

HIGH COURT OF CHHATTISGARH AT BILASPUR**Second Appeal No. 9 of 2010****Judgment reserved on 10/03/2021****Judgment delivered on 12/04/2021**

1. Murlidhar (died) through Lrs. :-

a. Shukdev Chaudhary, S/o Banshidhar Chaudhary,
Aged about 41 years, R/o Village Ameri, P.O.
Deogaon, Tahsil Baramkela, Distt. Raigarh,
Chhattisgarh.

---Appellant/Plaintiff**Versus**

1. Ramlal S/o Krishnachand, Caste Aghariya, Aged
about 55 years.

2. Basudev S/o Ramlal, Caste Aghariya, Aged about 38
years, Occupation Agriculturist.

3. Nand Dev S/o Ramlal, Aged about 32 years,
Occupation Agriculturist.

Note: Respondents No. 1 to 3 are R/o Village
Ameri, Tahsil Sarangarh, Distt. Raigarh,
Chhattisgarh.

4. State of Chhattisgarh, Through Collector,
Raigarh, Chhattisgarh.

--- Respondents/Defendants

For Appellant	:-Mr. R.N. Pusty, Advocate
For Respondents	:-Mr. B.N. Nande, Advocate
For State	:-Mr. Ravi Bhagat, Dy. G.A.

Hon'ble Shri Justice Sanjay K. Agrawal**C.A.V. Judgment**

1. This second appeal preferred by the appellant/plaintiff (now his Lrs.) was admitted for hearing on 26/08/2020 on the following two substantial questions of law :-

"1. Whether both the Courts below are justified in denying the relief of restoration of possession in favour of the plaintiff on the basis of Ex-D/1 allegedly executed by the plaintiff in favour of the defendants, by recording a finding which is perverse and contrary to the record ?

2. Whether both the Courts below are justified in dismissing the suit for want of Court fee ?"

[Parties will hereinafter be referred to as per their status given and ranking shown before the trial Court.]

2. The sole plaintiff – Murlidhar initially filed a suit for permanent injunction for restraining defendants from interfering with his possession in the suit property shown in Schedule 'A' appended with the plaint. Thereafter, during the pendency of the suit, by way of amendment in the plaint, he also inserted the relief of restoration of possession with respect to the suit property shown in Schedule 'B' appended with the plaint.

3. It is admitted position on record that plaintiff as well as defendants No. 1 to 3, all are

descendants of same ancestors and the suit property has already been partitioned between the ancestors of plaintiff and defendants. The suit property was subjected to proceedings under Section 145 of CrPC at the instance of defendants No. 1 to 3 and ultimately, final order was passed by the Additional Session Judge, Raigarh.

4. It is the case of the plaintiff that he is the owner and title-holder of the suit property shown in Schedule 'A' of the plaint admeasuring 6.418 hectares on which defendants No. 1 to 3 have started creating illegal interference, as such, relief of permanent injunction be granted in his favour and he is also entitled for relief of restoration of possession on the suit property shown in Schedule 'B' of the plaint admeasuring 1.781 hectares.

5. Defendants No. 1 to 3 filed their written statement and took a specific stand that agreement to sale has been entered into by the plaintiff and defendant No. 1 on 01/07/2000 (Ex. D/1) by which plaintiff has agreed to alienate the suit property shown in Schedule 'B' of the plaint in favour of defendant No. 1, as such,

plaintiff is not entitled for decree for possession in the suit property shown in Schedule 'B' of the plaint and his suit deserves to be dismissed.

6. Learned trial Court, after appreciation of oral and documentary evidence on record, held that though plaintiff is the owner and title-holder of the suit property shown in Schedule 'A' of the plaint, but he is not entitled for decree for possession in the suit property shown in Schedule 'B' of the plaint as he has already agreed to alienate the said suit property in favour of defendant No. 1 by virtue of agreement to sale dated 01/07/2000 (Ex. D/1) and accordingly dismissed the suit vide judgment and decree dated 28/02/2007 against which appellant/plaintiff preferred an appeal, but learned first appellate Court too affirmed the judgment and decree of the trial Court and dismissed the appeal vide impugned judgment and decree dated 07/10/2009. Feeling aggrieved, the appellant/plaintiff (now his Lrs.) has preferred the instant appeal which has been admitted by formulating two substantial questions of law

which have been set out in the opening paragraph of the judgment.

