

Parmanand and Others Vs. Kailash Chand and Others

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Court : Chhattisgarh

Decided On : Nov-29-2011

Judge : T.P. Sharma

Appeal No. : Second Appeal No 730 OF 1994

Appellant : Parmanand and Others

Respondent : Kailash Chand and Others

Judgement :

(SECOND APPEAL UNDER SECTION 100 OF CIVIL PROCEDURE CODE 1908)

1. By this second appeal under Section 100 of the Civil Procedure Code, 1908 (in short 'the Code') appellants have challenged the legality and propriety of the judgment and decree dated 16/12/1994 passed by First Additional Judge to the Court of District Judge, Bilaspur in Civil Appeal No.61-A/1978 partly allowing the appeal against the judgment and decree of suit dated 25/9/1978 passed by First Civil Judge Class-II, Janjgir in Civil Suit No. 2-A/1976 whereby First Civil Judge Class-II, Janjgir has decreed the suit for possession of suit property at Janjgir bearing Khasra No. 3632/1, by allowing the appeal, Lower Appellate Court has dismissed the civil suit filed on behalf of present appellants/plaintiffs.

2. Present second appeal has been admitted on following substantial question of law:-

"Whether under the facts and in the circumstances of the case the First Appellate Court was justified in holding that the respondent is entitled to protect his possession u/s 53A of Transfer of Property Act even when the respondent had never taken any action for specific performance of the contract nor has pleaded nor proved his readiness and willingness?"

3. As per pleadings made in plaint, Khasra No. 3632/1, area 0.10 Acres, situated at village Janjgir was owned by appellants as coparcener, which was purchased by them from one Ramchandra Bhogha vide registered sale deed dated 12/5/1972 for payment of consideration of Rs. 2500/- and obtained possession. After obtaining the possession, they started business of fuel tall and tried to construct some permanent structure thereafter proceedings under Section 145 of the Criminal Procedure Code, 1973 was initiated at the instance of defendant Shankarlal predecessor in-title of respondents No. 1 to 7. During subsistence of stay order, Shankarlal constructed temporary hutment. Defendants had claimed that grandson of Ramchandra Bhogha, Vijay Kumar had executed agreement to sell of aforesaid plot to Shankarlal on payment of consideration of Rs. 2000/- and executed agreement on 10/8/1971. On the aforesaid ground, suit for possession of suit property was filed by plaintiffs. Allegations were made in plaint were denied by Shankarlal and he has specifically pleaded that he is in possession of suit property on the basis of agreement to sell executed by Vijay Kumar grandson of Ramchandra Bhogha with the consent of Ramchandra Bhogha.

4. After providing an opportunity of hearing to the parties, learned First Civil Judge Class-II, Janjgir has decreed the suit in favour of plaintiffs, which was challenged before the Lower Appellate Court vide judgment and decree impugned, Lower Appellate Court by reversing the judgment and decree of trial Court has dismissed the suit by holding that possession was never handed to plaintiffs therefore, contract of sell was not completed.

5. Mr. H.B. Argawal, Sr. Advocate with Ms. Meera Jaiswal, Advocate for the appellants, Mr. Shree Kumar Agrawal, Sr. Advocate with Mr. Akhil Agrawal, Advocate for the respondents No. 1 to 7 and Mr. Sumit Jhanwar, P.L. for the State/respondent No. 8 are heard.

6. Judgment and decree of both the Courts below and record of both the Courts below perused.
7. Learned counsel for the appellants submits that appellants have purchased property after payment of consideration and execution of sale deed from Ramchandra Bhogha, original owner of the property therefore, plaintiffs are entitled for possession.
8. Learned counsel for the appellants further submits that as per claim of the respondents, they are in possession of the land on the basis of agreement to sell but in order to protect their possession, respondents are required to whether they were willing to perform their part of contract and why they were remained silent for long time. In absence of such compliance of condition, they are not entitled to protect their possession in terms of Section 53A of the Transfer of Property Act, 1882 (in short 'the Act of 1882').
9. Learned counsel for the appellants placed reliance in case of FGP LIMITED v. SALEH HOOSEINI DOCTOR AND ANOTHER in which Supreme Court has held that in failing to show that they have performed or willing to perform the part of their contract and long silence after agreement, respondents are not entitled to protect their possession in terms of Section 53A of the Act of 1882 and Section 53A of the Act of 1882 is not attracted.
10. On the other hand, learned counsel for the respondents No. 1 to 7 opposed the second appeal and submits that respondents have not entered into an agreement of sell/purchase from appellants but had entered into an agreement for purchase of land from Vijay Kumar grandsons of Ramchandra Bhogha, original owner with the consent of Ramchandra Bhogha prior to alleged sale deed executed in favour of the appellants therefore, appellants are not entitled to obtain possession or dispossess the respondents, they are entitled to protect their possession in terms of Section 53A of the Act of 1882.
11. Provisions of Section 53A of the Act of 1882 give protection to person who had obtained possession of immovable property on the basis of an agreement to purchase/sell, if he shows that he had performed or willing to perform the contract

