

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Date of Decision: July 05, 2016
RSA No.2144 of 1987 (O&M)

1)

Surinder Singh and others

.... Appellants

Vs.

Piara Singh @ Shangara Singh

.... Respondent

2)

RSA No.1379 of 2006 (O&M)

Surinder Singh and others

.... Appellants

Vs.

Piara Singh @ Shangara Singh

.... Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?

Present: Mr. Bhavnik Mehta, Advocate
for the appellants.

Mr. Sarwan Singh, Senior Advocate with
Mr. N.S. Rapri, Advocate
for the respondent.

Amol Rattan Singh, J.

These two appeals filed 19 years apart from each other, are otherwise connected, as the dispute is qua the same suit property. Though the appellants in both the appeals are the same, as is also the respondent in each appeal (now represented by his LRs), however, in a manner of speaking, the suits were 'cross-suits' to the extent that the defendant in the earlier suit (Civil Suit No.259 of 16.11.1983) was the plaintiff in the second

suit, filed on 23.01.1999. The first suit sought possession of the suit land from the defendant, whereas the second suit sought permanent injunction by the defendant in the first suit, against the plaintiff in the first suit; i.e. the plaintiff in the second suit sought permanent injunction against the LRs of the plaintiff in the first suit, qua the same suit land.

The appeals, though shown at the same serial number in the cause list, were heard separately and judgment reserved in each on different dates. However, being interconnected they are being disposed of by a common judgment.

2. The first appeal, i.e. RSA No.2144 of 1987, is being considered first and thereafter only the second appeal, being one arising out of a suit for permanent injunction, would be considered, consequent upon the decision in the first appeal.

Though initially both the learned counsel for the parties, were ad idem that if the appeal arising out of the suit for possession (RSA No.2144 of 1987) is to be dismissed, then this appeal would be rendered infructuous, however, subsequently, Mr. Bhavnik Mehta submitted that even if that appeal was to be dismissed, the respondents would still not be entitled to a decree of permanent injunction, in view of what is contained in Section 44 of the Transfer of Property Act, 1882.

RSA No.2144 of 1987

3. The facts in the first appeal, as taken from the judgment of the learned Courts below in the first suit, are that the plaintiff in the said suit

sought a decree of possession, putting him in such possession of a half share of the suit land measuring 27 kanals 12 marlas, of which, admittedly, the plaintiff and defendant were both joint owners to the extent of half a share each. However, it was contended by the plaintiff that he had been ousted from his possession of the land, upon the defendant taking such possession of the entire land (27 kanals 12 marlas, including the half share of the plaintiff therein), from the tenants on the land, since the *Kharif* season of 1979 (as given in the plaint, erroneously recorded as 1973 in the judgments, at some places).

Prior to institution of the suit before the learned Sub-Judge 1st Class, Hoshiarpur, on 16.11.1983, it is recorded in the judgment of that Court, that the plaintiff had earlier filed a suit in a Court at Dasuya, which had been resisted by the defendant and was eventually returned on 05.03.1982, to be presented before the proper Court.

Thereafter, the plaintiff filed a suit before the Sub-Divisional Officer (Collector), for possession and recovery of his half share of the land, which was also resisted by the defendant and finally, the suit in question in this appeal, was filed.

4. The case set up by the plaintiff (represented before this Court through his LRs), was that vide an agreement dated 26.07.1975, executed between him (plaintiff) and the defendant, the plaintiffs' half share in the suit land was to be sold by the plaintiff to the defendant, on payment of a consideration of Rs.1600/- per kanal (thus amounting to approximately Rs.22080/- as per the first appellate court). Of that amount, Rs.5,000/- was

paid as earnest money at the time of the execution of the agreement to sell. It was agreed upon, that the sale deed would be executed on 05.06.1976 but that time was extended initially up to “*Jeth Samvat 2034*” and at the time of such extension of date, another Rs.9,000/- were paid by the defendant and a writing to that effect was also executed.

It was further contended by the plaintiff that thereafter, the defendant did not pay any consideration to him and in fact, declared his non-willingness to complete the transaction, though he himself (plaintiff) was always ready and willing to execute the sale-deed. Hence, it was contended that the agreement having been violated by the defendant, his earnest money stood forfeited and the plaintiff deserved to be put in possession of the suit land.

In the plaint, it was also submitted that the plaintiff had also surrendered his possession of the suit land, at the time of execution of the agreement, on 26.07.1975.

5. Upon notice, the defendant contested the suit and submitted that he was not a donee of the suit land and in fact had been in possession thereof, on the basis of the agreement to sell dated 26.07.1975. He admitted the consideration amount settled, including the payments of Rs.5,000/- and Rs.9,000/- and further contended that he had paid another sum of Rs.6,000/- on 14.09.1979, in respect of which an endorsement was made, and the time for execution of the sale deed was extended up to 15.12.1979. Thus, it was contended by the defendant, that he had paid a sum of Rs.20,000/- in all to the plaintiff and he was ready and willing to perform his part of the contract.

