

Babu Ram Vs. Basdeo and ors.

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Court : Allahabad

Decided On : May-26-1982

Reported in : AIR1982All414

Judge : V.K. Mehrotra, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 96 and 100; [Evidence Act, 1872](#) - Sections 115; [Transfer of Property Act, 1882](#) - Sections 53A; Code of Criminal Procedure (CrPC) - Sections 145

Appeal No. : Second Appeal Nos. 1886 and 1887 of 1975

Appellant : Babu Ram

Respondent : Basdeo and ors.

Advocate for Pet/Ap. : Prem Shanker Gupta, Adv.

Judgement :

V.K. Mehrotra, J.

1. Within the municipal limits of Etawah city is a small piece of land situate in Mohalla Naurangabad. It forms part of bigger land occupied by buildings towards its south.

2. Krishna Behari and Basdeo were both sons of one Shiv Sahai. Krishna Behari had no issues. He is said to have adopted one of the sons of Basdeo, namely, Babu Ram on Feb. 8, 1935. The other son of Basdeo is Om Prakash. Krishna Behari is said to have executed an agreement to transfer the aforesaid piece of land to Suresh Chandra Chaturvedi for a consideration of Rs. 3,900/-. This was on July 2, 1956 through a document marked Ext. 61. A sum of Rs. 1,000/- was initially paid at the time of agreement but by the year 1958 the remaining amount was also paid to Krishna Behari who is said to have put Suresh Chandra Chaturvedi in possession of the property. Krishna Behari was murdered on Aug. 27, 1960.

3. Dispute arose about the land which is 84' towards north and 75' towards south while both towards east and west, its dimensions are 65' each. The dispute led to proceedings under Section 145, Cr.P.C., at the instance of Basdeo against Dinesh Chandra, eldest son of Suresh Chandra Chaturvedi and his tenant Rashid. The preliminary order dated 1-10-1965 was followed by attachment of the land on Oct. 5, 1965. By an order dated Feb. 1, 1966 (Ext. A-6) the property was directed to be released in favour of Basdeo on the finding that within two months of the preliminary order he was in possession of the land. This order was upheld by this Court when a revision filed by Dinesh Chandra and his brothers was dismissed on Feb. 15, 1968. Four days later, i.e. on Feb. 19, 1968 Dinesh Chandra and his brothers obtained a sale deed of the property in their favour which was executed by Babu Ram as the adopted son of Krishna Behari. This is Ext. 21 on the record.

4. On Feb. 22, 1968 Dinesh Chandra and his brothers, i.e., sons of Suresh Chandra Chaturvedi filed a suit, out of which arise the two second appeals, claiming declaration that they were owners in possession of the disputed land. In the suit, Basdeo was the first defendant while Babu Ram was impleaded as the second defendant. The claim for the above relief was founded upon the agreement of July 2, 1956 and the deed of sale of Feb. 19, 1968. It was asserted that possession had been transferred to Suresh Chandra Chaturvedi by Ch. Krishna Behari himself after the agreement and that, in any case, they acquired title through the sale deed of 1968.

5. The first two defendants took, different stands. While Babu Ram supported the case of Chaturvedis, Basdeo said that the land in suit had been jointly acquired by him along with Ch. Krishna Behari from joint funds and that constructions to its south were also made from similar fund. Babu Ram was never adopted by Krishna Behari nor did Krishna Behari execute any agreement for sale or transfer possession to the Chaturvedis. He claimed to be the sole owner of the property after the death of Krishna Behari which Babu Ram had no right to transfer. Chaturvedis were not entitled to the declaration sought by them.

6. The trial Judge found that Krishna Behari was the exclusive owner of the disputed property and had executed an agreement to convey it to Suresh Chandra Chaturvedi. The entire amount of consideration had been received by Krishna Behari who alone was in possession of the property through his lessee Suresh Chandra. However, Babu Ram was not adopted by Krishna Behari, so that no title passed to Chaturvedis through the sale deed of the year 1968, executed by him in their favour. He dismissed the suit.

7. This decision was resented not only by the Chaturvedis but also by Babu Ram. They filed two separate appeals against it being appeals 8 and 34 of 1981. The appeals were heard together by the II Additional District Judge, Eta-wah, who decided them by a common judgment of Oct. 6, 1965, He dismissed them both affirming the conclusions of the trial Judge. Chaturvedis and Babu Ram have now come to this Court in second appeals 1887 and 1886 of 1975 respectively.

