

HON'BLE Dr. JUSTICE B.SIVA SANKARA RAO
C.C.C.A No.38 OF 1997

JUDGMENT:

The unsuccessful plaintiffs in O.S. No.498 of 1990 on the file of VII Additional Judge, City Civil Court, Hyderabad maintained against defendant—Savitri Bai for declaration that they are the owners and for consequential eviction of the defendant—Smt. Savitri Bai and for mesne profits, for the same was dismissed by the trial Court, aggrieved by the dismissal of judgment and decree dated 09.09.1989, preferred the present appeal.

2) The brief facts of the plaint are as follows:

The 1st plaintiff—Satyasheela K.Kalevar @ Satyavathi Gandhi is the mother of 2nd plaintiff. The 1st plaintiff was allotted a two room tenement by the City Improvement Board in Khairatabad bearing House No.16/2 RT. It is renumbered as 6-1-576/7. The 1st plaintiff executed a hire purchase agreement Ex.A.1, dated 28.11.1956 and took possession of the house. The 1st plaintiff originally married one Mr.Gandhi and having divorced him, she again married one Keshavarao Kalevar. The 1st plaintiff stayed in the suit house for some time and later she was leaving Hyderabad and thereafter she engaged one Uddhamdas known to her as caretaker of her house and put him in possession. He was requested to occupy the house on free of charge and look after the maintenance of the same. Whenever she came to Hyderabad she used to stay in the suit premises. As she lost her husband Sri kalevar while they were at Indore, she wanted to come down and settle at Hyderabad and requested Uddhamdas to vacate the premises. It is also her plea that she paid all the monthly installments due to the Housing Board through said Uddhamdas and obtained sale deed covered by Ex.A2, dated 11.05.1978 and became full owner thereby of the suit premises, which is described in the Ex.A.3 plan appended to the Ex.A.2 sale deed and also certified by the

Housing Board vide Ex.A.4 letter dated 25.10.1989 in saying she became absolute owner pursuant to the Ex.A.2 sale deed obtained from the Housing Board dated 11.05.1978.

3) It is further averred that as Uddhamdas did not vacate the house, she filed suit O.S.No.3761 of 1978 against him seeking possession of the house property with damages for use and occupation from the date of suit and on his contest claiming that 1st plaintiff—Satyasheela K.Kalevar executed agreement of sale in favour of Savithri Bai—sole defendant herein O.S.No.490 of 1990, who is no other than mother of said Uddhamdas on 29.12.1962 and delivered possession of the suit house to her after receipt of the entire sale consideration of Rs.5,000/-. The 1st plaintiff denied the execution of said Ex.B.111 agreement of sale dated 29.12.1962, and also the receipt of Rs.5,000/-. The suit O.S. No.3761 of 1978 was ultimately on contest dismissed on 04.05.1983 after trial holding that Uddhamdas was in possession of the suit house by virtue of agreement of sale dated 29.12.1962 in favour of her mother Smt. Savitri Bai. Impugning said judgment and decree, the plaintiff No.1 preferred appeal A.S. No.96 of 1987 on the file of Additional Chief Judge-cum-Additional Metropolitan Sessions Judge, Hyderabad and the same was dismissed on 09.11.1989 holding that there are no reasons to interfere with the decree and judgment passed by the lower Court however, that “appellant is at liberty to file a separate suit for declaration of her title to the suit property and then she can request for possession by proving her title to the suit property”. It is basing on this observation only, present suit O.S.No.498 of 1990 was filed by the two plaintiffs viz., Satyasheela K.Kalevar @ Satyavathi Gandhi and Smt.Chaitanya Bala, against Smt.Savithri Bai for the relief of plaintiffs are the owners of said plaint schedule property bearing No.16-2 RT and Municipal No.6-1-576/7 admeasuring 180.00 Sq.yds equivalent to 150.66 Sq.mtrs situated at Khairatabad, Hyderabad shown in the red colour of the plan

appended to the plaint by dispossessing the defendant and persons claiming through her and any henchmen with past and future profits and also for costs.

4(a). The defendant Savithri Bai almost similar to the contest by her son Uddamdas (defendant in O.S.No.3761 of 1978), the respondent No.3 in the present appeal also since died and his legal heirs were brought on record as respondents 4 to 9, taken same stand in the written statement with counter claim for the relief of injunction against the plaintiffs to restrain their interference with her peaceful possession and enjoyment by saying the present suit is not maintainable with no cause of action and from bar by limitation.