7. Mr. R.N. Pusty, learned counsel for the appellant/plaintiff, would submit that both the Courts below have concurrently erred in relying upon Section 53-A of Transfer of Property Act, 1882 and holding that defendant No. 1 is entitled to retain possession over the suit property shown in Schedule 'B' of the plaint as necessary ingredients of Section 53-A are absolutely missing. He would also submit that there is no pleading of willingness and readiness on the part of defendant No. 1 and he never issued notice to get the sale deed (Ex. D/1) registered and he would rely upon the decision rendered by the Supreme Court in the matter of Vasanthi v. VenuGopal (dead) through Legal representatives¹ as well as the decision rendered by the Delhi High Court in the matter of Deepak Singla v. Kanta Nagpal² and another by the Orissa High Court in the matter of Jagannath Mallik v. Surendra Gartia³ to buttress his submission.

1 (2017) 4 SCC 723

2 2018 SCC Online Delhi 12201

3 (2017) AIR (Orissa) 128

8. Mr. B.N. Nande, learned counsel for the respondents/defendants No. 1 to 3, would submit that both the Courts below have concurrently and rightly dismissed the suit by holding that plaintiff has already agreed to alienate the suit property shown in Schedule 'B' of the plaint in favour defendant No. 1 by agreement to sale (Ex. D/1). He would also submit that since the entire consideration has been paid, nothing is left to be done by defendant No. 1. He would rely upon the decision rendered by the Supreme Court in the matter of **FGP Limited v. Saleh Hooseini Doctor & Anr.**⁴ to buttress his submission.

9. I have heard learned counsel for the parties, considered their rival submissions made hereinabove and went through the records with utmost circumspection.

Answer to Substantial Question of Law No. 1 :-

10. In the suit filed by the original plaintiff Murlidhar for perpetual injunction with respect to the suit property shown in Schedule 'A' appended with the plaint, he also claimed the relief of possession by amending the plaint on

4 (2009) 10 SCC 223

26/08/2003 that decree for possession be granted to him with respect to the suit property shown in Schedule 'B' appended with the plaint admeasuring 1.781 hectares. Learned trial Court, though held that plaintiff is the owner and title-holder of the suit property shown in Schedule 'A' appended with the plaint, but so far as the suit property shown in Schedule 'B' of the plaint is concerned, since the plaintiff has already executed agreement to sale dated 01/07/2000 (Ex. D/1) in favour of defendant No. 1 in lieu of the medical expenses paid by defendant No. 1 for treatment of plaintiff's son, therefore, plaintiff is not entitled for decree for possession with respect to the suit property shown in Schedule 'B' appended with the plaint, which was in turn affirmed by the first appellate Court holding that agreement to sale (Ex. D/1) was executed by plaintiff in favour of defendant No. 1, but he did not perform his part of the contract and once he has failed to perform his part of the contract, it cannot be expected from defendant No. 1 to act upon Ex. D/1 and dismissed the appeal preferred by the plaintiff.

11. The submission of learned counsel for the appellant/plaintiff is that defendants having failed to perform their part pursuant to the agreement to sale (Ex. D/1) and they have neither pleaded nor proved that they are ready and willing to perform their obligation and without taking any effective step towards the sale deed to be registered in their favour, they are not entitled to protect their possession over the suit property shown in Schedule 'B' appended with the plaint in terms of Section 53A of the Transfer of Property Act, 1882.
12. At this stage, it would be appropriate to notice Section 53A of the Transfer of Property Act, 1882, which provides as under :-

"53A. Part performance.— Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed 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."

