

Abdul Majid Vs. Abdul Gaffar

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Court : Rajasthan

Decided On : May-21-1985

Reported in : 1985(1)WLN687

Judge : S.K. Mal Lodha and; S.S. Byas, JJ.

Appeal No. : D.B. Civil Special Appeal No. 21 of 1976

Appellant : Abdul Majid

Respondent : Abdul Gaffar

Advocate for Def. : Mr. P.C. Mathur

Advocate for Pet/Ap. : Mr. H.M. Parekh, Mr. Parekh

Disposition : Appeal dismissed

Judgement :

S.K. Mal Lodha, J.

1. A learned Single Judge of this Court by his, order dated April 21, 1976, declared the case to be a fit one for appeal to the Division Bench under Section 18(2) of the Rajasthan High Court Ordinance, 1949 and as such, this special appeal has been filed against the judgment dated April 21, 1976 passed by him.

2. The plaintiff is Abdul Gaffar and the original defendants were Mohd. Umar (defendant No. 1), Abdul Aziz (defendant No. 2), Abdul Mazid (defendant No. 3) and Mohd. Ramzan (defendant No. 4). Defendants 3, 4 and 2 have died and they are represented by their legal representatives. They are all appellants, as per the amended cause title of the appeal. The plaintiff is respondent No. 1 and defendant No. 1 Mohd. Umar is respondent No. 2 in this special appeal.

3. The dispute is in respect of the house situate in Jodhpur City and which has been described in para 1 of the plaint. The house belonged to Mohd. Umar (defendant No. 1). He mortgaged this house with possession in favour of Abdul Aziz (defendant No.

2) for Rs. 3,000/-, on December 7, 1962. Mohd. Umar (defendant No.

1) entered into an agreement to sell the house to the plaintiff Abdul Gaffar for Rs. 6,000/- and received a sum of Rs. 1,600/-, as an earnest money from the vendee. The agreement to sell dated August 7, 1963 is Ex. 1 on the record. Mohd. Umar (defendant No.

1) executed the sale-deed (Ex.

2) on September 2, 1963 and received a sum of Rs. 1,400/- from the plaintiff in cash on that very day and the balance of Rs. 3,000/- was left with the plaintiff for the purpose of redemption of the mortgage from Abdul Aziz (defendant No. 2). The notice (Ex. A-1) was served by the plaintiff to the mortgagee Abdul Aziz (defendant No. 2)), on 20-9-1963 intimating him of the sale in his favour. The mortgagee Abdul Aziz (defendant No.

2) was also requested by the plaintiff to redeem the mortgage and deliver the possession of the house on payment of the mortgage money amounting to Rs. 3000/-. The plaintiff also sent a similar notice Ex. A. 2 to the mortgagee on November 4, 1963. The mortgagee did not pay any heed to the plaintiff's notice. He, thereupon, filed a suit on April 5, 1964 against the mortgagor Mohd. Umar (defendant No.

1) and the mortgagee Abdul Aziz (defendant No.

2) for redemption of the mortgage. On November 15, 1964, a preliminary decree for redemption was passed. Subsequently, a final decree was passed on June 1, 1965. The final decree was put in execution. The plaintiff Abdul Gaffar obtained the possession of the ground floor of the house on June 4, 1965. On that day, Abdul Mazid (defendant No.

3) father of the mortgagee Abdul Aziz (defendant No.

2) and Mohd. Ramzan (defendant No.

4) who is brother of Abdul Mazid (defendant No.

3) submitted an application under Order XXI, Rule 100, CPC to the executing court for restoration of possession of the house, which was illegally taken from them. The executing court, by its order dated June 27, 1966, accepted the application and ordered for the restoration of the possession of the house of Abdul Mazid (defendant No.

3) and Mohd. Ramjan (defendant No. 4). The mortgagor Mohd. Umar (defendant No.

1) entered into an agreement to sell (Ex. A.

3) in favour of the mortgagee's father Abdul Mazid (defendant No.