4(b). The defendant Smt. Savitri Bai in O.S. No.498 of 1990 while not disputing that the 1st plaintiff is absolute owner of the property having been allotted the suit house property by the Housing Board and Housing Board put her in possession of the suit property, however contested that, 1st plaintiff never stayed in the house property and the theory of Uddham Das was that he was inducted as a care taker of the house and to occupy the house free of charge and maintained the property is an invented story, in saying apart from Uddham Das, she had other close relatives also at Hyderabad, and she executed agreement in favour of the defendant Savitri Bai-mother of Uddham Das dated 29.12.1962 marked as Ex.A99 in O.S.No.3761 of 1978 and in the present suit as Ex.B.111 and having received entire sale consideration under the agreement, 1st plaintiff put the defendant in possession and the earlier suit filed O.S. No.3761 of 1978 against Uddham Das, ended in dismissal, is also a bar to the present suit.

4©. It is also the contest of the defendant that the 1st plaintiff has no right to pay the installments to the Housing Board after entered into sale agreement with the defendant on 29.12.1962 and to obtain sale deed vide Ex.A2 by payment of installments by way receipts and

challans vide Ex.A5 to A94 on 11.05.1978. It is the contest therefrom that the sale deed Ex.A2 obtained by 1st plaintiff is only for the benefit of the defendant-sole agreement holder under Ex.B111 and that the 1st plaintiff is bound to execute registered sale deed in favour of the defendant and claimed that Rs.2,480/- paid by her to the Housing Board.

4(d). It is also the contest that the concession to file fresh suit for declaration of title given by the Appellate Court in A.S.No.96 of 1987 no way gives right to maintain the present suit and the alleged gift by 1st plaintiff in favour of 2nd plaintiff under Ex.A97 is not a genuine one but for brought into existence and it was not even mentioned in the appeal stage of earlier lis in A.S.No.96 of 1987 for the gift claimed subsequent to the suit filed in O.S.No.3761 of 1978 and before filing of the appeal.

4(e). It is also the contest that the plaintiffs' claim for declaration and possession is thereby misconceived for nothing now she can claim as the relief is even covered by the earlier lis already adjudicated and the defendant is entitled to have protection under Section 53 –A of the T.P. Act, as a shield even against the plaintiffs, and thereby the suit claim to be dismissed and the counter claim sought for permanent injunction to be decreed.

5). From the pleadings before the trial Court issues 1 to 7 were framed are as follows:

1. Whether the suit is not maintainable in view of provisions of Section 53 (A) of T.P Act?
2. Whether decree and Judgment passed in O.S. No.3761 of 78 on the file of 9th Assistant Judge and in Appeal No.96 of 1987 on the file of Additional Chief Judge cum Additional Metropolitan Sessions Judge, Hyderabad operate as resjudicata upon this suit?
3. Whether the plaintiff is entitled for the relief of declaration as prayed for?

4. Whether the plaintiff is entitled for the relief of ejectment of the defendant from the suit premises and delivery of vacant possession of the same?
5. Whether the plaintiff is entitled for Rs.18,600/- towards past mesne profits?
6. To what relief?

6) It is after settlement of the issues and during trial on behalf of the plaintiffs, 1st plaintiff and one Muralidhar Sharma were examined as PWs.1 and 2 respectively and Exs.A1 to A101 were marked which include A.1 to A.4supra, Ex.A.5 to A.94 receipts and challans of payments made to the Housing Board, Exs. A.95 and 96-Certified Copies of decree and Judgment in A.S.No.76 of 1987 supra. Ex.A.97 is the said original gift deed; Ex.A.98 is the plan appended to Ex.A.97; Ex.A.99 is the Certified copy of sale agreement claimed in favour of defendant-Savithri Bai dated 29.12.1962 with alleged receipts one is even date and the other on 22.02.1977 vide Exs.100 and 101 respectively; On behalf of defendant, though Savitri Bai was alive she did not come to witness box but for her son Uddham Das as DW.1 sole witness and marked Exs.B1 to B117 viz., Ex.B1—letter dated 20.12.1956 of Controller of accommodation, Ex.B1-A—Endorsement of the 1st plaintiff on Ex.B1, dated 21.12.1958, Ex.B2—Letter dated 12.03.1963 from Bombay, Ex.B3 and B.4 are the C.C of the Judgment and decree in O.S. No.3761 of 1978 on the file of IX Assistant Judge, City Civil Court, Hyderabad. Ex.B5—O/c legal notice dated 28.10.1983 issued to PW.1 with Ex.B6—Postal acknowledgement, Ex.B7—O/c of legal notice dated 30.12.1983 with Ex.B8—Postal acknowledgement, Ex.B9 to B109—Tax receipts and challans, Ex.B111—Agreement of sale dated 29.12.1962 marked in O.S.No.3761 of 1978 of Ex.A99), Ex.B112—C.C. of plaint in O.S. No.3761 of 1978, Ex.B113—C.C of written statement in O.S. No.3761 of 1978, Ex.B114—C.C. of deposition of Kamal Kishan in O.S. No.3761 of 1978; Ex.B115—C.C of deposition of Balaram in O.S. No.3761 of 1978; Ex.B116—C.C of

