

PETITIONER:
RAM KUMAR AGARWAL & ANR.

Vs.

RESPONDENT:
THAWAR DAS (DEAD) THROUGH LRS.

DATE OF JUDGMENT: 20/08/1999

BENCH:
R.C.Lahoti, S.Rajendra Babu

JUDGMENT:

R.C. Lahoti, J.

In Mauza Saharanpur @ Jindapur of Pargana Haveli, Tehsil Sadar, District Gorakhpur there is an open piece of land over a part of which or adjoining to which there is some built-up property which is a lime factory known as 'karkhana'. It is not clear whether the 'karkhana' is situated over the land which is the property forming subject matter of the present proceedings or is situated by the side of it. However, as the facts stated shortly hereinafter would show that aspect of the matter is immaterial for the purpose of these proceedings. It is not in dispute that on 18.7.1956, the 'karkhana' has been transferred by way of sale by Phool Chand to Thawar Das. On the same day another agreement was entered into between the parties.

The agreement is reproduced hereunder:-

"We are Thawar Das s/o Shri Girdhari Mal r/o Mohalla Jaya Shankar Ka Pokhra, city of Gorakhpur Ist party and Phool Chand s/o Shri Mukhram r/o Mohalla Kharayya Ka Pokhra city of Gorakhpur Second Party. We the second party have sold all our business all kinds of Karkhana and goods including the building and quarter, belt and engine, two centigator and Lahorekhana which is situate inside the boundary of the land to the first party for Rs.9000/-. But the land is joint. Because we the first party will carry on our business on the land in question, therefore we the executants undertake that we will pay Rs.150/- p.m. as rent for the land in question and will after one year, make a sale deed of the land in question to the second party for Rs.7000/- (half of which is Rs.3500/-) and if after one year no sale deed of the land is made of the land in question on account of any thing on the part of the Ist party or the second party we the Ist party will pay rent after one year for three years at the rate of Rs.200/- per year in advance. If the first party will want to take the land after one year, the second party will have to execute the sale deed in any event. If the sale deed is not made for four years, we the first party will remove our goods from the land in question and will vacate it and the possession will be given by the Ist party to the 2nd party or its heirs and the

second party will remain in possession for three months. Therefore with free will and in sound stock of mind this rent deed is written so, that it may be of use in case of need.

Details of land situated in Mauza Saharanpur @ Jindapur, and Qasba Pargana Haveli, Tahsil Sadar, Distt. Gorakhpur.

East : Garha

West : Pucca Govt. Road

North : Garha

South : Gola Togan Lal

Sd/- Thawar Das

18.7.1956

In the year 1969 Phool Chand after serving a demand-cum-quit notice under Section 106 of the Transfer of Property Act instituted Suit No.240 of 1969 seeking recovery of arrears of rent and a decree of ejectment for failure of Thawar Das to purchase the land and consequently the relationship of landlord and tenant having continued to exist between them under the agreement. About seven months after the institution of suit by Phool Chand, Thawar Das instituted Suit No. 137 of 1969 against Phool Chand seeking specific performance of the agreement to sell dated 18.7.1956. One of the pleas taken by Thawar Das was that on 19.9.1966 yet another agreement was entered into and executed between the parties whereunder Thawar Das paid Rs.2,000/- to Phool Chand and Phool Chand reviving the old agreement of the year 1956 made a fresh promise to sell the land subject to payment of Rs.5,000/- by Thawar Das to Phool Chand. Phool Chand having expired, his sons were impleaded in his place. Inasmuch as there are cross-suits and cross-appeals preferred subsequently, for the sake of convenience we will continue to refer to the parties as Thawar Das and Phool Chand; the latter name would include his sons also upon whom his estate has devolved upon his death.

The two suits were consolidated. The suit filed by Thawar Das was treated as the lead case and evidence was recorded therein. By a common judgment dated 23rd July, 1975 the learned Additional Civil Judge dismissed the suit filed by Thawar Das and decreed the suit filed by Phool Chand. Two appeals were preferred by Thawar Das which were heard and disposed of by the District Judge by a common judgment. The learned District Judge has dismissed both the appeals. Upon an independent evaluation of the evidence adduced by the parties, the learned District Judge has affirmed all the findings of fact recorded by the Trial Judge.