3) on August 17, 1963 and received a sum of Rs. 1,000/- as the earnest money. The mortgagor Mohd. Umar (defendant No.

1) executed another document Ex. A. 4 on November 10, 1963, by which, he took Rs. 500/- more towards the sale-price from Abdul Mazid (defendant No. 3). It may be mentioned that in the document Ex. A. 4, defendant No. 1 had stated that under pressure and fraud he has executed the sale-deed of the house in favour of the plaintiff Abdul Gaffar without consideration. Subsequently, the mortgagor Mohd. Umar (defendant No.

1) executed the sale-deed Ex. A. 6 in favour of defendants No. 3 and

4. This sale-deed (Ex. A.

6) was got registered on April 1, 1964 on receipt of full consideration. The plaintiff Abdul Gaffar filed the suit in the Court of Civil Judge, Jodhpur on February 21, 1966 alleging that the sale-deed Ex. A. 6 dated April 1, 1964 is void as it was executed after the execution of the sale-deed Ex. A. 2 dated September 2, 1963 in his favour. It was also averred that the agreement to sell Ex. A. 3 dated August 17, 1963 is a fabricated and made-up document. It was mentioned in the plaint by the plaintiff that as the mortgagee Mohd. Aziz (defendant No.

2) accepted the sum of Rs. 7,000/- on May 1, 1965 as redemption money, he was estopped from setting up his title to the house in dispute. The main reliefs prayed for by the plaintiff in the plaint are these:

- (1) that the order of the executing court dated January 27, 1966 may be set aside;
- (2) that the plaintiff may be put in possession of the house; and
- (3) that the plaintiff be awarded Rs. 50/- p.m. as mesne profits from the date of the suit.

Defendants No. 2 to 4 (Abdul Aziz, Abdul Mazid and Mohd. Ramzan) filed a joint written statement on June 1, 1966 resisting the suit on various grounds. It is not necessary to state the grounds of defence, as they are covered by the issues framed by the trial court. Mohd. Umar (defendant No. 1) did not put in appearance.

4. The trial court framed the following issues on July 13, 1966:

- (1) Whether Defendant No. 1 agreed to sell the disputed house to the plaintiff for Rs. 6,000/- on 7-8-1963 and received Rs. 1600/- on 7-8-1963 in part payment of the agreed price (P)
- (2) Whether the defendant No. 1 sold the house to the plaintiff on 2-9-1963 in pursuance of the agreement to sold dt. 7-8-1963 received Rs. 1400/- from the plaintiff (P)

(3) Whether the plaintiff by notice informed the defendant No. 2 to redeem the mortgage, failing which he would be liable for damages at rate of Rs. 50/- per month (P)

(4) Whether the defendants No. 2, 3 and 4 asked the plaintiff not to deposit the mortgage money in court and not to file appeal against the decree of the Civil Judge Jodhpur and requested him to pay Rs. 1700/- to the defendant No. 2 before the delivery of possession of the house and that they would receive rest of Rs. 1300/- on the delivery of the possession of the house to the plaintiff and the plaintiff paid Rs. 1700/- on this representation to defendant No. 2 on 1-5-1965 and in presence of defendant Mohd. Ramzan (P)

(5) Whether the plaintiff threatened defendant No. 2 that if he did not receive the mortgage money, he would be sent to jail and as such, he accepted Rs. 1700/- (P)

(6) Whether the defendants No. 2, 3 and 4 are estopped from setting up their title in view of the facts enumerated in paras No. 2, 3 and 7 of the plaint ?