issues in O.S. No.3761 of 1978 and Ex.B117—G.P.A (original) given by the mother of DW.1 in favour of DW.1 dated 03.06.1996. Ex.C1 is the commissioner's report in I.A. No.238 of 1996 in O.S. No.498 of 1990.

7. The suit O.S.No.498 of 1990 on contest by the defendant was ended in dismissal before the trial Court vide judgment dated 30.10.1996. It is impugning the same, the unsuccessful two plaintiffs maintained the present appeal C.C.C.A. No.38 of 1998.

8) During pendency of the appeal, the two appellants died and appellant Nos.3 to 5 were brought on record as legal representatives of the 2nd appellant, vide order dated 28.09.2007 in C.C.C.A. M.P. No.417 of 2007. It is also to say the sole respondent Smt.Savitri Bai died during pendency of the appeal and as her legal representative are Madhulika Guman, D/o.Gian Singh was impleaded as 2nd respondent vide CCCA MP No.417 of 2007 dated 28.09.2007 and further Uddhamdas was also as other legal representative of Smt. Savitri Bai brought on record as R.3 to the appeal also later died, legal representatives of him were brought on record as R.4 to 9 vide CCCA MP. No.65 of 2015 dated 06.07.2015. It was endorsed as R.2 is not necessary party. R. 4 to 7 and 9 through one advocate and R.8 through another advocate are thus contesting appeal.

9. Heard both sides.

10.Now the points that arise for consideration in deciding the appeal in nutshell are:-

- i). Whether the plaintiff/appellant is entitled to the relief of declaration with consequential relief of possession and earlier suit O.S.No.3761 of 1978 ended in dismissal against which when appeal is preferred in A.S.No.96 of 87 where while disposing the appeal seeking for withdrawal there was a concession given to enable the appellant/plaintiff to file independent suit for declaration and possession as a result of which in filing the present suit is no way barred by law if so the trial Court decree and judgment holding the same as barred by resjudicata is unsustainable and requires interference by this Court while sitting in appeal?

ii). Whether the defendant is entitled to the counter-claim for injunction to protect possession claiming through an agreement under part performance of the contract for sale including under Section 53-A of the Transfer of Property Act, as concluded by the trial Court and if not whether the plaintiff/appellant is entitled to the relief of declaration and possession and to what extent this Court while sitting in appeal can interfere with the dismissal decree and judgment of the trial Court and with what observations?

iii). To what result?

Points i to iii:

11. From the facts referred and narrated supra, it no way requires repetition in saying once the 3rd respondent herein K. Uddhamdas as sole defendant in the earlier round of litigation in O.S.No.3761 of 78, no other than the son of Savitri Bai, the 1st defendant/1st respondent herein and said Savitridevi since died pending appeal, said Uddhamdas brought on record as sole legal heir, since he was contesting the earlier suit O.S.No.3761 of 78 based on agreement of sale dated 28.11.1956, said to have been executed by the 1st plaintiff by name Satyasheela K.Kalevar @ Satyavathi Gandhi(P.W.1) and thereby even Savitridevi was not a party to the earlier suit as the contest is by her son Uddamdas and on her behalf based on the agreement in her favour,who did not even seek to implead her as the alleged agreement holder i.e. Savitridevi the 1st defendant herein, for not even as her G.P.A. holder by then for Ex.B.117-GPA of her in his favour was dated 03.06.1996 for his deposing being her son as D.W.1 for she, as defendant did not come to witness box. It clearly reveals from the earlier round of litigation is for possession by eviction, whereas the present lis covered by second round of litigation is for declaration and possession for self-same property based on self-same title of plaintiff and on self-same ground of defence by the defendant herein and her son as defendant therein as also observed by the trial Court from self-same contest and self-same evidence and on self-same documents practically. Though otherwise a bar under resjudicata, once there is a concession given by the appellate Court in