It was further contended that he had made improvements upon the land, further incurring a cost of Rs.6,000/- and had also installed a tubewell on which he spent Rs.5,000/-. Still further, it was contended that he had duly appeared in the office of the Sub-Registrar for executing the sale deed, on 14.12.1979, 15.12.1979 and 18.12.1979.

6. A replication was filed by the plaintiff, refuting the payment of Rs.6000/- on 14.09.1979, alleging further that the endorsement in that regard was a forged one.

On the aforesaid pleadings, the following issues were framed by the learned Sub-Judge:-

- “1. Whether the plaintiff is owner of half shares of the suit land?OPP
2. Whether the defendant is owner in possession of ½ share of the suit land in terms of agreement dated 26.07.1975?OPD
3. Whether the defendant has made any improvements on the suit land? If so its value and effect?OPD
4. Whether the plaintiff was willing and ready to perform his party of contract?OPP
5. Whether the defendant failed to comply with the terms of the agreement dated 26.7.75 and it was, therefore, cancelled?OPP
6. Whether the suit has not been property valued for the purpose of court fee and jurisdiction?OPD
7. Whether suit is barred by time?OPD
8. Whether the plaintiff is estopped by his acts and conduct from filing this suit?OPD
9. Whether the suit is maintainable in the present form?OPP
10. Whether the defendant was not delivered possession of the plaintiff's ½ share of the suit land by way of part performance of agreement to sell?OPP
11. Whether the plaintiff was ousted by the defendant, as alleged?OPP

12. Relief.”

7. The plaintiff himself testified as PW1, whereas the defendant examined himself and 9 other witnesses.

On appraising the evidence, the learned Sub-Judge firstly found that the execution of the agreement and payment of Rs.5,000/- and another Rs.9,000/- on 26.07.1975 and 05.06.1976 respectively was an admitted fact. Though the payment of another Rs.6,000/- on 14.09.1979 was denied by the defendant, however, in view of the endorsement made on the agreement with regard to such payment and corroboration thereof by one Gurdev Singh (DW8), the said amount was also held to have been received by the plaintiff. It was further held that the very fact that the plaintiff had applied to the Collector for mesne profits and yet had filed the suit for possession, it obviously showed that possession stood with the defendant.

8. However, finding that no suit for specific performance had ever been filed by the defendant, seeking execution of the sale-deed in terms of the agreement dated 26.07.1975, and limitation for filing such suit having expired, taken from the date of last payment made, i.e. from 14.09.1979, it was held that the plaintiff was entitled to possession of the suit land. It was further held that the suit for possession had been filed (by the plaintiff-owner) within 12 years, and therefore, the suit of the plaintiff was within limitation.

As regards the contention of the defendant that he had made improvements on the property, including installation of a tubewell and thus had spent Rs.6,000/- plus Rs.5,000/- on the suit land, that issue was also

decided against the defendant, as no evidence with regard thereto was led.

9. The contention of the learned counsel for the defendant was also noticed by the learned Sub-Judge, to the effect that since possession had been delivered to the vendee (defendant) by the plaintiff, the defendant would be protected by Section 53A of the Transfer of Property Act 1882. The learned Court held, while noticing various judgment cited on behalf of the defendant, that though it had been laid down therein that time is not of the essence in a contract to sell immovable property, however, since the contract ceased to operate after the sale deed was not got executed on 14.09.1979, and the defendant had not filed any suit for specific performance, his possession would not culminate into one of an absolute owner of the property. His possession, according to that Court, was to be “protected only as a trespasser” and was to be taken back as per law. Thus, the plaintiff being a co-sharer to the extent of a half share in the suit land, and being owner of it to that extent, was held entitled to be put in possession thereof.

Consequently, the suit of the plaintiff was decreed in his favour, holding him entitled to take possession of the suit land.

10. In the appeal filed by the legal representatives of the defendant, i.e. those who are also the present appellants, the learned first appellate Court, after noticing the pleadings and the evidence led, and the arguments before it, found that the defendant was in actual possession of his own half share of the property, as also in possession of the half share which was agreed to be sold to him, but that the contention of the plaintiff-respondent

was that he had been dispossessed by the defendant only upon having got such possession from the tenants, since *Kharif* 1973 (actually Kharif 1979, as already noticed). Hence, the possession of the defendant was well admitted at least since 1979.

The findings of the lower Court, to the effect that Rs.5,000/- plus Rs.9,000/- plus Rs.6000/- were paid to the plaintiff by the defendant, were upheld on the same reasoning, i.e. admission on the part of the plaintiff qua the first two payments and the endorsement on the instrument (agreement to sell), seen with the testimony of DW8, as regards the last payment. As per the first appellate Court, eventually it had been agreed upon that the sale-deed would be executed by 15.12.1979.

