

**IN THE HIGH COURT OF PUNJAB AND HARYANA  
AT CHANDIGARH.**

**Regular Second Appeal No.3892 of 2006 (O&M)  
Date of Decision: January 15, 2015.**

Kulwant Singh and another

.....APPELLANT(s).

**VERSUS**

Parsada Ram

.....RESPONDENT(s).

**CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA**

Present: Mr. P.C. Gupta, Advocate  
for the appellant (s).

Mr. Saurabh Bajaj, Advocate  
for the respondent.

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**SURINDER GUPTA, J.**

This regular second appeal has been filed against the judgment and decree dated 24.08.2006 passed by Additional District Judge, Kaithal whereby the judgment and decree dated 14.03.2005 passed by Civil Judge (Junior Division), Kaithal was set aside and suit of respondent-plaintiff was decreed for permanent injunction restraining the appellants-defendants from dispossessing the respondent-plaintiff from the *Bara*/house in dispute.

2. Parsada Ram respondent-plaintiff filed suit for permanent injunction with the plea that he is owner in possession of *Bara*/house situated in village Keorak, Tehsil and District Kaithal shown as red with letters ABCD in the site plan Ex.P1 bounded as under:-

|       |   |                                                                                         |
|-------|---|-----------------------------------------------------------------------------------------|
| North | : | Road,                                                                                   |
| South | : | House of Puran,                                                                         |
| East  | : | Street,                                                                                 |
| West  | : | House of Ram Partap (in fact property of Parsada Ram, plaintiff as per site plan Ex.P1. |

3. The aforesaid *Bara* was owned by Kulwant Singh, appellant-defendant No.1 and was purchased by respondent-plaintiff on 02.09.1986 for a consideration of ₹6,000. The agreement was executed to this effect on 02.09.1986 and the possession was also delivered to the respondent-plaintiff on the same day. As per the terms of the agreement, appellant-defendant No.1 Kulwant Singh had agreed either to return the amount with interest on or before 01.03.1987 or to execute the sale deed in favour of respondent-plaintiff. It was also agreed that in the event of non-payment of loan amount of ₹6,000, respondent-plaintiff will be deemed as owner of *Bara* in dispute after 01.03.1987.

4. Neither the amount of ₹6,000 was returned with interest nor the sale deed was got executed in favour of respondent-plaintiff despite his request. Respondent-plaintiff was asked to use the *Bara* in dispute as owner with the assurance that the sale deed would be executed and got registered by Kulwant Singh after his retirement from service.

5. Respondent-plaintiff filled earth in *Bara*, raised boundary wall and constructed a room and kitchen by spending huge amount. He also planted several trees over it. Appellant-defendant No.1 was asked to get the sale deed executed and registered after his retirement but he had been postponing the matter on one pretext or the other. The appellants along with some other bad elements came to the spot about ten days before filing the suit and tried to dispossess the respondent-plaintiff from the *Bara*/house but their attempt was foiled due to intervention of respectables of the village, hence the suit, wherein the plaintiff has claimed the relief as follows:-

“It is, therefore, prayed that a decree for permanent injunction restraining the defendants from dispossessing the plaintiff from the *Bara*/house marked ABCD shown red in the site plan attached with plaint,

forcibly and illegally may kindly be passed in favour of the plaintiff against the defendants with costs.”

6. In the joint written statement, the defendants contested the claim of respondent-plaintiff inter-alia pleading that appellant-defendant No.1 Kulwant Singh was owner of land comprised in Khewat No.1466, Khatoni No.1944, rectangle/khasra No.901 measuring 5 marlas. He sold this land to appellant-defendant No.2 Jai Singh vide sale deed dated 09.08.2000 for a consideration of ₹18,000. The suit land was not properly described by the respondent-plaintiff and if it was not forming part of khasra No.901, the appellants-defendants had no concern with the same. It was admitted that appellant-defendant No.1 had taken loan of ₹6,000 from respondent-plaintiff which he had repaid with interest in the year 1987. No agreement for sale of the land ever took place and possession of the suit land was not handed over to the plaintiff-respondent. The land measuring 5 marlas forming part of khasra No.901 is continuously in possession of the appellants. A *Kotha* (room) and tree exist on the land measuring 5 marlas comprised in khasra No.901 which is now owned by appellant-defendant No.2.