8. About Babu Ram's appeal, it was observed by the Additional District Judge that the suit, in which he was a defendant, having been dismissed and not even liability of costs having been imposed upon him, Babu Ram did not have a right of appeal and the finding on the question of adoption against him could not bind him. He would be entitled to agitate the question of his adoption again against Basdeo in any proceeding before a competent court. It was also observed that there was nothing on the record to suggest that Babu Ram even asserted the right to cross-examine the witnesses produced by Basdeo on the question of adoption. Further, Babu Ram himself did not adduce any oral evidence in proof of that fact. He could not be heard to complain about that finding in this suit. The view of the Additional

District Judge, expressed through these observations, has been challenged on behalf of Babu Ram by urging that the finding that he was not adopted as a son by Krishna Behari would operate as *res judicata* against him and that aggrieved as he was against that finding, the appeal by him was competent. He was entitled to be heard in support of the pleas that he had been validly adopted by Krishna Behari.

9. In *Iftikhar Ahmed v. Syed Meharban Ali* : [1974]3SCR464 , K.K. Mathew, J. speaking for the Supreme Court, said (in para 9 of the report):

'Now it is settled by a large number of decisions that for a judgment to operate as *res judicata* between or among co-defendants, it is necessary to establish that, (1) there was a conflict of interest between co-defendants; (2) that it was necessary to decide the conflict in order to give the relief which the plaintiff claimed in the suit; and (3) that the court actually decided the question.'

Babu Ram executed a sale deed in favour of Chaturvedis claiming to be the adopted son of Krishna Behari. Basdeo said that Babu Ram had no right to the property as he had not been adopted as a son by Krishna Behari. He could not pass any title to Chaturvedis, Conflict of interest between Babu Ram and Basdeo is apparent and so is the need for a decision on the question whether Babu Ram was Krishna Behari's adopted son. The trial Judge found that he was not. This was affirmed by the lower appellate Court. The three requirements for making the decision *res judicata* against Babu Ram, a co-defendant of Basdeo in the suit, are clearly present. *Sri Pal v. Swami Nath* : AIR1968 All282 was a case on entirely different set of facts and the observation of the learned Judge that a finding given against a party in a litigation which terminates in favour of that party cannot operate as *res judicata* in a subsequent litigation in which arose a similar controversy, has to be confined to those facts. The dismissal of the suit in the instant case terminated the controversy in favour of Basdeo and not in favour of Babu Ram who had a conflict of interest with Basdeo and whose interest was similar to that of Chaturvedis in respect of the property in suit.

10. Was an appeal by Babu Ram competent? The answer seems to be in the affirmative. An appeal shall lie 'from every decree passed by any court exercising original jurisdiction'¹ under Section 96, C. P. C., save 'where otherwise expressly

provided in the body of this Code or by any other law for the time being in force'. A decree under Section 2(2), C. P. C., means 'the formal expression of an adjudication which so far as regards the court expressing it conclusively determines the right of the parties with regard to all and any of the matters in controversy in the suit'. There are certain exceptions contained in the definition which are not material. The finding that he was not the adopted son of Krishna Behari being a necessary finding and being operative as *res judicata* against him, would be a finding prejudicial to Babu Ram resulting from the decree in the suit, albeit dismissing it. It would be assailable in an appeal by him. See *Lachman Singh v. Mohan* (1878-1880 ILR 2 All 287); *Alleemuddin v. Haji Bashir Ahmad* (1977 All WC 683).

11. The view of the Additional District Judge that Babu Ram did not have a right to appeal is, therefore, erroneous in law.

12. In the second appeal by Chaturvedis, it was urged on their behalf, in the first place, that the courts below had misdirected themselves in law in concluding that Babu Ram had not been adopted as a son by Krishna Behari. They were in error, says the counsel for Chaturvedis, in placing the burden of establishing the factum of adoption upon them and, in any case, in view of admissions made in various earlier proceedings Basdeo was estopped from pleading that Krishna Behari had not adopted Babu Ram as a son. Further, the finding that Babu Ram was not adopted by Krishna Behari is vitiated also on account of consideration by the two courts below on inadmissible evidence.