However, disagreeing with the reasoning of the learned Sub-Judge, as regards the protection afforded under Section 53A, the lower appellate Court went on to hold that simply because a suit for specific performance of the contract was not instituted by the defendant, he would not be disentitled to the protection of the aforesaid provision of the Act of 1882. It was further held that with the time for executing the sale deed having been extended from time to time, time for execution was not the essence of the contract.

This was held to be especially so, in view of the fact, as held by that Court, that there was no bar on limitation to a defence being taken under Section 53A, when the time for execution of the sale deed had been time and again extended, and out of the total consideration of Rs.22080/- (as stated by that Court), the defendant had already paid Rs.20,000/-.

Consequently, the appeal was allowed and the suit filed by the plaintiff dismissed, holding that upon the remaining Rs.2080/-, plus ancillary expenses of stamp duty and registration etc., being deposited by the defendant, in the Court, by 20.06.1987, the plaintiff would execute the sale deed. It was further, however, stated that upon non-deposit of the aforesaid sum by the aforesaid date, the appeal would be deemed to have been dismissed.

11. Though no question of law had been framed earlier at the time when the second appeal was filed in 1987, the learned counsel for the appellants-plaintiff had subsequently framed 11 questions of law, which were ordered to be taken on file vide an earlier order dated 10.07.2014. Of these, essentially only two are actually questions of law and the others would amount to being questions dependent either consequent upon the decision on the substantial questions of law, or with regard to whether there was any perversity in the judgment of the lower appellate Court, in holding that a “new agreement dated 14.09.1979” stood duly proved.

Actually, the substantial question of law really involved in the present appeal, is as to whether, in the circumstances of the case, the defendant is entitled to the protection of Section 53A of the Transfer of Property Act, 1882, or whether the plaintiff-appellants are entitled to the protection of Section 16 of the Specific Relief Act, 1963.

The appeal is accordingly being considered in terms of the arguments made on the aforesaid substantive issue, with the other arguments to be dealt with essentially as questions of fact, as regards any perversity of

findings, by the lower appellate Court.

12. Mr. Bhavnik Mehta, counsel for the appellants, submitted that specific performance of a contract cannot be enforced in favour of a person who has not been ready and willing to perform the essential terms of the agreement that had to be performed by him, and as such, the decree in favour of the respondent-defendant, by the learned lower appellate Court, directing the predecessor-in-interest of the present appellants, i.e. the plaintiff, to accept the remainder amount of Rs.2080/- along with stamp duty and registration charges, and thereafter, to execute the sale deed in favour of the defendant, was actually contrary to Section 16 of the Act of 1963.

He further submitted that a perusal of the record before the Courts below, in the form of *khasra girdawaris* , shows that it was actually tenants who were in the possession of the suit land; namely, one Tulsi in 1975, Dogar in 1976 and Pritam Singh in 1979, and thereafter, the successors-in-interest of Pritam Singh actually handed over the suit land to the appellants, in the year 1999.

Hence, Mr. Mehta submitted, that the respondent not being in actual physical possession of the suit land on the date that the suit was filed, he cannot take advantage even of Section 53-A of the Transfer of Property Act.

In this regard, he cited a judgment of the hon'ble Supreme Court in **Sardar Govindrao Mahadik and another Vs. Devi Sahai and others** (1982) 1 SCC 237.

13. He next submitted that, in any case, both, the plaintiff and the

defendant, were co-sharers of the land; hence they would both be deemed to be in possession of all parts of the land and therefore, even possession claimed exclusively of a half share by the defendant, is of no consequence in the context of Section 53A of the Transfer of Property Act.

He submitted that neither the character of the possession was altered, nor anything in furtherance of the contract was done by the respondent, to fulfill the ingredients necessary for invoking the protection of Section 53A of the Transfer of Property Act.

Learned counsel further submitted that there are five ingredients to Section 53-A of the Transfer of Property Act:-

- i) Agreement to sell in writing,
- ii) Payment of consideration,
- iii) Possession by the intended vendee,
- iv) Act done by the intended vendee, and lastly,
- v) Readiness and willingness of the intended vendee to perform his part of the contract.

He submitted that though he is challenging even the possession of the defendant, however, in any case, the last two ingredients were not fulfilled by him.

As regards willingness and readiness is concerned, learned counsel submitted that since no suit for specific performance had been filed by the respondent, there was obviously no readiness and willingness on his part, to complete the contract.