A.S.No.96 of 97 enabling the plaintiff/appellant therein who is the plaintiff/appellant herein to maintain an efficacious suit for declaration and possession and once that appeal decree is made final without impugning, there is an estoppel against the defendant herein even though she is not a party from the finding is binding as an obitor, from agreement in her favour that was invoked by her son in the contest on her behalf in the earlier suit, even she did not come to witness box even for hearing but for her son even in her lifetime as referred supra. Thus, by virtue of the concession given by the appellate Court in the first round of litigation supra, there is no bar of resjudicata to the maintainability of the present lis before the trial Court for the trial Court to dismiss the same on the ground of resjudicata as there is estoppel that applies against the defendant(R.1) and her son-(R.3) respectively to raise such a contest having suffered the result to that extent by the appellate Court in the first round of litigation for the concession granted to plaintiff/appellant therein, to maintain the present suit by made it final without questioning its correctness. Thus, but for that, being stopped and but for the concession given by the Court in the first round of litigation to lay the second round of litigation, there is resjudicata. Thereby by virtue of that concession there is no resjudicata. The trial Court thus totally wrong in saying the earlier round of litigation for ejection operates as resjudicata to the present litigation for declaration and possession even that defendant in earlier round is not the defendant herein but for his mother for the contest is based on agreement executed by the 1st appellant/plaintiff to sell in favour of said 1st respondent/defendant by name Savitri Bai. Thereby to that extent the trial Court's dismissal decree and judgment on the ground of bar of resjudicata from said conclusion is unsustainable and is liable to be set aside.

12. Now coming to the claim of the plaintiffs(appellants) herein as well as even in the earlier suit for ejection against the

D.W.1(Uddamdas) herein as defendant therein was so also the defence of the defendant in that suit and his mother Smt. Savitri Bai as defendant in the present lis with no dispute that said Satyasheela k.Kalevar was allotted by the City Improvement Board, Khairatabad, the two rooms house bearing No.16/2 Room Tenement (bearing Municipal No.6-1-576/7) under hire purchase and paying monthly instalments as per agreement dated 28.11.1956 is not in dispute. The claim of plaintiff also in the evidence as P.W.1 is that after allotment of the house to her, she was to shift to Bombay from Hyderabad for professional engagements and later married one Keshavrao Kalevar as second husband after having get rid of her tie with her first husband Mr. Gandhi and while shifting to Bombay, she permitted Uddandadas(D.W.1), no other than the son of Smt. Savitri Bai, the defendant(herein), as a caretaker to look after the property till her arrival back and it is while so, her husband Keshavarao Kalekar died in 1977 while they were at Indore and therefrom she wanted to come back to Hyderabad to settle herein in the suit premises in the year 1977 and she came and demanded said Uddamdas to hand over the suit premises and as he failed to vacate, she was made to file the earlier suit No.3761 of 1978. She deposed in support of her further plea that, having paid all the installments to the Housing Board, she obtained sale deed under Ex.A.2 dated 11.05.78 from the Housing Board.

13. It is also important to mention from the Ex.B.113 written statement of even Uddamdas in the earlier round of litigation in O.S.No.3761 of 1978 was not that he got any independent right or he was staying setting up title by adverse possession against the plaintiff but basing on the sale agreement Ex.B.111 said to have been executed by the 1st plaintiff Satyasheela K.Kalevar in favour of mother of defendant who is said Uddanda das by name Savitribai, dated 29.12.1962 saying after having received Rs.5,000/- the entire amount in claiming later delivered possession and since then Savitribai and

Uddamdas as per right under the agreement were in possession of the said house and refusing to vacate.

14. Ex.A.1 is the agreement of sale dated 28.11.56 executed by the Hyderabad State representing through Governor in favour of the 1st plaintiff Smt. Satya Gandhi D/o Sri J.Khanna, Head Mistress, Bhansilal High School, saying to implement schemes for construction and allotment of houses under Low Income Group Housing Scheme, 1956 sponsored by Government of India, and as a part of that, the Housing Board constructed the House No.16/2 R.T.Kiataratbad and the allottee made a request to sell the house property to her to pay the amount under hire purchase by monthly installments and consequently as per the terms agreed upon the allottee is put in possession under the agreement to pay installments towards the sale price as fixed by the vendor and also to pay municipal, water and electricity charges to the respective departments while in occupation and charge of the property in allotting without right to sell or mortgage or otherwise dispose of the same till the payment of all the installments to the Housing Board in full and then to obtain registered sale deed and the allottee (1st plaintiff) may at any time pay the balance and purchase the house outright, however not entitled to sell the house to any other persons for 5 years from the date of allotment and if there is any violation by any sale within the said 5 years period, Government shall have first preference to purchase for the sale price less depreciation. So, the same is very clear of the allottee i.e. 1st plaintiff has to pay all the installments and after payment of last installment amount or by payment meanwhile in lumpsum of whole only, she has to obtain sale deed and meantime she has no right to alienate, more particularly, within 5 years from the date of allotment at any cost. Once the Ex.A.1 agreement in favour of the 1st plaintiff(P.W.1) by the Housing Board by then known as City Improvement Board was dated 28.11.1956, from where 5 years period to complete is by 28.11.1961. No doubt the Ex.B.111(Ex.B.99 in earlier