It will be useful to briefly set out the findings concurrently arrived at by the Trial Court and the First Appellate Court. It has been found that the time was of

essence of the contract for sale entered into between the parties and time for performance was limited upto four years from the date of the agreement.

During these four years and even thereafter in spite of Phool Chand having filed the suit for ejectment after serving notice of termination of tenancy, Thawar Das made no effort to purchase the land except filing a suit for specific performance which was more in the nature of a counterblast to the suit filed by Phool Chand. Thawar Das utterly failed in proving that he was ever ready and willing to perform his part of the contract and to have the purchase materialised. The plea raised by Thawar Das that on 19.9.1966 there was a fresh agreement entered into between the parties reviving the old agreement of 18.7.1956 and thereunder Thawar Das had paid an amount of Rs.2,000/- to Phool Chand was utterly false and the agreement dated 19.9.1966 propounded by Phool Chand was a false and forged document. The tenancy of Thawar Das was duly and validly terminated by a notice to quit under Section 106 of the Transfer of Property Act.

Thawar Das preferred two second appeals before the High Court of Allahabad which have been heard and disposed of by a learned Single Judge. By the judgment dated 21.9.1983 which is impugned in these appeals by special leave, both the appeals have been allowed. The judgments and decrees of the Trial Court and of the District Judge have been set aside; instead the suit filed by Phool Chand has been directed to be dismissed and the suit for specific performance filed by Thawar Das has been directed to be decreed. A perusal of the judgment of the High Court reveals reasonings, strange to some extent, which have not at all appealed to us and which we have found difficult to sustain.

The High Court has held that insofar as the suit land is concerned the name of one Kanaihalal, brother of Phool Chand was also recorded in the revenue papers. It is only on 27.2.1967 when name of Phool Chand came to be mutated in the revenue papers, the cloud cast on the title of Phool Chand was cleared and Phool Chand became capable of transferring his title in the land. It is therefore Phool Chand who alone must bear the blame for delay in performance of the agreement until 27.2.1967. The High Court has not disturbed and rather upheld the finding arrived at by the two courts below that the alleged agreement dated 19.9.1966 was a false and fabricated document and no amount much less an amount of Rs.2,000/- was paid thereunder by Thawar Das to Phool Chand. However, in the opinion of the High Court this finding was inconsequential because Thawar Das was prepared to pay the entire amount of Rs.7,000/- in case his plea of payment of Rs.2,000/- did not find favour with the Court. The High Court then proceeded to note that rent initially at the rate of Rs.150/- per annum and subsequently at the rate of Rs.200/- per annum had continued to be paid by Thawar Das to Phool Chand upto 17th July, 1965 and this conduct of Phool Chand in accepting the rent in spite of the expiry of four years from 18.7.1956 indicated waiver on the part of Phool Chand of consequences flowing from delay on the part of Thawar Das in the performance of the contract. Phool Chand could have insisted on the performance of contract by Thawar Das if only he would have proved his own readiness and willingness and also competence to execute the sale deed within the stipulated period of four years. It is to be

noted that though the High Court has tried to find fault with Phool Chand, nowhere in its judgment the High Court has recorded a finding that Thawar Das (the plaintiff in suit for specific performance) was always ready and willing to perform his part of the contract and to have the sale deed executed by Phool Chand in accordance with the terms of the agreement dated 18.7.1956. Before the High Court on behalf of Thawar Das reliance was also placed on a plea flowing from Section 53A of the Transfer of Property Act and the High Court proceeded to observe that possession of Thawar Das was in part performance of the agreement to sell and so also Phool Chand's suit for Thawar Das's ejectment could not have been decreed and the latter was entitled to continue and remain in possession of the land.