7. Respondent-plaintiff reiterated his case in the replication and pleadings of the parties led to the framing of issues as follows:-

- (1) Whether the plaintiff is entitled to decree for permanent injunction restraining the defendants from dispossessing the plaintiff from the bara/house marked ABCD shown in red colour in the site plan forcibly and illegally ?OPP
- (2) Whether the suit of the plaintiff is not maintainable in the present form ?OPD
- (3) Whether the plaintiff has concealed the true and material facts from the Court ?OPD
- (4) Whether the plaintiff has no cause of action against the defendants ?OPD

- (5) Whether the correct and complete description of the property has not been given by the plaintiff and on this ground the suit is liable to be dismissed ?OPD
- (6) Whether the suit is false and frivolous and is liable to be dismissed with costs ?OPD
- (7) Relief.

8. To support the case of the plaintiff, draftsman Suresh Kumar, who prepared the site plan Ex.P1, was examined as PW1. Vipin Taneja scribe of the agreement dated 02.09.1986 (Ex.P2) and receipt (Ex.P3) appeared as PW2. Singha son of Nathu, marginal witness of the agreement, appeared as PW3 and stated that he had put his thumb impression on the agreement (Ex.P2). Plaintiff himself appeared as PW4.

9. To rebut the evidence produced by the plaintiff, Kulwant Singh, appellant-defendant No.1 appeared as PW1, appellant-defendant No.2 Jai Singh was examined as PW2 and they placed on file copy of the sale deed executed by appellant-defendant No.1 in favour of appellant-defendant No.2 (Ex.D1) and copies of jamabandies (Ex.D2 and Ex.D3).

10. Learned Civil Judge (Junior Division), Kaithal vide judgment dated 14.03.2005 dismissed the suit with the observations as follows:-

(i) The land in dispute i.e. *Bara* is the same which bear khasra No.901 which was owned by Het Ram, father of defendant No.1. Kulwant Rai was not the owner of this land as per jamabandi for the year 1993-94, as such, could not sell the same to the plaintiff.

(ii) Vide agreement dated 02.09.1986 (Ex.P2), a loan amount of ₹6,000 was raised and the suit land was mortgaged with possession in favour of respondent-plaintiff. The suit for injunction is not maintainable as the remedy available with respondent-plaintiff was to file suit for foreclosure.

(iii) Protection of Section 53-A of Transfer of Property Act is not

available to the respondent-plaintiff as this plea is available only in defence and not to base his claim in the suit on this plea.

(iv) The respondent-plaintiff has not proved as to why he has not got executed sale deed in pursuance of the agreement.

11. Not satisfied, the respondent-plaintiff filed appeal, which was allowed. The first Appellate Court while accepting the appeal observed that Kulwant Rai had taken a loan of ₹6,000 vide “agreement/mortgage deed” dated 02.09.1986 which was not proved to have been returned, as such, Kulwant Rai, appellant-defendant No.1 could not be allowed to sell the suit land to Jai Singh, appellant-defendant No.2, as the respondent-plaintiff had become owner in possession of the suit land as per the terms of the agreement. The observations to the above fact are contained in para 14 of the judgment of first Appellate Court, which read as follows:-

“As per my aforesaid discussion, defendant Kulwant Rai did not return loan amount of Rs.6,000/- to Parsada Ram within prescribed time by 1.3.1987. Hence, as per recital of Ex.P2 Parsada Ram is owner of the suit land because it has been stated in the mortgaged deed Ex.P2 that in default of payment of Rs.6,000/- by defendant Kulwant Rai, Parsada Ram shall become owner of the suit land and he shall be at the liberty to effect registration of the land in his favour. Hence prima facie case is established in favour of appellant/plaintiff and he shall suffer irreparable loss and injury if permanent injunction is not issued in his favour. Therefore, findings of issue No.1 are answered in favour of the appellant/plaintiff and against respondent. Hence, findings of learned lower Court are reversed to this extent.”