13. Counsel for the parties have addressed arguments at length on this aspect of the case. They have not only placed the relevant portions of the Judgments of the courts below but have also drawn my attention to the evidence on record, both documentary and oral, in regard to their rival contentions. The admissions attributed to Basdeo have been considered at length by the trial court which found that some of them were not correct and others had been satisfactorily explained by Basdeo. The Additional District Judge considered the matter again in appeal and though he has not specifically referred to some of them in his judgment, he has affirmed the conclusion of the trial court. Admissions are at best a piece of

evidence and where, like in the present case, they have been explained to the satisfaction of the courts of facts, it is not possible to take the view that the findings concurrently recorded by them would nevertheless raise a triable question of law. The conclusive nature of the admissions could not justifiably be set up against Basdeo in this case even on the principle of estoppel for the plaintiff-appellants either made any allegation nor let in evidence to establish that Basdeo ever made a representation to them acting whereupon they altered their position to their prejudice. Estoppel can only arise when one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief. For before the doctrine of estoppel can be invoked there must be, (i) representation by a person to another, (ii) the other should have acted upon the said representation and, (iii) such action should have been detrimental to the interest of the person to whom representation is made, These conditions must co-exist. See *Mrs. Hem Nolini Judah v. Mrs. Isolyne Saroj-bashini Bose* : AIR 1962 SC1471 and *Gyarsi Bai v. Dhansukh Lal* : [1965]2SCR154 .

'The burden of proving the ingredients of Section 115 lies on the party claiming estoppel. The representation which is the basis for the rule must be clear and unambiguous and not indefinite, upon which the party relying on it is said to have, in good faith and in belief of it, acted the representation which estops a person making it front acting contrary to it is one on the belief of which the other person acts in a manner he would not have done but for it and on believing it to be true.'

observed the Supreme Court in *Bennet Coleman & Co. Pvt. Ltd. v. Punya Priya Das Gupta* : (1969)11LLJ554SC . It cannot be said, in the present case, that Chaturvedis obtained the sale deed from Babu Ram on some representation by Basudeo or that they would not have otherwise secured it.

14. In *Krishna Behari Lal v. Gulab Chand & Co.* : AIR 1971 SC1041 it was found on facts that the plaintiffs as revisionists were parties to a compromise and were, therefore, held to have made a representation to the widow who on that account gave up her claim in respect of some properties. The Supreme Court held that the plaintiffs could, in these circumstances, not be permitted to resile from the

compromise and claim a right inconsistent with the one embodied in it. In the circumstances of the instant case, Chaturvedis can hardly seek any support from this decision.

15. It was urged that Ext. A-3, the statement made by Babu Ram on May 4, 1961, before the Additional District Judge, Etawah, that Chaudhary Krishna Behari used to represent that he would give his property to his grandsons, i.e. sons of Babu Ram was an inadmissible piece of evidence taken into account by the Additional District Judge (in para 17 of his judgment) while considering the question of adoption. This, according to the submission vitiated the finding against the adoption. It has rightly been pointed out by the counsel for Basudeo that the recital in Ext. A3 was being taken into aid in his favour by Babu Ram in support of the plea that he had been adopted by Krishna Behari and that in para 17 of his judgment, the Additional District Judge discarded it by saying that 'the statement suggesting that in case Krishna Behari had at all said so he would have said so only because Babu Ram was not his adopted son otherwise there was no occasion for him to by-pass Babu Ram and give his property to his sons.' The learned Judge proceeded to observe that 'admittedly there was no litigation between Babu Ram and Krishna Behari and that the former clearly admitted in his cross-examination in that case that he started writing himself as the adopted son of Krishna Behari only after the murder of Krishna Behari and it was never done by him during the lifetime of Krishna Behari.' Ext. A 13 which was a copy of the statement of Krishna Behari made on June 20, 1960 in the court of Judicial Officer, Auraiya, Etawah, in a revenue case wherein he had said that a letter (Ex. A-4) was written by Babu Rarn son of Basudeo (referred to by the Additional District Judge in para 15 of his judgment) too was not inadmissible in evidence. It was admissible as the statement related to existence of relationship made by Krishna Behari, 'who had since died, under Section 32(v). Evidence Act, for Krishna Behari being the brother of Basudeo had special means of knowledge about Babu Ram being the son of Basudeo.

16. The mere fact that the Additional District Judge did not refer to each and every witness produced by the parties, in his judgment, while affirming that of the trial Judge, court who had done so would not vitiate the findings in the case. Even a

general agreement with the reasons given by the trial court may have sufficed when the learned Judge agreed with the view of the trial court for, as observed by the Supreme Court in *Girianandini Devi v. Bijendra Narain Chaudhary* : [1967]1SCR93 , 'it is not the duty of the appellate court when it agrees with the view of the trial court on the evidence either to restate the effect of the evidence or to reiterate the reasons given by the trial court. Expression of general agreement with reasons given by the court decision of which is under appeal would ordinarily suffice.'