(7) Whether the plaintiff is entitled to mesne profits at rate of Rs. 50/- p.m. (P)

(8) Whether the sale-deed dated 2-9-1963 in favour of the plaintiff was executed to defraud the defendant No. 2, 3 and 4 and is invalid being collusive, without consideration and without delivery of possession (D)

(9) Whether the defendant No. 1 contracted to sell the house to defendant No. 3 Abdul Mazid on 17-8-1963 for Rs. 6,000/- and in part performance received Rs. 1,000/- from the defendant No. 2, 3 and 4 of the same date and delivered possession of the house to them in part performance of the contract (D)

(10) Whether the defendant No. 1 in furtherance of the contract dated 17-8-1963 executed another agreement on 10-11-1963 and further received Rs. 500/- in furtherance of the contract (D)

(11) Whether defendant No. 1 executed sale-deed in favour of the defendants No. 2, 3 and 4 on 1-4-1964 after receiving full consideration of sale (D)

(12) Whether the court-fees paid by the plaintiff is deficit (D)

(13) Whether the defendant is entitled to special costs (D)

(14) Relief ?

The parties led their evidence. The trial Court decided Issues No. 1 and 2 in favour of the plaintiff. It was found that Mohd. Umar (defendant No. 1) had agreed to sell the house in dispute to the plaintiff on August 7, 1963 and subsequently sold the same to him by means of the sale-deed dated September 2, 1963. It also came to the conclusion that the agreement dated August 17, 1963 was executed by Mohd. Umar (defendant No. 1) in favour of Abdul Mazid (defendant No. 3). According to it, the decision on Issue No. 9 was not material so far as the plaintiff Abdul Gaffar was concerned. On the question relating to handing over of possession of the house to Abdul Mazid (defendant No. 3), the trial Court has observed in its judgment as under:

So far as the handing over of possession is concerned, the house was already in possession of the defendants as mortgaged and it has already been decided while deciding the Issue No. 1 that it is wrong to suggest that any further possession was handed over to them. I have already discarded the evidence of D.Ws. 1 and 2 so far as this fact is concerned.

It, accordingly, decided Issue No. 9 in favour of defendants No. 2 to 4 and against defendant No. 1 observing that this would not affect the rights of the plaintiff at all.

5. In connection with Issue No. 4, the trial court reached the conclusion that defendants No. 3 and 4 did not prohibit the plaintiff from depositing the money in court or from filing appeal against the decree of the Civil Judge or from paying Rs. 1,700/- before the delivery of the possession of the house. This was decided against Abdul Aziz (defendant No. 2), but not against Abdul Mazid (defendant No. 3) and Mohd. Ramzan (defendant No. 4). So also Issues No. 5 and 6 were decided against Abdul Aziz (defendant No. 2) and not against defendants No. 3 and 4. A finding was recorded that the sale-deed dated September 2, 1963 was neither collusive nor without consideration and that the plaintiff was not put in possession of the house in pursuance of the aforesaid sale-deed. Issue No. 8 was decided accordingly. While dealing with issue No. 7, relating to mesne profits, the

trial Court held that the plaintiff was entitled to mesne profits at rate of Rs. 40/- p.m.

6. In accordance with the findings recorded on the issues, the suit of the plaintiff was decreed and the mesne profits at rate of Rs. 40/- p.m. were allowed to him vide judgment dated September 30, 1969.

7. Aggrieved, Abdul Aziz. Abdul Mazid and Mohd. Ramzan (defendants No. 2 to 4) lodged and appeal. The learned District Judge by his judgment and decree dated Nov. 17, 1971, dismissed the appeal with costs.

8. It appears from the judgment of the learned District Judge that he has reached the following conclusions in agreement with the trial Court:

(1) that the agreement to sell Ex. 1 dated August 7, 1963 and the sale-deed Ex. 2 dated September 2, 1963, were executed by Mohd. Umar (defendant No. 1) for consideration;

(2) that the agreement to sell Ex. A. 3 dated August 17, 1963 and Ex. A. 6 dated April 1, 1964 are genuine;

(3) that the agreement to sell (Ex. 1) dated August 7, 1963 in favour of the plaintiff being prior to the date of the agreement (Ex. A. 3), the defendants No. 2 to 4 cannot claim any equity against the plaintiff;