12. I have heard learned counsel for the parties and have perused the paper book and record of the Courts below with their assistance.

13. During the course of arguments, some of the facts which have not been disputed emerge as follows:-

- (i) Kulwant Rai, appellant-defendant No.1 was the owner of the disputed *Bara* as described in the agreement Ex.P2 which he had inherited from his father Het Ram.
- (ii) He took loan of ₹6,000 from respondent-plaintiff Parsada Ram and executed an agreement Ex.P2 and receipt Ex.P3.
- (iii) There is no document of the return of loan amount.

14. Learned counsel for the appellants has argued that the description of *Bara* as given in the plaint do not tally with the description as given in agreement Ex.P2, as such, identity of the suit property is not established. In the agreement Ex.P2, the dimensions of the property agreed to be mortgaged was given as 32' X 40', while site plan pertains to the property measuring 60' X 45'. The suit filed by the respondent-plaintiff was not maintainable as he could only seek the specific performance of the agreement dated 02.09.1986. The first Appellate Court has committed grave error of law and fact while observing that the sale deed executed by appellant-defendant No.1 in favour of appellant-defendant No.2 is not legal and valid in view of agreement Ex.P2. The above observation has been recorded by the first Appellate Court despite the fact that the respondent-plaintiff has not challenged the legality of the sale deed and has only sought protection of his possession over the suit property. The relief of permanent injunction to protect the possession of the respondent-plaintiff cannot be allowed and his possession cannot be protected under Section 53-A of Transfer of Property Act as the plaintiff has not sought the equally efficacious remedy available to him and the protection under Section 53-A is available only in defence.

15. Learned counsel for the respondent-plaintiff has argued that there is a specific term in the agreement Ex.P2 that loan of ₹6,000 was advanced for a period of six months. Interest on the loan amount was fixed as 2% per month which Kulwant Rai, appellant was liable to pay for six months till 01.03.1987. On his failure to pay the loan amount with interest, respondent was given the right to get the sale deed executed through Court. As the amount of loan was not paid, the possession of the respondent-plaintiff over the disputed plot was under the agreement. The entire sale consideration has already been paid, as such, the respondent-plaintiff is entitled to seek the protection of his possession under Section 53-A of Transfer of Property Act.

16. While admitting the appeal, following substantial question of law was framed:-

**“Whether learned Appellate Court below was legally justified in passing impugned judgment and decree dated 24.8.2006 against appellants/defendants when there is specific evidence on record that the land in dispute and land measuring 5 marlas comprised in khewat No.1466 khatauni No.1944, khasra No.901 situated in village Keorak, District Kaithal, are one and the same which stands sold to defendant No.2.”**

17. As already discussed, this fact is not disputed that the plot mentioned in agreement Ex.P2 is the same which was sold by appellant-defendant No.1 to appellant-defendant No.2.

18. The entire case of the respondent-plaintiff is based on the agreement Ex.P2, which when translated in English reads as follows:-

“We, (1) Kulwant Rai son of Het Ram son of Maidhan, resident of Keorak, is first party; (2) Parshada son of Datu son of Maidhan, resident of Keorak, is second party.