Learned counsel further relied upon the following judgments in support of his contentions:-

- a) Mohan Lal vs. Mira Abdul Gaffar, (1996) 1 SCC 639

- b) Thakamma Mathew vs. M. Azamathull Khan, AIR 1993 (SC) 436
- c) Sunkara Venkata Rao vs. K. Venkata Rao, (2005) 11 SCC 436;

14. In response, Mr. Sarwan Singh, learned Senior Counsel appearing for the respondent (legal representatives of the defendant), submitted that since possession of the respondent is actually proved, firstly by dismissal of the suit for mesne profit filed by the plaintiff; secondly, by dismissal of the tenants' suit seeking permanent injunction against the respondent, and thirdly by decreeing of the suit for permanent injunction filed by the respondent against the present appellants, and further more, by admission of the plaintiff himself in his plaint, that after Khariff 1979, rent by the tenant was paid to the respondent, possession of the suit land by the respondents cannot be disputed.

He further submitted that as regards no willingness shown to execute the contract, just by virtue of his not having filed a suit for specific performance, does not negate the fact that steps in furtherance of agreement to sell, were actually taken, in the form of payment of consideration on three occasions, and further, by his having gone to the office of the Registrar on the last date when time for execution of the sale deed was extended. Hence, non-filing of a suit for specific performance, would not oust his right under Section 53A of the Transfer of Property Act.

15. Learned Senior Counsel further pointed to paragraph 5 of the plaint, from the records of the Courts below, to submit that though otherwise the plaintiff was denying that the defendant was in possession of the suit land, even in the agreement to sell dated 26.07.1975, handing over of

possession to the defendant was admitted.

In this regard, learned counsel also pointed to the cross-examination of the plaintiff, where he, even while denying the handing over of the possession to the defendant, however, had to admit in the face of what was contained in the aforesaid agreement, that it was recorded therein that such possession had been handed over.

Learned Senior Counsel next pointed to that part of the testimony of the plaintiff, where again he admitted that the defendant had installed a tubewell in the suit land, even though in the replication he had denied it, and the trial Court had held that there was no evidence led with regard thereto. He submitted that in the face of the admission of the plaintiff, no further evidence was required to be led, as regards the installation of the tubewell bore by the defendant.

16. As regards willingness of the defendant to execute the sale deed, learned counsel submitted that it was the specific contention of the defendant, even in his written statement, that he had gone thrice to the sub-registrars' office but the plaintiff had never turned up to perform his part of the agreement.

Next, learned Senior Counsel submitted that the fact that a major part of the consideration stood paid by the appellant, showed his readiness and willingness to execute the sale deed and as such, it was rightly held by the first appellate Court that it could not be inferred that the defendant was not willing to perform his part of the agreement with only Rs.2080/- remaining to be paid, out of the total consideration of Rs.22080/-.

He further submitted that the defendant having duly replied to the notice issued by the plaintiff on 17.09.1979, vide a detailed reply (Ex.PW-5/1) dated 28.09.1979, in which the dates of payment made, totaling Rs.20,000/- were referred to, and the date on which the defendant was put in possession of the land (26.07.1975), was also referred to, and it was stated that the defendant was very much willing to pay the balance consideration and execute the sale deed, the defendant had discharged the onus cast on him, to perform his part of the contract.

Hence, learned Senior Counsel submitted, that the lower appellate Court had committed no error in reversing the judgment of the learned Sub-Judge and in dismissing the suit of the plaintiff, further directing the plaintiff to execute the sale deed, upon the defendant depositing the balance consideration and stamp duty etc.

He submitted that in view of the aforesaid facts, the defendant was very much entitled to the protection granted by Section 53-A of the Transfer of Property Act, 1882.

17. In rebuttal, Mr. Mehta, learned counsel for the appellants- (plaintiff), cited from para 23 of the judgment in **Govindraos'** case (supra) and to Section 16 of the Specific Relief Act, to submit that payment of part consideration is not an act in furtherance of the agreement to sell on the part of the intended vendee and as such, the defendants' contention that he paid consideration right up to 1979, also would not be of help to him, even in defence of the suit, under Section 53A of the Transfer of the Property Act.

It may be noticed here itself that in para 23 in **Govindraos'** case,

their Lordships had referred to English law on the subject, where the earlier view was to the effect that part payment of consideration cannot be deemed to be part performance of the contract. Subsequently, in paras 30 and 31 of that case, a subsequent view was also referred to, to finally hold that part payment may be considered to be an act in furtherance of part performance of an agreement, seen with other acts towards such part performance (by the intended vendee).

18. Having considered the arguments of the learned counsel, as also the judgments of the learned Courts below and the evidence as pointed to by learned counsel from the records of the Courts below, before going on to substantial question of law, what needs to be first considered, if only for the sake of the record, is as to whether there was actually any payment of Rs.6,000/- made by the defendant to the plaintiff on 14.09.1979, as claimed by the defendant but refuted by the plaintiff.