to his part. This protection is available to party who is in possession under such agreement against the transferor or person claiming under him a right in respect of the property of which the transferee has taken or in continue in possession but it will not effect the right of transferee for consideration who has no notice of the contract of part performance. Section 53A of the Act of 1882 reads as follows:-

"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 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 therefore 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."

12. In the present case, respondents have claimed protection of their possession in terms of Section 53A of the Act of 1882, in order to attract provisions of Section 53A of the Act of 1882 transferee under such agreement is required to prove following essential ingredients:-

"1. There must be a contract to transfer immovable property: (a) the contract must be for consideration (b) the contract must be in writing and must be signed by the promisor, or on his behalf (c) the contract must be such as to enable the Court to ascertain with reasonable certainty the terms of the contemplated transfer.

2. The contract must have been part performed: (a) the intended transferee must have, in part-performance of the contract, possession of the property (or any part of it) proposed to be transferred, or, (b) when the intended transferee is already in possession, he must have retained possession in part- performance of the contract, and done some act in furtherance of the contract.

3. The intended transferee must have performed his part of the contract, or must be willing to do it.

4. The rule does not affect the rights of a transferee for consideration without notice of the contract or part performance thereof.

The conditions necessary for making out the defence of part - performance to an action in ejectment by owner are as follows:-

1. That the transferor has contracted 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;

2. That 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;

3. That the transferee has done some act in furtherance of the contract; and

4. That the transferee has performed or is willing to perform his part of the contract."

13. Admittedly, in the present case, appellants have not claimed any right under the transferee Ramchandra Bhogha but has claimed as an owner on the basis of sale deed executed by Ramchandra Bhogha in favour of the appellants. In these circumstances to debar the respondents from taking such protection appellants are required to prove the existence of proviso to Section 53A of the Act of 1882 which reads as follows:-

"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".

14. Both the parties had led evidence, written statement of original respondent Shankarlal and his evidence clearly reveals that land was owned by Ramchandra Bhogha but he has entered into an agreement with his grandson Vijay Kumar with the consent of Ramchandra Bhogha. For payment of consideration of Rs. 2000/- and in part performance he has paid Rs. 400/- to Vijay Kumar out of consideration of Rs. 2000/- in the month of August-1971. As per pleadings and evidence, remaining part of Rs. 1600/- was required to be paid within 2 years from alleged date of agreement dated 10/8/1971. The documentary and ocular evidence especially the evidence of defendant Shankarlal reveals that after payment of such Rs. 400/-, he has not performed his part of contract i.e. he has not paid of Rs. 1600/- to Vijay Kumar or Ramchandra Bhogha, he has not filed any civil suit for specific performance of contract against Ramchandra Bhogha or Vijay Kumar. He has never served notice to Ramchandra Bhogha or Vijay Kumar even after knowing the fact that Ramchandra Bhogha has executed registered sale deed in favour of present appellants on 12/5/1972. Evidence adduced on behalf of the respondents No. 1 to 7 clearly reveal that alleged transferee Shankarlal or their legal representatives have neither performed the part of their contract nor had shown willingness to perform part of their contract but it could be no help of present appellants on the ground that present appellants are not transferor under alleged agreement to sell or not claiming under the transferor i.e. Ramchandra Bhogha.

15. In order to claim possession or to exclude the right to protect possession of respondents, appellants are required to prove the fact that at the time of transfer of property by Ramchandra Bhogha for consideration, they were not having any knowledge or notice of the contract or of part performance thereof. In order to prove aforesaid facts, Chainmal, original plaintiff i.e. father of present respondents No. 1 to 3 have examined himself as PW1 who has specifically deposed that they have purchased property by registered sale deed from Ramchandra Bhogha. In Para-21 of his cross-examination, he has specifically deposed that at the time of such contract i.e. execution of sale deed, he was not having any knowledge that prior to such purchase, any agreement has been executed in favour of Shankarlal

or advance of Rs. 400/- has been given to Ramchandra Bhogha. In Para-22 of his evidence, he has further denied the suggestion that he was having previous knowledge of the agreement.