That a plot measuring about 32' X 40' situated at Keorak, Tehsil Kaithal is owned and possessed by first party and the same is bounded as follows:-

|       |   |                       |
|-------|---|-----------------------|
| East  | : | Street,               |
| West  | : | Property of Parshada, |
| North | : | Road,                 |
| South | : | House of Puran.       |

This plot which has not been mortgaged or sold earlier, is mortgaged with possession along with passage with second party for a sum of ₹6,000 (six thousand), half of which comes to ₹3,000. The possession has been delivered to second party. The first party will pay interest on the amount of ₹6,000 @ 2% per month for six months till 01.03.1987. Default of payment of the above amount with interest by first party will entitle the second party to get the sale deed executed through Court. The first party has received the entire amount of ₹6,000 vide receipt. For the registration of the sale deed, first party will not claim any other amount and the expenses of the sale deed will be borne by the second party. This agreement has been written for documentation.”

19. Perusal of the above agreement depicts that appellant No.1 had agreed to mortgage his plot measuring 32' X 40' in favour of respondent for a sum of ₹6,000. It was only as a penal clause in the event of non-payment of loan amount with interest that the respondent-plaintiff could get the sale deed, by treating the loan amount as sale consideration, executed from Kulwant Rai, appellant-defendant No.1 through Court. It is a suit for injunction, as to whether appellant No.1 committed default in complying the terms of agreement is an issue which could be seen and appreciated in appropriate proceeding seeking specific performance of the agreement.

20. Admittedly, no steps were ever taken by respondent-plaintiff

foreclosure. He never took any steps even to seek registration of the sale deed through Court under this agreement. No notice was ever served by respondent-plaintiff on the appellant-defendant No.1 calling upon him to execute the mortgage deed or sale deed in his favour. Hon'ble Supreme Court in case *A. Lewis & Anr. Etc Versus M.T. Ramamurthy & Ors. 2007(14) SCC 87*, has observed in para 6 of the judgment as under:-

“6. As rightly pointed out by the High Court, the existence of right to claim protection under Section 53-A of the Transfer of Property Act would not be available if the transferee just kept quiet and remained passive without taking effective steps. Further, he must also perform his part of the contract and convey his willingness.”

21. In view of the above fact, it will be relevant to see as to whether respondent-plaintiff was always ready and willing to perform his part of contract i.e. to get the sale deed executed and registered by bearing the expenses of registration. On perusal of statement of respondent-plaintiff, who appeared as PW4, it is evident that he has nowhere stated that he was ready and willing to perform his part of contract under the agreement or made any attempt to get mortgage deed or sale deed executed in his favour. He appears to be acting under the assumption that appellant No.1 stood debarred from seeking the redemption of mortgage even on payment of the loan amount. This assumption is erroneous and is not legally sustainable.

22. Now, another question which arises for consideration is as to whether the possession of respondent-plaintiff is protected under Section 53-A of Transfer of Property Act.

23. Section 53-A of Transfer of Property Act reads as follows:-

“53A. 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 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.]”

24. In the aforesaid Section, words “*the contract, though required to be registered, have not been registered, or*” occurring after the words “*notwithstanding that*” occurring in 13<sup>th</sup> line of Section reproduced above, were omitted with effect from 24.09.2001 by Act No.48 of 2001 (Section 10). However, the above amendment is not relevant for the purpose of decision of matter in issue in this case.

25. While discussing the import of Section 53-A of Transfer of Property Act, a Division Bench of this Court (Circuit Bench at Delhi) in case of *Sardari Lal and others Vs. Shrimati Shakuntla Devi* 1961 PLR 362 had

observed as follows:-

“17. The above section has imported the English doctrine of part performance with certain distinctive features. In England the phrase “part performance” is commonly used as a short and convenient statement of the general ground upon which verbal agreements regarding real estate are re-enforced. The doctrine rests upon the principle of fraud, and proceeds upon the idea that the party has so changed his situation on the faith of the oral agreement that it would be a fraud upon him to permit the other party to defeat the agreement by setting up the statute. The English equitable doctrine of part performance is a partial importation into India, and it is applied not generally, but within the confinement of the statute. The important limitation is, that the right conferred by section 53A is **only available to a defendant to protect his possession and does not furnish a basis for cause of action.** This right is restrictive in character in so far as it operates as a bar to the plaintiff asserting his title. This section contemplates that the transfer having taken place, the transferor is debarred from enforcing a right other than what is expressly provided by the contract. By applying the provisions of section 53A a person can protect his possession against a challenge contrary to the terms of the contract.