In this regard, it needs to be noticed that even while decreeing the suit of the appellants-plaintiff, even the learned Sub-Judge had held that the payment of Rs.6,000/- was not in doubt, in view of the endorsement made behind the agreement to sell dated 26.07.1975, duly read with the testimony of DW-8, Gurdev Singh. As pointed by the learned counsel for the respondent, the said document (in *Urdu-Ex.D2*) carries an endorsement behind it, in *Gurumukhi (Punjabi)*, to the effect that the date for executing the sale deed has been extended by agreement to 15.12.1979 and a payment of Rs.6,000/- has been received, thus, with a total amount of Rs.20,000/- having been paid.

The said endorsement carries the date of 14.09.1979 and is seen to be signed by the plaintiff and the defendant, both named Piara Singh, in the presence of the witnesses.

Hence, the contention of the learned counsel for the appellants and the question posed with regard thereto, as to whether the Courts below had erred in holding that a new agreement had come into existence on 14.09.1979, is a wholly misconceived argument and question, with both the Courts below having arrived at such a conclusion, not with regard to a new agreement having been executed, but simply with regard to an endorsement having been made on the original agreement on the said date as above.

Hence, with nothing perverse having been shown by the learned counsel for the respondents, in such findings, even from the record, I see no reason to upset that finding of both the Courts below.

19. Coming now to the question of law involved, i.e. whether it would be the provisions of the Specific Relief Act (specifically Section 16 thereof), or Section 53-A of the Transfer of Property Act, which would come to the aid of the plaintiff or the defendant respectively, the two provisions first need to be reproduced below:-

“16. Personal bars to relief.- Specific performance of a contract cannot be enforced in favour of a person-

(a) who would not be entitled to recover compensation for its breach; or

(b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or willfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or

(c) who fails to aver and prove that he has performed or has

always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation.- For the purpose of clause (c),

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.”

xxxx xxxx xxxx xxxx

“Section 53-A. 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 of a transferee for consideration who has no notice of the contract or of the part performance thereof.”

20. Learned counsel for the appellants cited the judgment in **Thakamma Mathews'** case (supra), wherein it was held that it was for the defendant to establish his claim that he had obtained possession of the suit

property.

Learned counsel for the appellants then cited the judgment of the Supreme Court in **Mohan Lals'** case (supra), in which it was held that a transferee can avail of the protection under Section 53-A only as a shield and not as a sword and he has to prove that he was willing to perform his part of the contract to take shelter of the said provision.

As regards that part, undoubtedly, learned counsel is correct to the extent that the defendant did not file a suit for specific performance to enforce the agreement to sell dated 26.07.1975; however, in the opinion of this Court, by making a payment of Rs.6,000/- even on 14.09.1979, duly proved before the Courts below, at least up till that point, he proved his willingness to execute his part of the contract, though on an agreed extended date, i.e. 15.12.1979.

Further, though in his replication, undoubtedly the plaintiff had refuted that the defendant had made any improvement on the land, or had even installed a tubewell, his said averment was negated by his own statement, when he faced cross-examination as a witness. In the cross-examination, while denying that the defendant had levelled the land, immediately before that, he stated that he had installed a “cavity tubewell” upon it.

Thus, it seems that after receiving the payment aforesaid, the plaintiff had a change of heart and consequently had a notice issued through his lawyer to the defendant, on 17.09.1979, stating therein that since after a payment of Rs.14,000/-, no further action had been taken by the defendant,

in furtherance of the agreement, the aforesaid amount stood forfeited, and the defendant 'was left with no right or claim to get it back' from the plaintiff and that the plaintiff would be selling the land to any other person.

The said notice is shown to have been duly replied to by the defendant, as already noticed, on 28.07.1979, giving the complete history of payments made right up till 14.09.1979, and showing his willingness to execute the sale deed by 15.12.1979.

Thereafter, he filed applications to the Sub-Registrar on 14.12.1979 and 15.12.1979 Exs. DW-7/1 and 7/2, duly endorsed by the Tehsildar (Sub-Registrar), that he had actually come present before him.

A retired official from the office of the Deputy Commissioner, Hoshiarpur, who on 14.12.1979 was working as the Reader to the Sub-Registrar (Naib Tehsildar), also testified as DW-7 in respect of the documents.

Hence, I do not see how that argument of non-willingness of the defendant to perform his part of the contract lies in his mouth.

The learned first appellate Court has also come to the same finding on the basis of the aforesaid documents, though, without reference to DW-7. I see no reason to interfere with that finding either, in view of the aforesaid discussion.

21. The judgment of the Supreme Court in **Sunkara Venkata Raos'** case (supra), also has no bearing on the present appeal in the opinion of this Court, in view of the fact that their Lordships had simply disposed of the said appeal before them, without expressing any opinion on the legal issues,

specifically leaving all questions open, holding therein that the appellant would not be dispossessed, except in accordance with law.