In our opinion, the judgment of the High Court suffers from serious infirmities. It also suffers from the vice of exercise of such jurisdiction as did not vest in the High Court under the law. Under Section 100 of the CPC (as amended in 1976) the jurisdiction of the High Court to interfere with the judgments of the courts below is confined to hearing on substantial question of law. Interference with finding of fact by the High Court is not warranted if it involves reappraisal of evidence (see *Panchugopal Barua & Ors. Vs. Umesh Chandra Goswami & Ors.* - 1997 (4) SCC 713 and *Kshitish Chandra Purkait Vs. Santosh Kumar Purkait & Ors.* 1997 (5) SCC 438). The High Court did not frame any substantial questions of law as contemplated by sub-section (5) of Section 100 of the CPC. It has not even discussed any evidence. No basic finding of fact recorded by the courts below has been reversed much less any reason assigned for taking a view to the contrary still the finding on the question of readiness and willingness to perform the contract which is a mixed question of law and fact has been upset. Plea under Section 53A of the Transfer of Property Act which again involves a mixed question of law and fact has been allowed to be urged and upheld by the High Court though there is no foundation for the same laid in the pleadings of Thawar Das and though the plea was not raised either before the Trial Court or before the First Appellate Court even at the time of hearing. Before us also at the time of hearing of the appeals the learned counsel for the respondent Thawar Das found it very difficult indeed to demonstrate availability of material on record whereon the findings as to readiness and willingness for performance of his part of the contract on the part of Thawar Das and as to his possession being available to be protected under the plea of part performance emanating from Section 53A of Transfer of Property Act could be sustained. The suit for specific performance filed in the year 1969, i.e., nearly nine years after the expiry of four years from 18.7.1956, the date of the agreement, was hopelessly barred by delay and laches. We do not propose to enter into the question of limitation though the plea that the suit for specific performance was barred by time was specifically raised by Phool Chand before the Trial Court. It is statutorily provided by Section 16(c) of the Specific Relief Act, 1963 that to succeed in a suit for specific performance of a contract the plaintiff shall aver and prove that he has performed and has always been ready and willing to perform the essential terms of the contract which were to be performed by him other than the terms the performance of which has been prevented or waived by the defendant. In the facts and circumstances of the case raising of the plea by Thawar Das that on 19.9.1966 there was a fresh agreement

between the parties and he had paid Rs.2,000/- to Phool Chand associated with positive finding arrived at by the two courts below which finding has not been upset by the High Court that the plea was false and was sought to be substantiated by producing a false and fabricated document makes the situation worse for Thawar Das. A person who falsely alleges to have paid Rs.2,000/- and also attempts at proving the plea at the stage of the trial cannot be said to have been ever ready and willing to pay Rs.7,000/- which under the contract it was his obligation to pay. The present one is not a case where a plea as to payment was raised bonafide but abandoned at or before the trial for inability to prove.

Plea under Section 53A of the Transfer of Property Act raises a mixed question of law and fact and therefore cannot be permitted to be urged for the first time at the stage of second appeal. That apart, performance or willingness to perform his part of the contract is one of the essential ingredients of the plea of part performance. Thawar Das having failed in proving such willingness protection to his possession could not have been claimed by reference to Section 53A of the Transfer of Property Act.

For the foregoing reasons, we find the judgment of the High Court wholly unsustainable in law. The appeals deserve to be allowed, setting aside the judgment of the High Court. During the course of hearing, the learned counsel for Thawar Das vehemently resisted the appeals by submitting that the decree under appeal as passed by the High court has been put to execution and sale deed in terms of the decree has been executed and therefore the appeals do not deserve to be allowed. We find no merit in this plea. The judgment of the High Court was pronounced on 21.9.1983. The sale deed in compliance with the judgment of the High Court appears to have been executed on 21.4.1984 through intervention of the court, that is, by taking out execution of the decree. Petition seeking special leave to appeal along with prayer for interim relief was filed in the Supreme Court on 2.1.1984. On 30.9.85 leave to appeal was granted and while directing notices to be issued to the respondents, this Court had also directed execution of the judgment and decree of the High Court to remain stayed if not already executed. Merely because the decree under appeal has been executed for want of stay order from the superior court the right of the judgment debtor to prosecute the appeal is not lost without there being something to show that the judgment debtor had waived or consciously given up his right of prosecuting the appeal.

The appeals are allowed. The judgment and decree passed by the High Court are set aside and instead the judgment and decree passed by the Trial Court and as affirmed by the District Judge are restored. The appellant shall be entitled to costs throughout in both the appeals.