17. Sri S.S. Bhatnagar for the appellants then urged that the Chaturvedis had been put into possession of the property by the undoubted owner Ch. Krishna Behari in pursuance of the agreement for the sale of the property (Ext. 61), dated July 2, 1956 before his death after having received the entire sale consideration. The Chaturvedis were, therefore, entitled to remain in possession of the property as owners in view of the principle contained in Section 53-A of the T. P. Act, quite apart from the fact that they were entitled to it under the sale deed dated Feb. 19, 1968 executed in pursuance of that agreement. The submission further is that the mere fact that they were not found in possession within two months of the preliminary order in the proceedings under Section 145, Cr. P. C., was of no consequence and that fact could not be pressed into aid for refusing relief to them.

18. The submission founded upon Section 53-A, T. P. Act, is countered by Sri S. N. Agarwal for the first respondent by urging that it was not permissible for the Chaturvedis to take this plea for the first time in the second appeal, particularly, when no such case was put forward by them in the plaint nor was any issue framed by the trial court about it. Also, that in his statement under Order X, Rule 2, C. P. C., the counsel for Chaturvedis had clearly stated on July 8, 1969, that the plaintiffs were basing their claim only upon the sale deed obtained from Babu Ram. It was also urged that, in any case, the plaintiffs, having been found to be out of possession of the property in the proceedings under Section 145, Cr. P. C., could not set up a right to recover possession on the principle of Section 53-A, T. P. Act. That provision could, at best, provide a defence for retention of possession and could never be put forward as a basis for recovery of possession of property over which the plaintiffs were not in possession at the time of the suit.

19. Section 53-A, T. P. Act, reads thus:

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

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

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

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed 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.'

This provision enshrines the equitable doctrine of part performance partially.

20. Before considering the question whether the Chaturvedis are, on the facts of the instant case, entitled to base the right to possession over the property in suit as plaintiffs, it is desirable to dispose of the objection of Sri Agarwal that the question may not be permitted to be raised for it had not been raised at any earlier stage in the suit. It is true that no specific issue was framed in the suit touching the question of Section 53-A yet, in fact on basic facts, namely, whether Krishna Behari, owner of the property, had entered into an agreement with Suresh Chandra Chaturvedi to convey the property to him and had put him in possession of the property on fulfilment by the latter of his obligation the parties were unmistakably at issue. They led evidence in support of their respective cases and

both the courts went into it. The finding, concurrently arrived at, is that Krishna Behari was the owner of the disputed property and had entered into an agreement with Suresh Chandra Chaturvedi for its conveyance to him. The trial court found that Krishna Behari had received the entire amount of consideration and was in possession of the property through his lessee Suresh Chandra. These findings were not disturbed by the Additional District Judge. The question whether on the facts found a party was entitled to the benefit of any provision of law is basically one of law which can be agitated even at the stage of a second appeal. The statement under Order X, Rule 2, C. P. C., by the counsel for the Chaturvedis cannot be read as one giving up claim to the property on the basis of any rights flowing from the agreement of 1956 or confining it to be based upon the sale deed of 1968 in the sense that any other possible basis in law for sustenance of their claim was being given up.

21. In these circumstances, it cannot be said that the plaintiffs are precluded from agitating in this court the question about their right to the disputed property on the basis of Section 53-A, T. P. Act.

22. In *Pandit Ram Chander v. Pandit Maharaj Kunwar* : AIR1939 All611 , the plaintiff-appellant in this court was put in possession of a house in November, 1930 by one Brij Lal, who executed a lease for a period of 11 years in favour of the plaintiff which was duly registered. In August, 1931, Brij Lal sold the house to Maharaj Kunwar in discharge of his liability towards the latter on the basis of two mortgage decrees. The lease had been executed during the pendency of the suits in which the mortgage decrees were obtained. Maharaj Kunwar demolished a part of the roof of the house, purportedly after receiving a notice from the Municipal Board asking for its demolition on the ground that the portion which was in occupation of the plaintiff was dangerous. Plaintiff Ram Chander then filed a suit praying for an injunction to restrain Maharaj Kunwar and the other defendant from doing anything towards the demolition of the house or any other act which might interfere with his right as lessee as well as for a direction to the defendants to restore the demolished portion to its original condition. The question that was canvassed in this court in a second appeal by the plaintiff was whether having obtained possession in terms of the lease executed in his favour, the plaintiff could

not be ejected from the house by a process of law or otherwise. The defendants took the stand that the plea of the plaintiff, based as it was upon Section 53-A, T. P. Act, could only be taken in defence to a suit to eject him and it was not open to the plaintiff to bring a suit upon the basis of a lease and claim an order that he be left in undisturbed possession of the property leased to him. Thom, C. J. observed thus for the Division Bench which decided the case (at page 613 of the report):