13. Following are the essential conditions contemplated by Section 53A of the Transfer of Property Act, 1882 :-

(1) there must be a contract to transfer for consideration of 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

14. Protection provided under Section 53A of the Transfer of Property Act, 1882 to the proposed transferee is a shield only against the transferor. It disentitles the transferor from disturbing the possession of the proposed transferee who is put in possession in pursuance of such an agreement. It has nothing to do with the ownership of the proposed transferor who remains full owner of the property till it is legally conveyed by executing a registered sale deed in favour of the transferee. Such a right to protect possession against the proposed vendor cannot be pressed into service against a third party. (See: Rambhau Namdeo Gajre v. Narayan Bapuji Dhotra (Dead) Through LRS.⁵)

15. In the matter of Shrimant Shamrao Suryavanshi & Anr. v. Prahlad Bhairoba Suryavanshi (Dead) By Lrs. & Ors.⁶, their Lordships of the Supreme Court have clearly held that the person, obtaining possession of the property in part performance of an agreement to sale, can defend his possession in a suit for recovery of

5 (2004) 8 SCC 614

6 (2002) 3 SCC 676

possession filed by the transferor or by subsequent transferee of the property claiming under him, even if a suit for specific performance of the agreement of sale has become barred by limitation and observed in paragraphs 16 and 17 as under :-

"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 has barred by limitation. "

16. Their Lordships further held that the law of limitation does not apply to a plea taken in defence by defendant even though that defence as

a claim made by him may not be enforceable in court being barred by limitation and observed as under in paragraphs 18, 19 and 20 :-

"18. The matter may be examined from another angle. The established rule of limitation is that law of limitation is not applicable to a 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 of 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. Venkatachari v. L.A.R. Arunachalam Pillai*⁷ it was held, thus:

"[T]hat 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 be able to enforce that right through a suit or action. "

17. The principle of law laid down in **Shrimant** (supra) has been followed with approval in the matter of **Vasanthi v. Venugopal (Dead) through Lrs.**⁸ in which their Lordships of the Supreme Court have clearly held that though mere expiry of the period of limitation for a suit for specific performance may not be a bar for a person in possession of an immovable property in part performance of a contract for transfer thereof for consideration to assert the shield of Section 53A of Transfer of Property Act, it is nevertheless imperative that to avail the benefit of such protection, all the essential prerequisites therefor would have to be obligatorily complied with.

18. Similar is the proposition of law laid down by the Supreme Court in the matter of **FGP Limited** (supra) which has been relied upon by learned counsel for the respondents/defendants.

19. In the matter of **A. Lewis & Anr. v. M.T. Ramamurthy & Ors.**⁹ it has been held by their

⁸ (2017) 4 SCC 723

⁹ (2007) 14 SCC 87

Lordships of the Supreme Court that the existence of right to claim protection under Section 53-A of the Transfer of Property Act would not be available if the transferee just kept quiet and remained passive without taking effective steps and performing his part of the contract and conveying his willingness. The principle of law laid down in A. Lewis (supra) has also been followed with approval in Vasanthi (supra).

20. Their Lordships further held that section 16 of the Specific Relief Act, 1963, specific performance of a contract cannot be enforced in favour of a person who, inter alia, 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 unless prevented or waived by the other party thereto.

21. At this stage, it would be appropriate to notice Section 55(1)(d) of the Transfer of Property Act, 1882, which states as under :-

"55. Rights and liabilities of buyer and seller. - In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the

rights, mentioned in the rules next following, or such of them as are applicable to the property sold :-

(1) The seller is bound -

(a) XXX XXX

(b) XXX XXX

(c) XXX XXX

(d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place;"

22. Similarly, it would also be appropriate to notice Section 29(c) of the Indian Stamp Act, 1899, which states as under :-

"29. Duties by whom payable. - In the absence of an agreement to the contrary, the expense of providing the proper stamp shall be borne -

(a) XXX XXX

(b) XXX XXX

(c) in the case of a conveyance (including a reconveyance of mortgaged property) by the grantee; in the case of a lease or agreement to lease - by the lessee or intended lessee;"