(4) that it has not been established that defendants No. 2 to 4 (appellants) had no knowledge about the agreement to sell (Ex. 1) dated August 7, 1963, up to the time the agreement dated August 17, 1963 was executed in their favour;

(5) that Section 53A of the Transfer of Property Act (No. IV of 1882) (here in after referred to as 'the Act') was not attracted to the facts of the case and on the basis of the doctrine of part performance, as contained in Section 53A of the Act, defendants No. 2 to 4 are not entitled to obtain the possession of the house. In this connection, the learned District Judge has given the following reasons:

(a) that the agreement to sell in favour of the plaintiff was of earlier date than that of the agreement in favour of Abdul Mazid (defendant No. 3); and

(b) that Abdul Mazid (defendant No. 3) who was transferee in the agreement to sell, was not put in possession of the house in part performance of the contract.

Dissatisfied with the judgment and decree dated December 1, 1971 passed by the learned District Judge, a second appeal was filed. The learned Single Judge dismissed the appeal by his judgment dated April 21, 1976. He did not interfere with the findings of fact arrived at by the courts below on the ground that they were not open to challenge in the second appeal. The learned Single Judge held that the agreement to sell Ex. 1 dt. Aug. 7, 1963 and the sale-deed (Ex. 2) date. September 2, 1963 were executed by Mohd. Umar (defendant No. 1) for consideration; that they are genuine; and that Mohd. Umar had executed the agreement to sell Ex. A. 3 dated August 17, 1963 and the sale-deed Ex. A. 6 dated April 1, 1964, in favour of defendants No. 2 to 4. It appears that the main argument that was raised before the learned single Judge was that defendants No. 2 to 4 are protected by the doctrine of part performance of the contract as envisaged by Section 53A of the Act and, therefore, they cannot be dispossessed from the house in question. The argument was repelled by the learned single Judge holding that Section 53A of the Act has no application to the facts of the case. The learned single Judge has observed as under:

It may also be pointed out that in view of the fact that the sale-deed Ex. 2 executed on September 2, 1963, was in pursuance of the agreement to sell dated August 7, 1963, the plaintiff has a better title than to the defendant-appellants, who took the sale-deed Ex. A. 6 dated April 1, 1964 under the agreement to sale Ex. A. 3 dated August 17, 1963. The defendant-appellants also cannot be regarded as transferees in good faith because admittedly, they took the sale-deed on April 1, 1964 and paid substantial amount of the sale-price to Mohammed Umar with the knowledge of the plaintiff's earlier title deed dated September 2, 1963. It may be noticed that on the date of the execution of the agreement dated August 17, 1963 Abdul Mazid paid Rs. 1,000/- only to Mohammed Umar towards the sale-price. The remaining amount of sale-price was paid to Mohammed Umar vide Ex. A. 4 and Ex. A. 6 knowing fully well that Mohammed Umar had already executed sale-deed Ex. 2 in favour of the plaintiff. It is further surprising to note that Abdul Aziz accepted Rs. 1,700/- from the plaintiff on May 1, 1965 even though Abdul Aziz,

Abdul Mazid and Mohammed Ramzan had obtained sale deed Ex. A. 6 from Mohammed Umar on April 1, 1964. That goes to show that the defendant-appellants are not bonafide purchasers of the house.

The appeal was, accordingly, dismissed as stated above. The learned single Judge declared the case to be a fit one for appeal Under Section 18(2) of the Rajasthan High Court Ordinance. Hence this special appeal as aforesaid.

9. We have heard Mr. H.M. Parekh, learned Counsel for the appellant and Mr. P.C. Mathur, learned Counsel for respondent No. 1. No body has appeared to oppose the appeal on behalf of respondent No. 2 Mohd. Umar.