'Now, in the present case, what is it that the plaintiff is attempting to do? He is not attempting to set up a transfer which is invalid, he has not instituted a suit for the declaration of the validity of the transfer; he has not instituted a suit in which he claims an order against the defendant directing him to perform any covenant of the transfer. What he is seeking to do is to debar the defendants from interfering with his possession into which he has entered with the consent of his transferor after the execution of transfer in his favour. He is, in other words, seeking to defend the rights to which he is entitled under Section 53-A, T. P. Act. Defendants 1 and 2 in demolishing part of the property of which the plaintiff had obtained possession were acting suo motu with the aid of the Municipal Board of Moradabad. The defendants it is who are seeking to assert rights covered by the contract. The plaintiff seeks merely to debar them from doing so; the plaintiff is seeking to protect his rights. In a sense, in the proceedings he is really a defendant and we see nothing in the terms of Section 53-A, T. P. Act, to disentitle him from maintaining the present suit.'

23. The Bench allowed the appeal and granted perpetual injunction restraining the first two defendants from doing anything towards the demolition of the house in dispute and from interfering with the plaintiff's right as a lessee. It also granted an injunction restraining the third defendant (the Municipal Board) from demolishing the house for so long as its condition remained as it was found by the lower appellate court, namely, that neither the ceiling nor the walls showed any sign or danger of falling down.

24. In *Ewaz Ali v. Mt. Fi-rdous Jehan* (AIR 1944 Oudh 212) a Division Bench presided over by Thomas C. J. said that 'the cardinal principle underlying Section 53A is that part performance must be the act of the person seeking to avail himself

of the equity and that the acts of the person sought to be charged are of no avail.....The section cannot be used as a weapon of attack, and that it confers upon the transferee the privilege of invoking the doctrine embodied therein only as a shield against any invasion of his rights by the transferor or persons claiming under him. The words of the section do not warrant a conclusion that a plaintiff as such is necessarily debarred from the benefit of the rule. Where by the nature of the case, as disclosed by the pleadings or otherwise, it is apparent that the transferee comes to court to defend his possession against the invasion of it by the transferor he is entitled to, invoke the aid of the equitable doctrine therein embodied. The present suit under Order 21, Rule 103, Civil P. C., is of that nature being, in our opinion, practically a continuation of the proceedings before the executing court, wherein the transferor and his representative succeeded in electing Mt. Firdous Jehan from possession which she had originally taken in pursuance of the contract of purchase..... There is no essential difference in respect of this matter between suits under Order 21, Rule 63 and those falling under Order 21, Rule 103. In both cases the object of the suit is to protect possession, and the capacity in which the plaintiff comes to court is in reality one of defence.....In the case before us, we are clearly of opinion that the position of Mt. Firdous Jehan was that of a person who was trying to defend her possession upon the doctrine of part performance against the invasion thereof by the transferor and his representative. Her position was, therefore, in fact one of defence and she was not debarred by the terms of Section 53-A from taking advantage of it in a suit filed under Order 21, Rule 103.'

25. In *T. Achayya v. E. V. Subba Rao* (AIR 1957 Andh Pra 854), Subba Rao, C. J. speaking for a Division Bench, observed (in para 19 of the report):

'It is not necessary to multiply cases. It is settled law that under Section 53-A of the T. P. Act, no title passes to a transferee. He cannot file a suit for a declaration of his title to the property or seek to recover possession of the same on the basis of any title conferred on him. But, if the condition laid down in the section are complied with, it enables the transferee to defend his possession if the transferor seeks to enforce his rights, against the property. This statutory right he can avail himself both as a plaintiff and as a defendant provided he is using his right as a

shield and not as a sword. Or to put in other words, he cannot seek to enforce his title but he can resist the attack made by a transferor.'