23. In the matter of Baruna Giri v. Rajakishore

Giri¹⁰, the Division Bench of Orissa High Court

has held in paragraph 14 as under :-

"14. No doubt the entire consideration had been paid, but the next step in the performance of the contract was the execution of the sale deed. It was the duty of the defendants to propose a proper draft of the sale deed and submit it to the plaintiff as contemplated under Section 55(1)(d) of the T. P. Act. Under

the provisions of Section 29 of the Stamp Act the expenses for the sale-deed were to be borne by the purchaser. Until the defendants paid the money for the stamp duty, the sale-deed could not be executed. By virtue of the combined effect of Section 55(1)(d), T. P. Act and Section 29(c), Stamp Act it was the duty of the defendants to propose a draft of the sale deed and to express their readiness and willingness to pay the money and to call upon the plaintiffs to execute the sale-deed--See ILR (1975) Cut 993 at page 998, Bhimasen Mohapatra v. Bhabani Mahapatrani. In para 14 of the written statement it was stated as follows:--

"..... But as the executants of the agreement for sale were residing in the District of Singhbhum and as all of them were not available at a time the registered sale deed could not be executed by them and as the land remained in possession of Chandramohan and the members of his family no required steps were taken for a registered sale deed....."

This shows that instead of complying with the requirements of Section 55(1)(d) of the T. P. Act and Section 29(c) of the Stamp Act, the defendants remained contented with possession of the land. Had it really been a fact that the defendants were ready and willing to perform their part of the contract, instead of sitting quiet for such a long time they would have sent a written notice calling upon the plaintiffs to execute the sale deed. Their failure to send such a notice shows that they were not ready and willing to perform their part of the contract. We accordingly hold that the defendants are not entitled to the benefit of Section 53-A, T. P. Act."

24. Reverting to the facts of the case in light of the aforesaid legal position, it would be appropriate to notice that in the instant case,

it is not in dispute that the transferee/defendant No. 1 has taken possession of the suit property in part performance of the contract, but a careful perusal of the written statement would show that the transferee/defendant No. 1 has not taken any plea that he is ready and willing to perform his part of the contract. It was the duty on the part of defendant No. 1 to ensure the completion of the sale deed by proposing a proper draft of the sale deed to the plaintiff as provided under Section 55(1)(d) of the Transfer of Property Act. It was also the duty of the defendants to bear the expenses of the sale deed as required under Section 29(c) of the Indian Stamp Act and get the sale deed executed. The defendants further failed to show their readiness and willingness to perform their part of the contract as required under Section 53A of the Transfer of Property Act. They ought to have sent a written notice calling upon the plaintiff to execute the sale deed. Their failure to send such a notice demonstrates that they were not ready and willing to perform their part of the contract and accordingly, it can be held that

defendants are not entitled to get possession over the suit property under Section 53-A of the Transfer of Property Act.

25. As such, both the Courts below have committed legal error in holding that defendants are entitled to protect their possession over the suit property shown in Schedule 'B' appended with the plaint by virtue of Section 53-A of the Transfer of Property Act, particularly for the reason that defendants did not plead they were ready and willing to perform their part of the contract. It was specifically for them to take such a plea in the written statement and establish the same by leading evidence, but no such plea has been taken by them and it is clear that they were not ready and willing to perform their part of the contract. Accordingly, substantial question of law No. 1 is answered in favour of defendants and against the plaintiff.

Answer to Substantial Question of Law No. 2 :-

26. Plaintiff, in the suit initially filed for perpetual injunction, later on by order dated 26/08/2003 amended the plaint and inserted the relief of recovery of possession with respect to the suit property shown in Schedule 'B' appended

with the plaint admeasuring 1.781 hectares. Learned trial Court dismissed the suit on the ground that along with the relief of perpetual injunction, plaintiff has further claimed for recovery of possession, but his suit has not been valued accordingly which has also been affirmed by the first appellate Court.

27. It appears that both the Courts below have overlooked the provisions contained under Order 7 Rule 11(b) of CPC which provides that where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time fixed by the Court, fails to do so, then the plaint shall be rejected. As such, if the trial Court as well as first appellate Court recorded a finding that the relief claimed is undervalued, then they ought to have granted time to the plaintiff to correct the valuation.