10. Mr. H.M. Parekh, learned Counsel for the appellants has assailed the finding, which relates to Issue No. 9, that Section 53A of the Act is not attracted in this case and submitted that the defendants-appellants are protected by it and so, they cannot be dispossessed from the house in question. It was urged that though the agreement to sell Ex. A. 3 dated August 17, 1963 was executed in favour of Abdul Mazid (defendant No. 3) but in true sense, it was in favour of defendants No. 2 to 4 and that the possession of the house in dispute on the date of agreement to sell (Ex. A. 3) dated August 17, 1963 was with defendants No. 2 to 4 and they continued in possession thereof in part performance of the agreement to sell Ex. A. 3 and, therefore, the defendants-appellants are entitled to protect their possession Under Section 53A of the Act. The proposition that was placed for consideration by the learned Counsel for the appellants is that a transferee cannot have better title than the vendor himself, and, therefore, he cannot eject or dispossess a person, who was in possession of the property in pursuance of an agreement to sell by the vendor. He illustrated the above proposition by stating as under:

A transfers to B possession of the property (P) in pursuance of an agreement to sell. Subsequently, A executes a registered sale-deed in respect of the property (P) in favour of C. C cannot dispossess or eject B because A himself could not have dispossessed.

It was submitted that the possession of the house in dispute on the date of agreement to sell (Ex. A. 3) dated August 17, 1963 was with the defendants-appellants and they continued to be in possession in part performance of the agreement to sell. He relied on the finding recorded in connection with Issue No. 9, in so far as it relates to possession and submitted that after the agreement Ex. A. 3, they continued in possession in part performance of the agreement to sell.

11. It will be relevant to read the relevant portion of the agreement to sell Ex. 1, dated August 7, 1963:

:0 3000 rhu gtkj :i;k jgu ds eqLeh vCnqy vtht oYn vCnqy ethn dlkbZ O;kikjh [kk-tkks/kiqj fV- IdMh xyh okys dks fnykdj mlls vkids edku gS dCtk vkt ls ,d ekg es fnyk naxk A

The relevant part of Ex. A. 3 dated August 17, 1963 is as under:

vkids ikl crkSj Hkksxykus gS og edku :i;k 6000 v[kjs N% gtkj es cspku fd;ks fo.k js jftLVh jks 'kjuh ekjsk ;kuh eksgEen mej [kWk gks lks A

In the agreement to sell (Ex. A. 4) dated November 10, 1963, it has been recited as under:

exj etcwjh ds dkj.k /kks[ks es vkdj eSus bl edku dk o;ukek vCnqy xQkj oYn olhj [kka ds gd es dj fn;k gS exj eSus muls jde ugh yh gS vkSj blfy, eSus muls jde ugh yh gsS AvkSj mlds gd es o;ukek eqdfeYy ugh gqvk gS ftldsk eS jn~ djrk gWw AvCnqy xQkj dk bl edku es dksbZ gd okLrk ugh gS A

12. In order to appreciate the contention of the learned Counsel for the appellants, we may read Section 53A of the Act, which reads as under:

Section 53A. 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 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.

The question as to the applicability of Section 53A of the Act, came up for consideration in *Hemraj v. Rustomji* : AIR 1953 SC503 . Chandrasekhar Aiyer, J., Speaking for the Court, observed as under:

The person claiming under the transferor referred to in Section 53A is a person who claims under a title derived subsequently to the date of the transfer and not anterior to the said date. The proviso to the section saves the right of a transferee for consideration who has no notice of the contract of which there was part performance, that is to say, any rights which the transferee under the unregistered document may have on the strength of part performance of the contract against the transferor would not be of any avail against a bona fide transferee for value from the transferor who had no notice of the transaction. Where therefore, the plaintiff claimed possession of property under a good and genuine contract of sale earlier in date to the defendant's contract, and the defendant was not a transferee for value who had paid money in good faith but all that he had got was a contract of sale but not a sale, and the High Court had found further that he took his contract with the knowledge of the plaintiff's earlier title, Section 53A had no application.