18. In *Parbodh Kumar Dass v. Dantmara Tea Co. Ltd.*, *AIR 1940 PC 1*, at page 2, Lord Macmillan said :-

“In their Lordships’ opinion, the amendment of the law effected by the enactment of Section 53-A conferred no right of action on a transferee in possession under an unregistered contract of sale. Their Lordships agree with the view expressed by Mitter, J. in the High Court that **‘the right conferred by Section 53-A, is a right available only to the defendant to protect his possession.’** They note that this was also the view of their late distinguished colleague Sir Dinshah Mulla, as stated in Edn.2 of his treatise on the Transfer of Property

Act at page 262. The section is so framed as to impose a Statutory bar on the transferor; it confers no active title on the transferee. Indeed, any other reading of it would make a serious inroad on the whole scheme of the Transfer of Property Act.”

It will thus be seen that section 53A confers no title on the transferee but permits this provision to be used in defence and not for attack.

Reference may also be made to *New Delhi Municipal Committee v. H.S. Rikhy, AIR 1956 Punjab 181 (185)*, wherein the view that Section 53A merely protects the defendant and does not confer any legal right. The right which is conferred by Section 53A is in the nature of a passive equity available only to the defendant for protection of his possession without conferring upon him any active title and on its basis the law in India does not permit him to sue. In a suit like the present the doctrine of part performance cannot be availed of.”

26. Section 53-A was inserted in Transfer of Property Act by way of Act No.20 of 1929 on the recommendation of the Special Committee constituted by then Government of India to make recommendation whether the British equitable doctrine of ‘part performance’ be extended in India also. The Special Committee was of the view that an illiterate or ignorant buyer who had partly performed his part of contract required statutory protection. The Committee was of the further view that where a transferee in good faith that lawful instrument i.e. a written contract would be executed by the transferor takes possession over the property, the equity demanded that the transferee should not be treated as trespasser by the transferor and subsequently evict him through process of law in the absence of lawful transfer instrument. The Special Committee also considered the question whether protection under the proposed Section 53-A to a transferee would

also be available even if the period of limitation for bringing an action for specific performance of an agreement to sell has expired. On the said question, the Committee was of the view that even after expiry of period of limitation, the relationship between the transferor and transferee remains the same as it was within the period of limitation and, therefore, the possession over the property taken in part performance of an agreement is required to be protected even if the period of limitation for bringing an action for specific performance has expired.

27. The object of introduction of the above provision in the Transfer of Property Act was to overcome the difficulty faced by the transferee in possession if his claim of seeking specific performance of agreement has become barred by limitation.

28. In case of *State Bank of Bikaner and Jaipur Vs. Vijay Kumar 1999(2) Civil Court Cases 671 (P&H)*, a Co-ordinate Bench of this Court has observed as follows:-

“If all the conditions are satisfied, then lessee (or the transferee) is entitled to continue in possession, irrespective that the lease has not been registered. Section 53-A is principally for the protection of ignorant transferees who take possession or spend money in improvements relying on documents which are ineffective as transfers or on contracts which cannot be proved for want of registration. The effect of the section is to relax the strict provisions of the Transfer of Property Act and the Registration Act in favour of the transferees in order to allow the defence of part performance to be established. It can be used not for an attack but only in defence and that too in defence only against the transferor or any person claiming under him. The right conferred is one available to the defendant to protect his possession.”