suit) sale agreement in favour of Smt. Savitri Bai claimed was dated 29.12.1962. A perusal of the said agreement dated 29.12.1962 supra shows executed by 1st plaintiff Satyavathy Gandhi W/o Shantilal Gandhi, in favour of Savitribai W/o Thadharam with the conditions that the vendor is in possession of the house allotted to her and put in possession by the City Improvement Board, Hyderabad on hire purchase basis on payment of Rs.1068/- being 20% of sale price and vendor (1st plaintiff) had been paying monthly installments regularly and still there was balance and the vendee agreed to purchase, subject to the vendors acquiring absolute ownership of the said house property for Rs.5,000/- and the vendor was not in position to transfer, on the date, as City Improvement Board allotted to her on the condition of not transferable within 5 years period from the date of allotment to her i.e. on 28.11.1956. Now it is agreed that vendor shall sell and the vendee shall purchase the said house for a consideration of Rs.5,000/- and the vendor shall obtain a letter of authority from the Hyderabad, Housing Board, Hyderabad or the successive office in the nature of no objection for alienation of the said house and whereafter the sale deed shall be executed and registered and vendor shall produce a 'nil' encumbrance certificate by obtaining from the registration authority of the District and vendee has paid entire sale consideration of Rs.5,000/- in cash to the vendor before the attestors witnesses by name Kanwar Kishan and another and the vendor acknowledged and received said amount and passed a separate receipt of and time for specific performance in favour of the vendee of the agreement runs only from the date when the vendor becomes competent to transfer said house and the contingency being house to become the transferable property of the vendor and vendor delivered vacant possession to the vendee and vendee shall pay all monthly installments to the Housing Board or its successors in the name of vendor and keep receipts for vendee herself and shall pay property tax, electricity charges and water charges with no responsibility to

vendor and the vendee to as and when demands made and vendor and shall not claim back possession of the house or rescind the performance of the contract, for any breach or any default, the vendor shall pay Rs.5,000/- towards liquidated damages with sale money of Rs.5,000/- and vendee is at liberty to make additions, alterations and constructions, and carry major or minor repairs to the said house and in consequence of any breach of the performance due to the default on the part of the vendor, the vendor shall be liable to pay the costs and expenses incurred by the vendee to such additions, alterations and repairs etc., that may have been done and made, by the vendee to the said house, from time to time, irrespective of the fact, whether the vendee has obtained the requisite sanction or not and the vendor handed over all the correspondence between the vendor and the Government and the Housing Board and the receipts for payment of premiums so far by her in token of her bona fide intention to implement this agreement. The vendor is shown as signatory in the agreement only at last page i.e. page No.5.

15. No doubt as referred supra under Ex.A.1, the bar is for alienation within 5 years after allotment and not later though title cannot be conveyed. Though the fact remains from perusal of the Ex.B.111 possessory sale agreement, dated 29.12.1962, it is a conditional agreement being aware about original agreement obtained by the plaintiff from the Housing Board and after payments of installments only, the title will be transferred in her name for in the meantime there can be no title to convey for no right to transfer. It is the possessory sale agreement acknowledging the delivery of possession, though in the title or in the nomenclature of the agreement it no way referred as such at page 1(one). Undisputedly for claiming part performance of the contract under Section 53-A of the T.P.Act, the vendee must show readiness and willingness. The Subsequent acquisition of title after the agreement by the vendor can be enforced

by the vendee for specific performance against the vendor from reading of Sections 20,16 and 17 of the Specific Relief Act, 1963, provided the vendee is always ready and willing to perform her or his part of the contract. In this case as referred supra in favour of 1st plaintiff the agreement executed by the Housing Board by putting her in possession by allotment of the plaint schedule property was under Ex.A.1 dated 28.11.1956. The agreement relied on by the defendant through the evidence of her son D.W.1 including in the earlier suit D.1, exhibited as Ex.B.99 and marked as Ex.B.111 was dated 29.12.1962.