22. On the other hand, the judgment of the Apex Court which actually would apply to the circumstances of the present case, again in the opinion of this Court, would be the judgment in **Shrimant Shamrao Suryavanshi vs. Pralhad Bhairoba Suryavanshi**, (2002) 3 SCC 676.

In a somewhat similar case, their Lordships, after considering the issue, held as follows:-

“16. But there are certain conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under Section 53-A of the Act. The necessary conditions are -

- (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.

17. We are, therefore, of the opinion that if the conditions enumerated above are complied with the law of limitation does not come in the way of a defendant taking plea under Section 53-A of the Act to protect his possession of the suit property even though a suit for specific performance of a contract is barred by limitation.

18. The matter may be examined from another angle. The established rule of limitation is that law of limitation is not applicable to plea taken in

defence unless expressly a provision is made in the statute. The law of limitation applies to the suits and applications. The various articles of the Limitation Act show that they do not apply to a defence taken by a defendant in a suit. Thus, the law of limitation bars only an action in a court of law. In fact, what the Limitation Act does is, to take away the remedy of a plaintiff to enforce his rights by bringing an action in a court of law, but it does not place any restriction to a defendant to put forward any defence though such defence as a claim made by him may be barred by limitation and cannot be enforced in a court a law. On the said principle, a defendant in a suit can put forward any defence though such defence may not be enforceable in a court of law, being barred by limitation.

19. In *M.K. Venkatchri and others v. I.A.R. Arunchalam Pillai and others*, AIR 1967 Madras, 410, it was held, thus :

"that defence to limitation is a creature of a positive law and, therefore, cannot be extended to cases which do not strictly fall within the enactment. It is an established canon of construction of law of limitation not to enlarge the scope of statutory provisions of limitation by analogy or logic".

20. It is, therefore, manifest that the Limitation Act does not extinguish a defence, but only bars the remedy. Since the period of limitation bars a suit for specific performance of a contract, if brought after the period of limitation, it is open to a defendant in a suit for recovery of possession brought by a transferor to take a plea in defence of part performance of the contract to protect his possession, though he may not able to enforce that right through a suit for action."

(Emphasis applied by this Court).

Thus, as regards the principle, on which the question of law in the present case is based, there is no longer any manner of doubt, that the protection of Section 53-A is available to a prospective vendee who otherwise fulfills the conditions laid down in the said provision, even if he did not file a suit for specific performance of the contract, and the limitation to file such a suit, has expired.

Hence, in the present case, the defendant not having filed such a suit but a defence having been taken for him, before the Courts below, by his counsel, and it having been dealt with by those Courts, the learned lower appellate Court was not in error, at least to the extent that it was held that he is entitled to protection of such possession.

As regards the defendant having taken any steps in furtherance of the contract, as already discussed, further payment having been made, first of Rs.9000/- and then of Rs.6000/-, on 05.06.1976 and 14.09.1979 respectively, i.e. after Rs.5000/- was paid at the time when the agreement was signed on 26.07.1975, seen with the fact that he had installed a tubewell, and still further, his having at least twice visited the office of the Sub-Registrar on 14.12.1979 and 15.12.1979, would all point to his willingness to execute the contract, in furtherance of which he took the aforesaid steps.

23. The question then is, as to whether, factually, the defendant can be held to be in possession of the suit land, in view of the fact that though the lower appellate Court held him to be in such possession, it is eventually an admitted fact on both sides that actual possession was that of tenants, even at the time when the contract to sell the land was entered into.

Learned counsel for the appellants had cited the judgment in **Sardar Govindraos'** case (supra), wherein while considering the case of a mortgagee, in whose favour a sale deed was executed but not registered, it was held that with no physical possession having changed hands, by way of the mortgagee actually coming into possession as an owner, in part performance of the contract, and having done nothing in furtherance of the

contract, the benefit of Section -53A could not be taken by him.

Therefore, in the present case, could the defendant be considered to be in possession of the suit land, despite it actually having been in the cultivating possession of tenants?

Opposed to the contention of Mr. Mehta as above, learned Senior Counsel appearing for the respondents-defendant, has submitted that firstly, with a recital in the agreement itself, that the defendant-prospective vendee had been put into the possession, nothing further needs to be proved. However, he further submitted, that proof of possession being that of the defendant, was also obvious from the fact that the plaintiff-vendor was not deriving any benefit of the fruits of the land, after the agreement to sell was entered into, as he unsuccessfully filed a suit against the tenants as also the defendant, seeking mesne profits. That suit having been admittedly dismissed, learned counsel submitted that it obviously means that the defendant was receiving the tenancy/lease money, from the tenants, and therefore, his possession through such tenants/lessee, stood established.