The mortgagee is Abdul Aziz (defendant No. 2), who is son of Abdul Mazid (defendant No. 3). The agreement to sell Ex. A. 3 dated August 17, 1963 was executed by Mohd. Umar (defendant No. 1) in favour of Abdul Mazid (defendant

No. 3). The recital in the agreement to sell Ex. A. 3 that it was mortgaged with Abdul Mazid is obviously wrong, for, the mortgagee is Abdul Aziz (defendant No. 2). There was no question of any agreement to sell in favour of Abdul Aziz, who was in possession of the property and, therefore, the question of his continuing in possession in part performance of the agreement to sell, does not arise. Abdul Mazid, being father, was living with him and so, there was no question of his independent possession as mortgagee. The mortgagee Abdul Aziz was in possession & not Abdul Mazid(defendant No. 3) transferee and, therefore, there was no question of continuance of possession as the words used in Section 53A are 'the transferee being already in possession continue to be in possession, in part-performance of the contract, and has done some act in furtherance of it' Section 53A applies to those cases where the transferee, who is in possession under a contract to transfer immovable property. Abdul Mazid (transferee), prior to agreement Ex. A. 3 dated August 17, 1963, was not in possession, but the possession was that of the mortgagee-Abdul Aziz, who is of-course son of Abdul Mazid.

13. The proviso to Section 53A lays down that nothing in Section 53A of the Act would affect the rights of the transferee for consideration and who has no notice of the contract or of the part-performance thereof. The burden of the proviso is on the person claiming part-performance.

14. In *Bapuji and Ors. v. Kukaji* AIR 1954 Madhya Bharat 128, it was held by a learned Judge of the Madhya Bharat High Court that under Section 53A, it is for the person claiming benefit of the doctrine of part performance to show that the transferee who otherwise has a legal title, had notice of the contract or of the part performance thereof. In that case, in a suit for redemption filed by the bonafide transferees of the mortgagor, it was contended by the mortgagees that they had purchased the equity of redemption by means of a document which had not been registered and that Section 53A helped them. Following *Ko Mar v. Ma May* AIR 1935 Rang. 12, it was observed that there was in fact no reason why the plaintiffs should have made any inquiries as to in what capacity the mortgagees were in possession of the house. It was also held that it was very well known that they were usufructuary mortgagees and as such under the registered mortgage-deed

their possession must have been in that capacity. It was opined that the plaintiffs were not bound to make searching inquiries as to whether or not the equity of redemption had been sold to these mortgagees under some unregistered sale-deed. In *Kukaji v. Basantilal* AIR 1955 M.B. 93, A mortgaged with possession his house B, subsequently. A sold the house to B in consideration of the mortgage-debt and the amount spent by A on improvements and repairs of the house. The deed was not registered. A sold the same property to C under a registered sale-deed. C sued B for redemption. B relied on the equitable doctrine of part performance in defence. It was, inter alia, held: (1) that even under the equitable doctrine of part performance, B must show that he continued in possession of the mortgaged property in part performance of the contract of sale in his favour and he did some act in furtherance of the contract; (2) that the deed in his favour would at the most show that B continued in possession of the mortgaged property in part performance of the contract but the execution of the deed itself or the terms thereof are no proof of any act done by B in furtherance of the contract; and (3) that even the filing of a suit for specific performance by B is an act for enforcing the contract and not one done in furtherance of the contract.

15. It was held in *Murlidhar v. Lalit Mohan* : AIR1962 Ori46 that the mere fact of continuance of possession is not enough to charge the transferee with notice of the contract to sell, and that if the character of the possession changes from that of a tenant to that of vendee in part performance of the contract, it must be proved that the subsequent transferee had notice thereof.

16. The principles laid down in the aforesaid authorities afford useful guide lines for determining the question under consideration. In the case on hand as stated above, the mortgagee was in possession of the house and there was nothing to show that after the agreement to sell Ex. A. 3 dated August 17, 1963 defendant No. 3, who is father of defendant No. 2, was delivered possession in furtherance of it and that the plaintiff had notice of the contract between Abdul Mazid (defendant No. 3) and Mohd. Umar (defendant No. 1). There is nothing on the record to infer that the plaintiff had notice of the contract to sell or part performance thereof. Thus, the defendants-appellants cannot take any advantage under the provisions of Section 53A of the Act.