The 1st plaintiff undisputedly obtained from the Housing Board regular sale deed on 11.05.1978 which is Ex.A.2. The recitals of Ex.A.2 speak that pursuant to the hire purchase and allotment agreement executed dated 28.11.1956(Ex.A.1 supra), for Rs.9566.65 paise, to pay the installments to transfer title thereafter, the title is conveyed as payment made and a plan is appended as part of the sale deed. From this now though on combined reading of Exs.A.1 and A.2 with Ex.B.111 and within the scope of provisions of the Specific Relief Act referred supra the vendee, the defendant can claim by suit for specific performance to enforce the contract for sale at least within three years from Ex.A.2 sale deed dated 11.05.1978 and at least immediately after filing of O.S.No.3761 of 1978 and serving of summons of that defendant Sri Uddhamdas- son of Smt. Savitri Bai. It was not done. Even by Exs. B.5 and B.7 notices in 1983, the claim is barred for specific performance. The claim for specific performance thus at any cost thereby barred by law of limitation under Article 54 of the Indian Limitation Act. However even by prior to the date of counter claim for injunction relief in the present suit O.S.No.498 of 1990, the sale agreement remedies right to seek specific performance of the contract for sale is barred by limitation, the protection to claim possession as a shield under the doctrine of part performance can be availed, provided it is proved of always ready and willing to perform the part of contract left unperformed by the vendee- vide expression of the Apex Court in

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Suryavamshi^[1], the reasoning is that law of limitation a bar to claim or the remedy, but did not bar to the defence, as such even to file suit for specific performance became barred by limitation, a person who obtained possession in part performance can defend his possession in a suit for recovery of possession by the transferor or any subsequent transferee from his and claiming under him, provided the requirements of Section 53-A of the T.P.Act, exists. For that purpose Section 53-A of the T.P.Act reads as follows:-

53A:Part performance:

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, notwithstanding that 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 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 or a transferee for consideration who has no notice of the contract or of the part performance thereof.

From the Section 53-A of the T.P.Act wording supra also, transferee has to show performed or is willing to perform his part of contract in addition to showing has done some act in furtherance of the contract, that even required to be registered not registered, the possessory agreement or agreement evidencing by possession not registered is thus no bar to invoke the protection to continue.

16. No doubt, the case of 1st plaintiff (P.W.1) is that she never executed the said sale agreement much less in favour of Savitribai(D.1 herein) mother of Uddandadas(D.W.1) and he is only caretaker and lincensee permitted to take care of the house, if not trustee by saying

the permission is even to vacate after her arrival and while so stating for the defendant failed to vacate which made her to file the suit O.S.No.3761 of 1978 against him and the possessory sale agreement in favour of his mother Savitri Bai was even relied to contest, said Savitribai, alleged agreement holder, was not impleaded in the earlier suit. It is to say under the agreement of sale subject to proof to claim protection of part performance to continue in possession. Once relying for that defence with counter claim by the defendant, the defendant and her son in claiming through her under the sale agreement have no manner of right to set up hostile title or to claim any title by adverse possession but for by showing continuous readiness and willingness to perform their part of the contract remained to be performed to continue to protect such possession as a shield. When the defendant (Savitridevi) herein under the agreement besides the plaintiff disputes the same, not enforced the agreement in any manner by filing any suit for specific performance and there is something remained to be performed that is to obtain sale deed even possession claimed delivered and even being conscious of earlier suit lis contested based even on the possessory agreement in her favour by her son, to say she got knowledge of the earlier suit lis which contested by her son on her behalf also thereby whether such a shield can be used to resist the suit for declaration and possession by maintaining the counter claim for injunction. It is needless to say counter claim made for injunction relief cannot make the shield as sword.

17. The decisions placed reliance in this regard by the defendant before the trial Court are in **State of U.P.Vs. District Judge** ^[2] held that protection under Section 53-A of T.P.Act to the proposed transferee under the agreement of sale, cannot be claimed of land covered by the agreement as liable to be included in the holding of the owner-vendor and that is surplus. The decision has no application herein so also the decision referred therein of **State of A.P.Vs. Mohd.**

Ashrafuddin^[3] where the three Judge Bench expression of the Apex Court is that the possession of holding of agreement holder and the owner and transferee can include his holding and show the same as excess for surrender. The other decision placed reliance is of **Balmik Vs. Ramnaresh Singh**^[4] of suit for possession basing on registered sale deed executed by D.7, other defendants pleading possession under unregistered sale deed executed by the D.7, if the said sale deed is found genuine, the defendants can plead protection under Section 53-A of the T.P.Act and validity of the sale deed not gone by the High Court in disposal of the suit thereby the Apex Court remanded the matter to decide that also has no application herein. Among the other decisions in this regard is **A lewis s. M.T.Rama murthy**^[5], it is categorically observed therein that the benefit u/sec. 53 of the T.P.Act, is not available if the transferor kept quite and remained passive without taking effective steps as to claim protection for he must perform his part of the contract and also convey his willingness to perform. Thus even to claim protection under Section 53-A of the T.P. Act as a shield, the plea of readiness and willingness is essential and he must demand and not mere sitting passive enough.