Further, he submitted that the tenants also filed a suit seeking permanent injunction against the defendant, which was also dismissed. However, no evidence was led in that regard, but the fact is not otherwise denied.

Lastly, Mr. Sarwan Singh submitted in this regard, that even the suit filed by the defendant against the present appellants, i.e. the legal representatives of the plaintiff, seeking permanent injunction against them restraining them from interfering in the peaceful possession of the defendant,

was decreed in favour of the defendant in this *lis* (plaintiff in that suit), and the appeal filed by the present appellants against that judgment, was also dismissed, leading to the filing of the connected RSA No.1379 of 2006.

Thus, learned counsel submitted that with the Court, in that suit also, having concluded that it was the respondent-defendant in the present *lis* who was in possession, thereby dis-entitling the present appellants from a decree of permanent injunction, nothing further needed to be said with regard to possession of the suit land being with the defendant, even at the time of the filing of the suit by the plaintiff.

24. Having considered the above, I am in agreement with the learned counsel for the respondents-defendant, that even though actual cultivating possession of the suit land may have been that of tenants, however, the rent/lease money that was being paid, by such tenants, was to the defendant and not to the plaintiff.

Therefore, though no evidence with regard to dismissal of the suit filed by the tenants, against the defendant in this *lis*, is available, and as such that contention has to be discarded, however, as regards the suit filed by the plaintiff, against the defendant and the tenants, it is seen to have been admitted by the plaintiff in his plaint itself, as noticed by the Courts below, and is borne out from a perusal of the plaint, as pointed out by the learned counsel for the defendant, from paragraph 5 thereof. Though in the plaint, it is stated that the suit was pending, learned counsel further pointed out from the cross-examination of the plaintiff, that he had admitted that the said suit had been dismissed.

25. Hence, in the opinion of this Court, possession not necessarily being cultivating possession, but possession by way of control of the suit land, proved by payment of rent by the tenants to the defendant, does not leave any manner of doubt that such possession was actually that of the defendant, as even recited in the agreement to sell dated 26.07.1975.

Even if the statement of the learned counsel for the appellants is taken at face value, that physical possession was handed over back by such tenant to the appellants-plaintiff, in the year 1999, that would not dis-entitle the defendant from claiming protection under Section 53-A of the Act of 1882, as obviously the said handing over of possession, even if it is true, is during the pendency of this appeal before this Court, and as such any change in possession at the stage of second appeal in any case would be hit by the doctrine of *lis pendens*, even though such handing over is to one of the parties to the *lis*. Simply because the tenants changed sides after a period of 20 years or more, obviously does not take away the fact that the defendant was put in possession of the suit property at the time of signing of the agreement to sell, after which he continued to receive rent from the tenants at least till the year 1999.

Therefore, in view of the entire discussion hereinabove, firstly the substantial question of law is answered in terms of the judgment of the hon'ble Supreme Court in **Suryavanshis'** case (supra), as reproduced hereinabove, to the effect that despite no suit for specific performance having been filed by the prospective vendee, within the period of limitation prescribed, he is still able to take protection of Section 53-A of the Transfer

of Property Act, 1882, if the parameters contained therein are fulfilled, in terms of the said provision.

Such parameters having been fulfilled in view of what has been held above, by the defendant, I see no error in the judgment of the first appellate Court, in reversing the judgment of the learned Sub-Judge and in dismissing the suit of the plaintiff-vendor, and decreeing it in favour of the defendant-prospective vendee.

A word may be added here, that their Lordships, in Suryavanshis' case, only decided the question of law, to the effect that the prospective vendee would be entitled to protect his possession. In the present case, the learned first appellate Court also directed the plaintiff to execute the sale deed in the defendants' favour, upon payment of balance consideration and charges etc. However, I see no error in such decree either, because in such a situation, simple protection of possession of the defendant, with the plaintiff actually having no further right remaining in the suit property, inasmuch as he cannot also take back possession of it, it would be wholly illogical to allow him to continue to be the owner of such property, with no further rights in it.

Consequently, in view of what has been held hereinabove, the appeal is dismissed, leaving the parties to bear their own costs.

RSA No.1379 of 2006

26. Learned counsel for the parties, as already noticed in the judgment in RSA No.2144 of 1987, were initially ad idem that if the

connected appeal (RSA No.2144 of 1987), is decided against the appellants, then this appeal would be rendered infructuous. However, subsequently, Mr. Mehta submitted that even if that appeal was to be dismissed, the respondents would still not be entitled to a decree of permanent injunction, in view of what is contained in Section 44 of the Transfer of Property Act.