And later in para 21 of the report that:

'Even so, it is contended that as the plaintiffs are not in possession of the property, they cannot rely upon the provisions of Section 53-A. Section 53-A does not say that the transferee should be in possession on the date when the transferor seeks to enforce her right against the property. The essential condition for invoking the doctrine is that he should have taken possession of the property in part performance of the contract and has done some act in furtherance of the contract. The plaintiffs were admittedly put in possession and the fact that subsequently they lost possession could not deprive them of their rights which they are entitled to under the section.'

26. In *Chaitan Das v. Murali Dalai* (AIR 1971 Orissa 41), the defendants approached the High Court against a decree in a suit for declaration of tenancy right, recovery of possession and mesne profits both past and future. The plaintiffs were in possession and were raising crops on the suit land year after year. The defendants disturbed their possession which led to initiation of proceedings under Section 145, Cr. P. C., wherein the possession of the defendants was upheld. Relying upon the judgment of Subba Rao, C. J. in the case of *Akram Mea v. Secunderabad Municipal Corporation* (AIR 1957 Andh Pra 859) that protection under Section 53-A was available to the transferee both as a plaintiff and as a defendant for so long he is using it as a shield, R.N. Misra, J. (as he then was) affirmed the decree in favour of the plaintiffs. The case is illustrative of a situation where a person put in possession over property in part performance of the contract, but subsequently dispossessed, was permitted to recover possession by reliance upon the equity in his favour engrafted in Section 53-A T. P. Act.

27. In *Delhi Motor Co. v. U. A. Bas-rurkar* : [1968]2SCR720 the Supreme Court observed (in para 6 of the report):

'.....Section 53-Ais only meant to bring about a bar against enforcement of rights by a lessor in respect of property of which the lessee had already taken

possession but does not give any right to the lessee to claim possession or to claim any other rights on the basis of an unregistered lease. Section 53-A, T. P. Act, is only available as a defence to a lessee and not as conferring a right on the basis 'of which the lessee can claim rights against the lessor.'

Dealing with the decision of this court in Ram Chander's case : AIR1939 All611 (supra), the Supreme Court said (in para 7 of the report) that:

'Without expressing any opinion as to the correctness of the view taken by the Allahabad High Court, we have to point out that the interpretation put on Section 53-A, T. P. Act, even by that Court is of no assistance to the firm in the present case. In this case, the firm is seeking to enforce rights under the unregistered lease and to seek a decree for possession against the lessor. The Allahabad High Court in that case proceeded on the 'basis that the plaintiff of that suit was in the position of a defendant and was only seeking to protect his rights by resort to the provisions of Section 53-A, T. P. Act, so that no principle was laid down by the High Court that Section 53-A is available to a lessee otherwise than as a defence. We are unable to accept the submission that the judgment in that case should be read as recognising a right of a lessee to enforce rights on the basis of an unregistered lease by resort to that provision of law..... That decision may be justified, if at all, on the basis that though the lessee in that case was a plaintiff, he was actually seeking protection under Section 53-A, T. P. Act, by being in the real position of a defendant. On the question whether a person, who sues as a plaintiff, may still be regarded as defending the rights sought to be conferred upon him by an unregistered deed, we need express no opinion.'

It is clear that the Supreme Court did not lay down a principle contrary to the one that a person suing as a plaintiff may still be regarded as defending his rights under an unregistered deed. Obviously it left that question open. This is what was felt by the Gujarat High Court too in Savarkundla Nagar-palika v. Maninagar Nivas Nirman Sahkari Mandi Ltd. : AIR1981 Guj243 .

28. Counsel for Basudeo brought to my notice decisions of various High Courts which have taken a view supporting the rival contention made before me in this case.