17. Mr. Parekh, learned Counsel for the appellants relied on Subbrahmnyam v. Subba Rao AIR 1948 PC 95. In that case, the mother of a Hindu minor entered into a contract for sale of immovable property belonging to the minor, on his behalf, and the contract was one which it was within her competence as guardian to enter into, so as to bind the minor by it and the contract was for the benefit of the minor. It was held that the minor in that case was the person who most aptly answered the description of the transferor' in the sense in which these words are used in Section 53A of the Act. It was also held that in such a case, he is debarred by section from obtaining relief by way of possession against the transferee who had been let into possession in pursuance of the contract and who had performed his part of the contract. The Privy Council observed as under:

In the present case, neither of the two condition's mentioned is wanting, having regard to the findings of the Courts in India. It would appear, therefore that the contract in the present case was binding upon the respondent from the time when it was executed. If the sale had been completed by a transfer, the transfer would have been a transfer of property of which the respondent, and not his mother, was the owner. If an action had been brought for specific performance of the contract, it would have been brought by or against the respondent and not by or against his mother.

Reliance was also placed on Stewart & Co. v. Mackertich : AIR1963 Cal198 . In that case, A and B were the owners of certain premises. B was also a member of a partnership with others. A and B by registered lease deeds, leased out the premises to the partnership. Subsequently, the partnership contracted to transfer by an agreement their leasehold interest to a company. There was, however, no registered deed. It was held that though B executed the agreement, he did so as one of the partners of the partnership firm, and did not sign the agreement as an owner of the land or the premises. It was observed as under:

Section 53A. Applies only when a person has contracted to transfer for consideration any immovable property by a writing signed by him or on his behalf. The partners contracted to transfer by the agreement their leasehold interest to the Company. Thus, the registered company might under Section 53A claim to remain

in possession of the leasehold premises as against the partners of the firm, the agreement could not bind B in his capacity as an owner of the property, it could not also bind A who was not a party to the agreement at all. In the circumstances, Section 53A could not avail the company in its claim to be governed by the terms of the registered lease deeds.

These cases as is clear from the facts stated here in above are distinguishable and cannot be availed of by the appellants, It follows from what has been discussed here in above that Abdul Mazid(defendant No. 3) did not continue in possession in part performance of the agreement to sell (Ex. A. 3) dated August 17, 1963, for, the mortgagee Abdul Aziz (defendant No. 2) was in possession of it. Apart from that, defendants No. 2 to 4 failed to discharge their burden, which lay upon them that Abdul Gaffar's title would be affected, for he was not transferee for consideration and has notice of the contract or part performance thereof.

18. A perusal of Hemraj's case AIR 1953 SC 503 abundantly makes it clear that the person claiming under the transferor referred to in Section 53A of the Act is obviously a person who claims under a title derived subsequently to the date of the transfer and not anterior to the said date. In the present case, there are no such parties in as much as the plaintiff claims under a good and genuine agreement to sell (Ex. 1) and contract of sale (Ex. 2). The former is earlier in date to the defendant-appellants' agreement to sell (Ex. A3) dated August 17, 1963. In pursuance of the agreement to sell (Ex. 1) dated August 7, 1963, the sale-deed (Ex. 2) was executed on September 2, 1963. All this leaves no doubt that the plaintiff has better title than the defendants-appellants who took the sale-deed Ex. A. 6 dated April 1, 1964 under the agreement to sell Ex. A. 3 dated August 17, 1963.

19. For the reasons mentioned above, the defendants-appellants cannot claim the protection of Section 53A of the Act. The contention of the learned Counsel for the appellants is devoid of force, and it is rejected.

20. No other point was argued by the learned Counsel for the appellants In this special appeal.

21. The result is that this appeal has no force and it is, accordingly dismissed. In the circumstances of the case we leave the parties to bear their own costs of this appeal.

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