

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Judgment: 31.05.2011*

+ **R.S.A.No. 4/2011**

RAJPAL & ANOTHER

.....Appellant
Through: Mr. Shekhar Dasi, Advocate.

Versus

HARSWAROOP

.....Respondent
Through: Mr. S.P. Chugh, Advocate.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J. (Oral)

1 This appeal has impugned the judgment and decree dated 24.11.2010 which had reversed the finding of the trial judge dated 01.12.2005. Vide judgment and decree dated 01.12.2005, the suit of the plaintiff seeking possession of the suit property i.e. property comprising of a shop no. D-61, Gali No. 4, Laxmi Nagar, Delhi, had

been dismissed. Impugned judgment had reversed this finding; suit of the plaintiff stood decreed.

2 The case of the plaintiff is that the defendants had entered into an agreement to sell dated 13.11.1992 with the father of the plaintiff namely Sh. Mangat Ram for the purchase of the aforementioned suit property; total consideration was Rs. 2,80,000/-; a sum of Rs. 1,05,000/- was paid to Sh. Mangat Ram; defendants agreed to pay the balance consideration on or before 13.09.1993. The balance amount was not paid. Defendants requested Sh. Mangat Ram to cancel the agreement; Sh. Mangat Ram returned a sum of Rs. 80,000/- to defendant no. 2 and adjusted ₹ 25,000/- as use and occupation charges for the possession of shop. Defendant no. 2 executed an agreement cum receipt dated 01.07.1995 for the cancellation of the said agreement. Defendants had agreed to vacate the property within 3-4 months and latest by 31.10.1995. Sh. Mangat ram expired on 21.04.1997. In spite of requests of the plaintiff to the defendant to vacate the suit property as also the legal notice dated 22.12.2001; defendants failed to adhere to the said request. Present suit seeking possession of the suit shop as also damages at the rate of ₹ 5000/- per month was claimed.

3 In the written statement, it was contended that the plaintiff had no locus standi to file the present suit. It was barred by limitation. Defence of the defendants was that they had made payment of the balance amount on 15.11.1992 and on 30.11.1992; defendants had not taken back any amount of ₹ 80,000/- from the plaintiff; defendants had made a payment of ₹ 75,000/- on 13.11.1992; it was denied that the defendants had asked for the cancellation of the agreement or any sum much less the sum of ₹ 80,000/- had been received by Sh. Mangat Ram from the defendants. Suit was liable to be dismissed.

4 On the pleadings of the parties, following issues were framed:-

- 1. Whether the suit is barred by limitation? OPD*
- 2. Whether the plaintiff has no locus standi to file the present suit as the plaintiff is not the son of Sh. Mangat Ram? OPD.*
- 3. Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD.*
- 4. Whether there is no cause of action and the suit is liable to be dismissed on this ground? OPD.*

5. Whether the plaintiff is entitled for a decree of possession?

OPP

6. Relief.

5 Trial judge had applied the doctrine of part performance as contained under Section 53 (A) of the Transfer of Property Act (hereinafter referred to as TPA Act); it was noted that defendant has been able to prove that he has made a payment of ₹ 2,15,000/- to Sh. Mangat Ram; protection under Section 53 (A) of the TPA was granted to the defendant; suit of the plaintiff stood dismissed.

6 In appeal, this finding was reversed. The impugned judgment had noted that the sale consideration was ₹ 2,80,000/-; even as per the case of the defendant, only a sum of ₹ 2,15,000/- had been paid; balance consideration had not been paid; defendant was not entitled to the protection of Section 53 (A) of the TPA. Suit of the plaintiff stood decreed.

7 This is a second appeal. It has been admitted and on 14.02.2011, following substantial question of law was formulated:-

“Whether the finding in the impugned judgment dated 24.11.2010 qua the provision of Section 53A of the Transfer of

Property Act granting protection to the appellant/defendant are perverse? If so its effect?”

8 On behalf of the appellant, it has been urged that the judgment of the trial court suffers from a perversity; without going into the factual matrix of the case, the impugned judgment had held that doctrine of part performance as contained in Section 53 (A) of the TPA is not applicable. This finding calls for an interference.

9 Arguments have been rebutted. It is pointed out that this defence of Section 53 (A) had not been taken in the written statement; it cannot be urged now; the case of the plaintiff all along was that his father Mangat Ram had in fact canceled the earlier agreement dated 13.11.1992 and this has been correctly appreciated in the impugned judgment. The doctrine of part performance is inapplicable.

10 This court sitting in a second appeal has to answer the substantial question of law as formulated by it. At this stage, relevant it would be to extract Section 53 (A) of the TPA which reads as under:-

“53A. 1[Part performance.- Where any person contracts to transfer for consideration any immoveable 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, 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 therefore by the law for the time being in force, 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: Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.”