18. Here from this legal position, coming to the facts further in proof of the said possessory agreement in favour of the defendant dated 29.12.1962 covered by Ex.B.111 in the earlier suit both the attestors K.Balaram and Kunwar Kishan were cross-examined and it is deposed by D.W.1 Uddamdas that Kunwar Kishan died and whereabouts of K.Balaram were not known to say their depositions are admissible under Section 33 of the Indian Evidence Act, which are exhibited as Ex.B.114 and 115 respectively to say the Exs.B.111 possessory agreement is proved. In fact once the plaintiff obtained from Housing Board regular sale deed dated 11.05.1978 and even defendant cause issued legal notices under Exs.B.5 to B.8 that too with acknowledgments in October and December,1983, no reply or

refusal apart from already the plaintiff filed earlier suit O.S.No.3761 of 78 and even the possessory agreement exhibited therein, there was no whisper and it is only the latter even notices issued. The fact however remains further is that on 14.06.1983 itself the 1st plaintiff executed registered gift deed covered by Ex.A.97 in favour of her daughter Chaitanya Bala after first round of litigation of suit filed in O.S.No.3761 of 1978 before the judgment of the suit and even on knowing. Once the suit for specific performance not filed and barred, defendant is not entitled to enforce even taken the possessory sale agreement is proved and the law as laid down in **A Lewis** supra by the Apex Court to claim protection u/sec. 53-A of the T.P.Act remaining passive with inaction without taking steps to perform the part of the contract by expressing readiness and willingness always, protection cannot be invoked even as a shield. No doubt the law is very clear that even the suit for specific performance barred by law, protection u/sec. 53-A of the T.P.Act as a shield can be invoked. However, Section 53-A of the T.P.Act referred supra, willingness to obtain sale deed by performing her part of the contract remained to perform is one of the pre-requisites like u/Sec.16 of the Specific Relief Act, though specific performance barred by law to claim protection to continue based on the counter claim which is no doubt not as sword but as a shield. Once such is the case, the mere payment receipts for water charges, electricity charges and house tax etc., for that defendant in possession of the property from what the plaintiff also claiming she put the son of the defendant in possession by name Uddamdas as a caretaker and when what they claimed is not even by adverse possession. From possessory sale agreement in claiming equitable relief of injunction in the counter claim even to invoke Section 53-A of the T.P. Act, apart from no injunction of equitable relief can be granted against true owner, but for to enforce Section 53-A of the T.P.Act as a shield, while disputing the entitlement of the plaintiff's claim for possession by the defendant, the defendant can continue in possession even not entitled

to the relief of injunction until evicted through due process of law. The explanation of the plaintiff of sending money to her relative Smt.Rani Karan Prasad by instructing to pay installments of the Housing Board, however she has taken away the receipts and handed over to Uddamdas and those filed by Uddamdas therefrom in the earlier suit O.S.No.3761/78 is unbelievable for saying certified copies of the same thereby and certified copies of the same obtained from Housing Board and filed by the plaintiff.

19. According to 1st plaintiff(P.W.1) Uddham Das was put in possession of the house property and whenever she was coming to Hyderabad she stayed in the suit premises, that after her husband kalevar died in the year 1977, she wanted to settle in Hyderabad and requested Uddham Das to vacate the house and she, having made payments of balance installments under the hire purchase agreement to the Housing Board at once and obtained Ex.A.2 sale deed in her favour from the Housing Board. No doubt, she claims that she never entered into the so-called agreement of sale on 29.12.1962 in favour of the defendant Smt.Savitri Devi, mother of D.W.1 Uddham Das and she did not receive Rs.5,000/- and the signatures on the sale agreement were not that of her and even by 1962, she was not having any title from Housing Board to enter into any agreement as she was only allottee in the year 1956 and Housing Board did not convey title to her till 1978. PW.2—Muralidhar Sharma deposed that PW.1 was residing at Bombay and he was meeting her at Bombay several times. In 1957, he went on official tour to Bombay and stayed at her for a few days. In the year 1962, during Christmas vacation, he contacted PW.1 over telephone in connection with his nephew, who ran away to Bombay to become a film hero and took shelter in the house of PW.1. PW.1 did not come to Hyderabad in the last week of December.