28. The Supreme Court in the matter of **Commercial Aviation and Travel Company & Ors. v. Vimla Pannlal**¹¹ held as under :-

"9. In this connection, we may refer to the provision of order VII, Rule 11(b) of the Code of Civil Procedure, which provides, inter alia, that the plaint shall be rejected where

11 1988 (3) SCC 423

the relief claimed is undervalued and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so. It is manifestly clear from the provision of order VII, Rule II(b) that a Court has to come to a finding that the relief claimed has been undervalued, which necessarily means that the Court is able to decide and specify proper and correct valuation of the relief and, after determination of the correct value of the relief, requires the plaintiff to correct his valuation within a time to be fixed by the Court. If the plaintiff does not correct the valuation within the time allowed, the plaint is liable to be rejected. The question is whether in a suit for accounts simpliciter, the Court can come to a finding as to the proper and correct value of the relief until the final determination is made. In our opinion, ordinarily it is not possible for the Court at a preliminary stage to determining the value of the relief in a suit for accounts simpliciter. If the Court is itself unable to say what the correct valuation of the relief is, it cannot require the plaintiff to correct the valuation that has been made by him. Indeed, in a suit for accounts it is also difficult for the Court to come to a finding even as to the approximate correct valuation of the relief. In such a case, the Court has no other alternative than to accept plaintiff's valuation tentatively."

29. Similarly, in the matter of Manoharan v.

Sivarajan¹², their Lordships of the Supreme Court have clearly held that Section 149 of CPC prescribes a discretionary power which empowers the Court to allow a party to make up the deficiency of court fee payable on plaint, appeals, applications, review of judgment etc. This Section also empowers the Court to

retrospectively validate insufficiency of stamp duties and observed in as under :-

"7. Section 149 of the Civil Procedure Code prescribes a discretionary power which empowers the court to allow a party to make up the deficiency of court fee payable on plaint, appeals, applications review of judgment, etc. This section also empowers the court to retrospectively validate insufficiency of stamp duties, etc. It is also a usual practice that the court provides an opportunity to the party to pay court fee within a stipulated time on failure of which the court dismisses the appeal. In the present case, the appellant filed an application for extension of time for remitting the balance court fee which was rejected by the learned Sub-Judge. It is the claim of the appellant that he was unable to pay the requisite amount of court fee due to financial difficulties. It is the usual practice of the court to use this discretion in favour of the litigating parties unless there are manifest grounds of mala fides. The court, while extending the time for or exempting from the payment of court fee, must ensure bona fides of such discretionary power. Concealment of material fact while filing application for extension of date for payment of court fee can be a ground for dismissal. However, in the present case, no opportunity was given by the learned Sub-Judge for payment of court fee by the appellant which he was unable to pay due to financial constraints. Hence, the decision of the learned Sub-Judge is wrong and is liable to be set aside and accordingly set aside."

30. In the instant case, learned trial Court, after having held that relief of recovery of possession has not been valued properly and no Court fees has been paid for the same, it could

have given an opportunity to the plaintiff to correct the valuation by granting some time, but it was not done and the suit was dismissed which was also affirmed by the first appellate Court.

31. As such, the finding recorded by the two Courts below dismissing the suit of the plaintiff on the ground of not valuing the relief of possession is hereby set aside and plaintiff is granted 30 days' time to correct the valuation by making payment of requisite Court fees.

32. As a fallout and consequence of the aforesaid legal discussion, the judgment and decree passed by both the Courts below are hereby set aside. Plaintiff's suit is decreed and it is directed that plaintiff would be entitled for recovery of possession of the suit property shown in Schedule 'B' appended with the plaint admeasuring 1.781 hectares within 60 days from the date of correcting valuation and paying court fees.

33. The appeal is allowed to the extent indicated herein-above. No cost(s).

34. Decree be drawn-up accordingly and Schedule 'B' appended with the plaint be made part of the decree.

Sd/-
(Sanjay K. Agrawal)
Judge

Harneet