29. Hon’ble Supreme Court in case of *Raheja Universal Limited Vs.*

***N.R.C. Limited and others 2012(2) R.C.R. (Civil) 506***, has observed as follows:-

“47. The provisions of Section 53A of 1882 Act recognize a right of a transferee, where a transferor has given and the transferee has taken possession of the property or any part thereof. Even this provision does not create title of the transferee in the property in question but gives him a very limited right, that too, subject to the satisfaction of the conditions as stated in Section 53A of the Act of 1882 itself. In the case of *State of U.P. v. District Judge (supra)*, this Court, while deliberating upon the rights emerging from Section 53A of the Act of 1882, held as under:

“... That protection is available as a shield only against the transferor, the proposed vendor, and would disentitle him from disturbing the possession of the proposed transferees who are put in possession pursuant to such an agreement. But that has nothing to do with the ownership of the proposed transferor who remains full owner of the said land till they are legally conveyed by Sale Deed to the proposed transferees.”

30. In case of ***Delhi Motor Company and Ors Vs. U.A. Basrurkar (Dead) by his legal Representative and Ors 1968 AIR (SC) 794***, a Three Judges Bench of Hon’ble Supreme Court has observed that protection of Section 53-A is available as defence and does not confer a right on the basis of which a claim can be raised. Similar observations were made by Hon’ble Supreme Court in case of ***Biswabani Pvt. Ltd. Vs. Santosh Kumar Dutta 1980 (1) SCC 185***.

31. Perusal of Section 53-A of Transfer of Property Act shows that in order to defend or protect his possession, the transferee has to fulfill following conditions:-

- 1) there must be a contract to transfer for consideration any immovable property;
- 2) the contract must be in writing, signed by the transferor, or by someone on his behalf;
- 3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;
- 4) the transferee must in part performance of the contract take possession of the property, or of any part thereof;
- 5) the transferee must have done some act in furtherance of the contract; and
- 6) the transferee must have performed or be willing to perform his part of the contract.

32. In the light of the above proposition of law, it is to be seen as to whether the respondent-plaintiff was competent to file suit for injunction and seek the protection of Section 53-A of Transfer of Property Act. One of the ingredients required for seeking protection of Section 53-A of Transfer of Property Act is that he has performed or is ready and willing to perform his part of contract. There is no evidence led by the plaintiff to this effect. As such, he is not entitled to seek protection under Section 53-A of Transfer of Property Act firstly due to the non-fulfillment of the condition incorporated therein; secondly, protection under Section 53-A of Transfer of Property Act can be used not for an attack but only in defence. The right conferred is one available to the defendant to protect his possession.

33. The first Appellate Court while decreeing the suit, has gone astray while observing that appellant No.1 could not be allowed to sell the suit land. Even if, document Ex.P2 be taken as creating a charge over the disputed plot, the subsequent vendee will get the title subject to that charge

which he will be entitled to meet and seek the discharge of the same. In this

case, it was a loan transaction between the respondent and appellant No.1. In lieu of loan of ₹6,000, appellant No.1 agreed to mortgage with possession the disputed plot measuring 32' X 40'. Thereafter, remedy available for the respondent-plaintiff was to seek specific performance of the agreement. Instead he has started claiming himself to be owner of the disputed plot. Neither there is any document of title in his favour nor the agreement Ex.P2 has bestowed any title on the respondent-plaintiff. As per the terms of the agreement, he could come to the Court to get the sale deed registered. In the event of his filing the suit, it would have been a matter for the Court to consider as to what relief was to be allowed to him. Respondent-plaintiff after 1986 has not taken any step in furtherance of the contract or expressed his willingness to perform his part of contract. The suit filed by him is a misuse of the process of law. The first Appellate Court was not legally justified in passing the impugned judgment and decree dated 24.08.2006 against the appellants, which is perverse and against the facts of the case. The substantial question of law as framed in this case is answered in favour of the appellants.

34. As a sequel of my discussion above, this appeal has merit and the same is accepted. The judgment and decree passed by the first Appellate Court is set aside and that of lower Court is restored and affirmed.

**January 15, 2015.**  
*Sachin M.*

**( SURINDER GUPTA )**  
**JUDGE**