27. Thus, a brief reference to the merits of the controversy needs to be made in this appeal also.

The suit out of which this appeal arises, was filed by the defendant in the other suit (as already stated earlier), i.e. Piara Singh son of Labh Singh , who had claimed to be in possession of the suit land since the date that the agreement to sell between him and the plaintiff in the other suit (also named Piara Singh, son of Waryam Singh), was entered into, i.e. 26.07.1995. The plaintiff in this suit, (now the respondent in this appeal, through his LRS), had sought a decree of permanent injunction against the defendants, i.e. the present appellants (who are legal representatives of the plaintiff in the other suit, i.e. the LRs of the vendor, with the present respondents being the LRs of the prospective vendee of the suit land).

The suit of the plaintiff in the present case, i.e. of the prospective vendee, seeking permanent injunction, was decreed by the learned Additional Civil Judge (Sr. Divn.), Dasuya, on 31.07.2004, the suit having been instituted on 23.01.1999.

It was held by the Additional Civil Judge that in fact the defendants (present appellants), though while examining defendant No.1 as DW-2, had denied that the plaintiff ever came into possession of the suit

land, the said testimony was wholly contrary to the written statement of the defendants, wherein they had admitted possession of the plaintiff over the suit land, on the basis of the agreement dated 26.07.1975. A perusal of the written statement, as pointed to by the learned counsel for the respondents herein, bears out the above finding. Subsequently though, as also noticed by the Courts below, the written statement stated that thereafter the defendants (present appellants) were in possession of the suit land.

The learned Civil Judge found that there was no reasoning given to show as to how, after 26.07.1975, the defendants again came into possession of the suit land.

Further holding that once the father of the defendant had filed a suit seeking possession against the plaintiff in the current lis, even the subsequent possession of the defendants could not stand to be established.

As regards the actual cultivating possession of the tenants, i.e. Atma Singh, Pritam Singh and after Pritam Singhs' death, his sons, that Court found that, in fact, Atma Singh had also filed a civil suit against the plaintiff in the present lis (father of the present respondents, i.e. the prospective vendee), in which the said Atma Singh was awarded *status quo* on an application filed under Order 39 Rules 1 and 2 CPC. Against that order, the present appellants had filed an appeal, which was allowed, thereby showing that the appellants-defendants were not satisfied with the order of status quo, as they obviously were not in possession of the suit land.

28. The first appeal filed by the present appellants, against the judgment of the learned Additional Civil Judge, was also dismissed by the

learned first appellate Court, further holding that even the issue of stay of the suit under Section 10 of the CPC, was correctly decided against the appellants-defendant, in view of the fact that firstly, the earlier suit filed by the father of the defendants, was one seeking possession, whereas the suit in the present lis, was simply one seeking permanent injunction.

Secondly, the earlier suit was already in proceedings of a second appeal and as such, the Court seized of the second suit, seeking a different relief, would not be barred from entertaining such suit, or the appeal arising therefrom.

The first appeal was also consequently dismissed.

29. Before this Court, Mr. Mehta, learned counsel for the appellants, essentially reiterated what he had submitted with regard to possession while arguing the connected appeal (RSA No.2144 of 1987) and further submitted that even in terms of Section 44 of the Transfer of Property Act, a transferors' right to joint possession of common land, or part enjoyment of the property, remains protected.

The arguments repeated by the learned counsel have already been dealt with while dismissing the previous appeal, with this Court holding possession to be that of the respondents in this appeal and their predecessor-in-interest, i.e. the prospective vendee in the agreement to sell, through tenants who were paying rent to him. The same obviously need not be repeated here.

30. As regards the contention of the learned counsel on Section 44 of the Transfer of Property Act, the said provision is reproduced herein:-

“44. Transfer by one co-owner-Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this Section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.”

Obviously, the learned counsel has wholly mis-interpreted the provision, as what is protected by Section 44, is the transferees' right in the jointly owned immovable property, as transferred to him by the transferor; that is to say that all such rights as were vested in and were enjoyed by the transferor, in the common property, get transferred to the transferee to the same extent.

Thus, the transferee (respondent-plaintiff herein) being entitled to the rights enjoyed by the transferor (father of the present appellants), I do not see what mileage the appellants can draw from the aforesaid provision.

31. Hence, the respondents herein and their predecessor-in-interest, Piara Singh son of Labh Singh, having been held to have been in possession of the suit land, through tenants paying rent to the said Piara Singh, at the time when the suit for possession was filed by the predecessor-in-interest of

the present appellants, i.e. Piara Singh son of Waryam Singh, and no evidence having been led as to how the present appellants or their father, Piara Singh son of Waryam Singh, ever came into possession after 26.07.1975, as also held by the Courts below in the present lis, I see no reason to interfere even in this appeal either, with the judgments of the Courts below.

Consequently, finding no merit in this appeal also, it is dismissed, but with no orders as to costs.

July 05, 2016

vcgarg/dinesh

**(AMOL RATTAN SINGH)
JUDGE**