29. In *V. V. Raghava Rao v. Gopala-rao* (AIR 1942 Mad 125), Patanjali Sastri, J. observed (at pages 126 and 127 of the report) that 'the limits of the application of the doctrine of part performance have now been defined in Section 53-A of the Act and it is plain that that provision only entitled a person in possession to invoke the doctrine as a shield to protect such possession if the conditions therein referred to are satisfied and does not enable a person who has lost possession to sue for recovery of it.' In *Radhakrishna Paik v. Sana Rout* (AIR 1945 Pat 124), a Division Bench took the view that a transferee not having valid title in his favour as the sale had not been registered, could not maintain a suit to recover possession after he had been dispossessed under Section 53-A, T. P. Act. In *Hari Prosad Affar-walla v. Abdul Haq* : AIR1951 Pat160 , the view taken by a Division Bench was that the provision of Section 53-A, T. P. Act, did not create a right in the transferee to go to court for redress of his grievance and that it imposed a bar on exercise of some of the legal rights of a transferor in a court of law. The provision did not give any active right to the transferee to go to court as a plaintiff either to maintain his possession or to recover possession, if dispossessed, after having been put in possession in pursuance of the contract. Sinha, J. one of the members of the Division Bench, did not accept the interpretation put upon the provision by the Allahabad High Court in *Ram Chander's case* : AIR1939 All611 . Das, J., however, expressed no opinion on the question whether a transferee could go to court to defend his possession against acts of aggression on the part of the transferor or his representative though he could not ask for recovery of possession for want of a perfect title. In *Padmalabha Panda v. Appalanarasamma* : AIR1952 Ori143 , a Division Bench dissented from the view taken by the Oudh Chief Court and the Allahabad High Court in the cases of *Ewaz AH* (AIR 1944 Oudh 212) and *Ram Chander* and felt that the provision can never be availed of as providing a cause of action and was not available to a transferee as a weapon of attack in an action which took rise from an invasion of the transferee's rights under the contract. In *Biswabani Private Limited v. Santosh Kumar Dutta* : AIR1964 Cal235 , the view expressed by a Division Bench was that Section 53-A, T. P. Act, could protect the possession of the appellant only during the period provided for in a compromise decree. The equitable right created by Section 53-A came to an end upon the expiry of that period. The Bench, however, did not consider or express any opinion

on a question of the kind which is arising in the present case. In *Motilal v. Jaswant Singh* the view taken was that in a suit under Order 21, Rule 63, C. P. C. a plaintiff-transferee cannot be granted the advantage of Section 53-A, T. P. Act. According to the learned single Judge, who decided that case, the provision had to be construed as debarring any person coming to a court of law from enforcing any right against the transferee but it did not give any right to the transferee to approach the court as a plaintiff.

30. In the opinion of a Division Bench of the Gujarat High Court in *V.M. Ak-baralli v. Manoranjan Barua* : AIR1970 Guj122 the decision of this Court in *Ram Chander's* case was not correct and the one in case of *Ewaz AH* (AIR 1944 Oudh 212) was distinguishable on its own facts. The view taken by the Bench was that Section 53-A conferred upon a transferee the right to defend his possession and did not confer on him any active title. In para 14 of the report the Bench said that '.....the Privy Council and the Supreme Court (in *Probodh Kumar Das v. Dantamara Tea Co. Ltd.* 0043/1939 and in *Delhi Motor Co. v. U.S. Basrurkar* : [1968]2SCR720 . had emphasised that Section 53-A is available to a transferee by way of defence only that is, in a case where he is arrayed as a defendant seeking to protect, by pleading estoppel, what he has got and not as a plaintiff seeking to remedy the infringement of right." In *Garaj Narain Singh v. Babulal Khemka* : AIR1975 Pat58 , it was said by the Division Bench that the right conferred by Section 53-A was available only to the defendant to protect his possession but the provision conferred no active title upon the transferee. It was only available as a defence to the lessee but did not give any right to him to claim possession or to claim any other right on the basis of an invalid lease. In *B. Sita-ram Rao v. Bibhisano Pradhan* : AIR1978 Ori222 the view taken was that Section 53-A, T. P. Act, could not be pressed into service by the plaintiff for obtaining decree for declaration of his title and relief of injunction even where he had been put in possession of property covered by an agreement of sale made by the first defendant with him. In the opinion of the learned Judge, who decided the case, special facts had to be pleaded to invoke the application of the provision and the basis founded upon the provision had to be specifically put forward by the plaintiff.

31. In *Ranchhoddas Chhaganlal v. Devaji Supdu Dorik* (AIR 1977 SC 1517), it was observed by the Supreme Court (in para 10 of the report) that '..... the doctrine of part performance is a defence. It is a sword and not a shield. It is right to protect his possession against any challenge to it by the transferor contrary to the terms of the contract'. The plaintiff was the appellant before the Supreme Court in suit for relief of possession of property and in the alternative for a decree for money consisting of the principal sum as the balance of the purchase price together with interest. The plaintiff had set up an oral agreement under which he had agreed to convey the property to the defendant-respondent. The defendant alleged that he was entitled to retain possession as he had performed his part of the contract by paying the entire amount due from him and had been put in possession of the property in part performance of the contract. The finding by the High Court accepted by the Supreme Court was that the defendant had never been ready and willing to perform his part of the agreement and had not paid the entire amount of consideration due from him. The defendant could not succeed on the plea of part performance which had never been pleaded by him. The observation of the Supreme Court has to be read in the context of the facts of the case. It cannot be construed as laying down a rule that a court is precluded from granting relief to party on the basis of proved facts where the legal stand available to it on those facts has not been pleaded by it.