11 The conditions necessary for making out the defence of part performance to an action in ejectment by the owner are

1. That the transferor has contracted to transfer for consideration any immoveable 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 transferor 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.”

12 This provision does not confer a title on the transferee in

possession; it only imposes a statutory bar on the transferor. In the instant case, is it not in dispute that an agreement to sell dated 13.11.1992 had been executed by Mangat Ram (the father of the plaintiff) qua the disputed shop in favour of the defendant. In terms thereof, the entire consideration had to be paid on or before 13.09.1993. At the back of Ex. PW-1/D1 (agreement to sell) at point 'Z', the plaintiff in his cross-examination had admitted that it bore the signatures of Mangat Ram (his father). Thus a fact finding had been returned by the two fact finding courts below that payment of ₹2,15,000/- had been received by Mangat Ram from the defendant. Admittedly the sale consideration was ₹2,80,000/- and this amount of ₹2,15,000/- paid by the defendant to Mangat Ram was only in part performance of the agreement dated 13.11.1992. The case of the plaintiff that this amount had been returned back by Mangat Ram to the defendant and a sum of ₹80,000/- had been received by the defendant vide Ex.PW-1/3 (dated 01.07.1995) had rightly not been believed by the trial court; perusal of Ex.PW-1/3 shows that it does not even bear the signatures of Mangat Ram i.e. the person between whom this agreement cum receipt had been executed; PW-1 has also admitted that he was not present at the time of the transaction of

this property. This finding on Ex. PW-1/3 was not reversed in the impugned judgment; the impugned judgment had, although, disallowed the defence of part performance to the defendant (under Section 53 (A) of the TPA), yet the court had not reversed the finding on Ex.PW-1/3.

13 Section 53 (A) of the TPA is a legal proposition; the trial Judge had adverted to in its judgment. Pleadings as is evident from the written statement clearly establish the defence of defendant that he was occupying this suit property in his own right; merely because a section or a particular statutory provision has not been mentioned is no reason not to take this defence into account. The trial court as also the first appellate court has dealt with the doctrine of part performance and this is also the substantial question of law formulated by this Court which has to be answered; the objection of the defendant that this question cannot be considered is of no avail.

14 This Court is of the view that essential ingredients of the doctrine of part performance (as contained in Section 53 (A) of the TPA) had been made out entitling the defendant to seek shelter and protection under this statutory provision. Admittedly in terms of this agreement dated 13.11.1992, the defendant was put in possession of the suit shop. This has specifically stated in para 2

of the written statement to which there is no denial in the corresponding para of the replication. Even before this Court learned counsel for the respondent has admitted that in terms of the agreement dated 13.11.1992, the defendant had been given possession of the suit shop; it has also been proved on record that a sum of ₹2,15,000/- had been paid by the defendant to the plaintiff in part performance of the contract; he was also ready and willing to perform his part of the contract and in fact his case was that the balance consideration had also been paid by him to the plaintiff. The case of the plaintiff on the other hand was that this amount had been returned back and a sum of ₹80,000/- had been paid vide Ex.PW-1/3. This document (as noted) was rightly disbelieved; it did not even bear the signatures of Mangat Ram. The impugned judgment while noting the ingredients of Section 53 (A) of the TPA had disallowed this defence to the defendant for the reason that there was nothing on record to show that the possession of the suit property had been handed over to the defendant in view of this agreement. This is a perverse finding. Para 2 of the written statement had specifically averred that the suit shop had been given to the defendant in view of agreement dated 13.11.1992 to which there was no denial in the replication. DW-2

had also specifically so stated this on oath for which there was not a whisper in the cross-examination.

15 This finding in the impugned judgment on this score is thus liable to be set aside.

16 The judgment relied upon by learned counsel for the respondent reported in IR 2008 Karnataka 157 Shivayya Vs. Praveena & another to support his submission that where the defendant has not filed a suit for specific performance, such a party is not entitled to a defence under Section 53 (A) and he cannot resist a suit for possession if his right to obtain specific performance is barred by limitation has been controverted by the learned counsel for the appellant; he has placed reliance upon the judgment reported in AIR 2002 SC 960 Shrimant Shamrao Suryavanshi and another Vs. Pralhad Bhairoba Suryavanshi where the Apex Court had noted that a defendant-transferee is entitled to protect his possession over the suit property taken in part performance of the contract even if the period of limitation to bring a suit for specific performance has expired; the Limitation Act does not extinguish the defence; it only bars the remedy. This judgment squarely answers this argument of learned counsel for the respondent.

17 The result of the aforementioned discussion is that the
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substantial question of law is answered in favour of the appellant and against the respondent. Appeal is allowed. Suit of the plaintiff is dismissed.

INDERMEET KAUR, J.

MAY 31, 2011

Ss/a