20. DW.1 Uddham Das, son of the Savitri Devi, deposed that PW.1 was financially unsound and decided to sell away her house

and she entered into an agreement of sale for the suit house in favour of his mother under Ex.B111=Ex.A99 dated 29.12.1962, in the presence of one Kamal Kishan and M.Balaram who attested the agreement and he was also present at the time Ex.B111. Under Ex.B111, the sale consideration of Rs.5,000/- was paid in cash to PW.1, who passed a receipt vide Ex.B110 in the presence of the attestors supra and delivered possession of the suit house to the defendant on the same day of the agreement and ever since the defendant and DW.1 were in possession and enjoyment of the suit house uninterruptedly. As per the terms of Ex.B111, the defendant was to pay the future hire purchase installments to the Housing Board, which the defendant paid upto 1977. The defendant has also paying the water and electricity consumption charges and the property tax for the suit house. As per the terms of Ex.B111(discussed supra), the defendant was permitted to take alterations and additions as per her requirement in the suit house at her own cost. Exs.B9 to B109 are the original tax receipts and challans. He deposed that 1st plaintiff handed over to the defendant and DW.1 later behind back of defendant, she paid the balance of future installments and obtained Ex.A2—sale deed in her favour on 11.05.1978 from Housing Board. The defendant and Uddham Das came to know this fact only after filing of O.S. No.3761 of 1978 against him, which he contested and said suit was dismissed. Both the attestors of the Ex.B.111 sale agreement were examined but Kamal Kishan died recently whose deposition was marked as Ex.B114 and another attestor Balaram, whose deposition marked as Ex.B.115 of whose whereabouts are stated not known. The defendant issued two legal notices covered by Exs.B5 and B7 dated 28.10.1983 and 30.12.1983 respectively, for which the 1st plaintiff failed to respond, to enforce the sale agreement of 1962 and after earlier suit and appeal ended in dismissal, Uddham Das made further constructions in the schedule property according to him by spending nearly 3.5 lakhs and by then the suit O.S. No.498 of 1990 was filed

and advocate commissioner was appointed and inspected the property and his report marked as Ex.C1 shows the improvements made. The evidence of P.W.2 runs contrary to the evidence of P.W.1, that at the time of execution of agreement, 1st petitioner was at Bombay in December, 1962, which cannot be believed in the light of evidence proving the due execution of the sale agreement and thereby it can be said the Ex.B.111 possessory sale agreement is proved. Once the Ex.B.111 sale agreement is proved and when what is remained is obtaining of sale deed, in the facts supra, it can be said from the counter claim of defendant, for she was not party to the earlier suit, for not even impleaded her, after contest by defendant by referring to the sale agreement, it cannot be denied of the protection of Section 53-A of the T.P.Act is available to the defendants. However, it is to be made clear that, same no way takes away any further rights of plaintiffs regarding seeking any recession of the contract for sale and to seek for possession consequent thereto.

21. Accordingly, while the point for consideration No.i is answered in favour of the plaintiffs-appellants, the point No.ii for consideration is answered in favour of the respondents-defendants to the above extent.

22. In view of the above discussion, the appeal can be partly allowed only by declaring the plaintiffs as absolute owners having title over the plaint schedule property and however by virtue of the possessory sale agreement proved executed by the 1st plaintiff in favour of the 1st defendant, the plaintiffs are not entitled to the consequent relief of possession of the plaint schedule property from the defendants without rescinding the sale agreement to seek for possession.

23. Accordingly and in the result, by setting aside the trial Court's dismissal decree and judgment dated 09.09.1989, the appeal

is partly allowed to the extent of declaring that the plaintiffs are the absolute owners of the plaint schedule property having title over the same; however by virtue of the possessory sale agreement proved executed by the 1st plaintiff in favour of the 1st defendant, the plaintiffs are not entitled to the consequential relief of recovery of possession from the defendants, until the contract for sale is rescinded and thus till then the defendants are entitled to continue in possession of the suit property by left open to the plaintiffs to seek any such remedies. There is no order as to costs.

24. Consequently, miscellaneous petitions, pending in this appeal, if any, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Dt.03.06.2016

VVR/KNL

[\[1\]](#) (2002) 3 SCC 676

[\[2\]](#) 1997(1) SCC 596

[\[3\]](#) AIR 1982 SC 913

[\[4\]](#) 2002(5) ALD 4 (SC)

[\[5\]](#) 2007 14 SCC 87