32. The proved facts in the present case are these: Ch. Krishna Behari entered into an agreement with Suresh Chandra Chaturvedi, father of the plaintiffs, on July 2, 1956 (Ext. 61) to convey the property to him for a consideration of Rs. 3,900/-. By 1958 the entire amount of consideration was paid to Krishna Behari who put Suresh Chandra Chaturvedi in possession. This was before the death of Krishna Behari on Aug. 27, 1980. The formal deed of sale could not be executed before his death by Ch. Krishna Behari through whom Basudeo is laying claim to the property after an unsuccessful plea by him about the property being joint in character. It was on Feb. 1, 1966 that in proceedings under Section 145, Cr.P.C., was it found that within two months of the preliminary order made in the year 1965 Basudeo was in possession of the property.

33. These facts clearly show that the essential conditions for application of Section 53-A, T. P. Act, are made out in the case. There was a contract for transfer of immoveable property for consideration of which terms could be ascertained with reasonable certainty from Ext. 61, the transferee was put in possession by the transferor, the transferee had performed his part of the contract by paying the entire amount of consideration. The first defendant, who has been found to be claiming under Krishna Behari is debarred from enforcing against Chaturvedis any right in respect of the property other than those specially provided by the terms of the contract. Basudeo is not seeking to enforce against Chaturvedis any right founded upon the terms of the agreement between their father Suresh Chandra and late Ch. Krishna Behari. The view of this Court in the case of Pt. Ram Chander : AIR1939 All611 , which was followed by the erstwhile Oudh Chief Court, Andhra Pra-desh High Court and the Orissa High Court in Chetan Das (AIR 1971 Orissa 41). is not only binding upon me as a single Judge but is even otherwise acceptable as a preferable view for it advances the cause of equity and justice. After all the transferee has done all that he was required to do to fulfil his part of the contract and had been put in possession of the property in part performance of the contract. He should not be deprived of his right to remain in possession thereof or recover possession wherefrom he has been illegally dispossessed by the transferor or someone claiming under him. Founded as they are upon the equitable doctrine of part performance, though partially, the provisions of Section 53-A, T. P. Act, must be held available to the transferee, even as a plaintiff, not only where he is physically in possession of the property on the date of the suit but also where he has been found to have been illegally dispossessed by some person claiming under the transferor. The contention that where, on the date of the suit, the transferee is not found to be in possession over the property, he cannot invoke the aid of the equitable principle enshrined in this provision, if accepted, would reduce the utility of the provision to a naught because a powerful transferor or a person claiming under him would be able to defeat the equitable provisions contained in the section by forcibly dispossessing the transferee and leading him to a court as a plaintiff. Such a result would not be conducive to the interest of an orderly social order.

34. The question then is about the relief to be granted in these appeals. As far as the appeal of Babu Ram is concerned, it has to fail on the concurrent finding of the two courts below that he was not the adopted son of Ch. Krishna Behari. The evidence on record on this question was duly considered by these courts. The lower appellate court has rightly observed that Babu Ram did not assert his right to cross-examine the witnesses produced by Basudeo. He did not adduce any evidence. In fact through his application (220 Ga-2) Babu Ram intimated the trial Judge that he did not intend producing evidence. The observation of the Additional District Judge that Babu Ram did not have a right of appeal and that the finding on the question of adoption could not operate as *res, judicata* against him undoubtedly does not reflect the correct position of law, which is otherwise, yet, on merits, the decision against him has to be upheld. Second Appeal No. 1886 of 1975, therefore, fails.

35. The appeal of Chaturvedis succeeds. It is held that they are entitled to possession of the property in suit notwithstanding the fact that in proceedings under Section 145, Cr. P. C., Basudeo was found in possession thereof within two months of the preliminary order.

36. Second Appeal No. 1886 of 1975 is dismissed. Second Appeal No. 1887 of 1975 is allowed and the plaintiffs' suit is decreed in the terms aforesaid. Parties shall, however, bear their own costs of this court.

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