment of a part of the sale consideration and therefore they were entitled to protect their possession under Section 53-A of the act. Alternatively, their case was that they had become the owners of the property by way of adverse possession as they were in continuous possession of the same since 1968.

8. The High Court relying upon a judgment of this Court in Mohan Lal (deceased) through his LRs. Kachru & Ors. Vs. Mirza Abdul Gaffar & Anr., 1996 (1) SCC 639, came to the conclusion that since the respondents were claiming to be in possession of the property in part performance of the agreement to sell, the plea of acquisition of title by adverse possession was not available to them. Learned counsel appearing for the respondents did not assail this finding of the High Court. The view expressed in Mohan Lal (deceased) through his LRs. Kachru & Ors. case (supra) has been reiterated by this Court in Roop Singh Vs. Ram Singh, 2000 (3) SCC 708. It has been held in the latter judgment that the pleas of adverse possession and retaining the possession by operation of Section 53-A of the Act are inconsistent with each other. Such a plea is not available to a proposed vendee.

9. Relying upon few letters written by Mool Chand admitting that he had agreed to sell the property, the appeal filed by the respondents to the extent of Mool Chand's share was allowed. It was held that the respondents could protect their possession under Section 53-A of the Act. The appeal qua the share of Leela Ram's half share was dismissed. It was held that respondents continued to be in joint possession of the property to the extent of half share but he was not entitled to actual possession till partition of the property in dispute. Since the possession was joint Leela Ram was not entitled to the mesne profits as well.

10. Section 53-A provides 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, in part performance of the contract, 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 furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract then he is entitled to protect his possession in respect of the property of which he was put in possession in part performance of the agreement to sell.

11. This Court in Nathulal Vs. Phool Chand, 1969 (3) SCC 120, while interpreting Section 53-A culled out the following conditions to be fulfilled for making out the defence of part performance to an action in ejectment by the owner, as under:

"(1) that the transferor has contracted 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;

(2) that the transferee has, in part performance of the contract, 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;

(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."

After culling out the aforesaid conditions, it was held:

"If these conditions are fulfilled then notwithstanding that the contract, 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 therefor by the law for the time being in force, the transferor or any person claiming under him is debarred from enforcing against the transferee 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."

12. In *Sardar Govindrao Mahadik Vs. Devi Sahai*, 1982 (1) SCC 237, it was reiterated that to qualify for the protection of the doctrine of part performance it must be shown that there is an agreement to transfer of immovable property for consideration 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.

13. In view of the authoritative view expressed by this Court the learned counsel appearing for the respondents on being called upon did not dispute the proposition that a proposed vendee could not protect his possession of an immovable property on the basis of an oral agreement. He conceded that written agreement was sine qua non for the applicability of the equitable doctrine of part performance enshrined in Section 53-A of the Act.

14. Learned counsel appearing for the respondents by referring to the letters written by Mool Chand dated 14th January, 1969 - Ex. P12, 24th January, 1969 Ex. P11, 5th February, 1969 - Ex. P10, 18th February, 1969 Ex. P9, 8th March, 1969 Ex. P8, 28th March, 1969 Ex. P7 and 14th May, 1969 Ex. P5 submitted that Mool Chand having admitted that he had agreed to sell his half share of the property, the letters written by him be deemed to be the written agreement to sell in terms of Section 53A of the Act. We have perused these letters and on their perusal find that Mool Chand in these letters has admitted that he had agreed to sell his half share of the property for a sum of Rs. 15,000/- out of which Rs. 10,000/- was received by him. In each of these letters Mool Chand has called upon Bhagwan Dass to pay the balance amount of Rs. 5,000/- as he was in urgent need of the money. Bhagwan Dass failed to do so. Ultimately, on 21st May, 1970 Mool Chand wrote a letter, Ex. P3, repudiating the so called agreement to sell as Bhagwan Dass had failed to carry out

his part of the agreement. It was further stated in this letter that the amount received by him as advance was appropriated by him towards the use and occupation of the property at the rate of Rs. 20/- per day from 1st May, 1970 onwards. He categorically stated that he was no longer interested in selling the property. From the admission made by Mool Chand that he had agreed to sell his half share in these letters, learned counsel for the respondents argued that the letters written by him be taken to be the agreement to sell in which the terms of the agreement have been spelt out. We do not find any substance in this submission. The letters written by Mool Chand cannot be termed as an agreement to sell, the terms of which have been reduced into writing. At the most it is an admission of an oral agreement to sell and not a written agreement. Statutorily the emphasis is not on a written agreement only. In addition the emphasis is on the terms of the agreement as well which can be ascertained with reasonable certainty from the written document. There was no meeting of minds.

Admission made by Mool Chand of an oral agreement to sell does not spell out the other essential terms of the agreement to sell such as the time frame within which the sale deed was to be executed and as to who would pay the registration charges etc. The letters written by Mool Chand cannot be taken to be an agreement to sell within the meaning of Section 53-A spelling out the terms of an agreement for sale. In our view, the High Court fell in error in coming to the conclusion that the letters written by Mool Chand, referred to above, constituted an agreement to sell the terms of which have been reduced in writing. Terms necessary to constitute the transfer with reasonable certainty could not be ascertained from the letters written by Mool Chand to his uncle. At the most it is an acknowledgment that there was an oral agreement to sell but the same could not be construed to be a written agreement to sell the terms of which have been reduced into writing. Written agreement has to precede the putting of the proposed vendee in possession of the property. Bhagwan Dass was never put in possession in pursuance of the property to the written agreement arrived at between the parties.

15. For the reasons stated above, the appeal is accepted. Judgment of the High Court is set aside and the suit filed by the plaintiff/appellants for possession and mesne profits of their property is decreed.

16. Respondents have deposited a sum of Rs. 1,47,000/- towards the mesne profits, which are lying deposited in the High Court at Shimla. The mesne profits are restricted to the amount already deposited by the respondents. Out of this amount a sum of Rs. 55,000/- is stated to have been withdrawn by Mool Chand. The balance amount lying deposited in the High Court be disbursed to the appellants along with interest, if any. There will be no orders as to costs.

J.
(V.N. Khare)

.J.
(Ashok Bhan)

January 29, 2002