16. Original defendant Shankarlal has also examined himself, in his detail evidence, he has deposed that he entered into an agreement to purchase suit property from Vijay Kumar grandson of Ramchandra Bhogha who use to act on behalf of Ramchandra Bhogha. He has further deposed in Para-3 of his evidence that he has paid Rs. 400/- to Vijay Kumar out of consideration of Rs. 2000/- and obtained possession of the land subsequently he obtained signature of Ramchandra Bhogha. In Para-4, he has deposed that it was agreed to execute the sale deed after payment of remaining consideration within 2 years. In Para-4, he has further deposed that he was always ready to pay remaining consideration. In his detail cross-examination, he has admitted factual position relating to proceedings under Section 145 of the Criminal Procedure Code, 1973. In Para-13, he has admitted that he has not called Vijay Kumar to give evidence on his behalf. In Para-14, he has further admitted that he has called Ramchandra Bhogha for evidence in proceedings under Section 145 of the Criminal Procedure Code, 1973 but Ramchandra Bhogha refused to give such evidence. He has further admitted in Para-15 of his evidence that he tried to call Vijay Kumar to give evidence but Vijay Kumar had not given any evidence in his behalf. In Para-16, he has admitted that he has not taken any assistance of Court for examining Vijay Kumar. In Para-17, he has further admitted that in May-1970, he came to know that sale deed has been executed in favour of Chainmal but he has not served any notice to Ramchandra Bhogha or Vijay Kumar. In Para-18, he has deposed that Vijay Kumar was grandson of Ramchandra Bhogha therefore, he was heir of Ramchandra Bhogha, he has requested Vijay Kumar for execution of sale deed but Vijay Kumar informed him that partition proceedings is pending between his family therefore, after partition it would clear that who would be owner of aforesaid plot. In Para-34, he has admitted that after 2-3 years of such agreement, Ramchandra Bhogha died. In his detail cross-examination, he had not deposed that whether at the time of execution of sale deed by Ramchandra Bhogha, appellants were having knowledge that prior to such sale deed, any agreement has been executed by Vijay Kumar relating to such property in the name of

Shankarlal and Shankarlal had performed his part of contract/agreement inter alia these facts have been specifically denied by Chainmal in his evidence that he was having knowledge of the aforesaid agreement. Evidence of Shankarlal further reveals that he was required to perform his part of contract within 2 years but he has never paid remaining consideration of Rs. 1600/- even after knowing the fact that sale deed has been executed in favour of appellants, he has not given any notice of his intention to perform of his contract even Ramchandra Bhogha had denied to give evidence in his favour, Vijay Kumar has also not given any evidence in his favour and he has not taken any assistance of the Court for summoning Vijay Kumar. Evidence of Shankarlal itself is sufficient to establish the fact that he has failed to perform his part of contract, he was not ready and willing to perform contract of his part.

17. As per evidence of PW1 Chainmal, Chainmal has clearly deposed that he was not having any knowledge of such agreement on or before execution of sale deed in their favour by Ramchandra Bhogha, original owner of property. Burden to prove the fact that at the time of such sale or transfer in favour of appellants, they were not having any knowledge of aforesaid agreement to sell or of part performance thereof (Virtually, there was no part performance of contract by Shankarlal) was upon appellants/plaintiffs. By examining PW1 Chainmal. Plaintiffs/appellants they have successfully discharged their onus and onus shifted upon defendant Shankarlal. Defendant Shankarlal had not deposed anything to show that appellants were having knowledge of agreement to sell and thereby defendant Shankarlal has failed to discharge his onus, which was shifted upon him. In these circumstances, evidence of Chainmal is sufficient to prove and sufficient to discharge his burden that at the time of execution of sale deed, plaintiffs were not having any knowledge of such agreement to sell.

18. As per evidence of Shankarlal, Vijay Kumar was grandson of Ramchandra Bhogha and he was acted on behalf of Ramchandra Bhogha on account of his old age but as per his evidence and documents subsequent to such agreement, Ramchandra Bhogha has signed upon the agreement to acknowledge receipt advance of Rs. 400/- which clearly shows that Ramchandra Bhogha was not unable to discharge his function. As per evidence of defendant Shankarlal, Vijay

Kumar was grandson of Ramchandra Bhogha and would have been a heir of Ramchandra Bhogha which shows that during lifetime of Ramchandra Bhogha, Vijay Kumar was not having any right over the property in dispute to execute any agreement or entered into an agreement with any person. Para-18 of evidence of defendant Shankarlal reveals that when he requested Vijay Kumar for execution of sale deed then he told that partition proceedings is in progress and after such partition, he would be in position to say that aforesaid property would be in whose share which clearly reveal that Vijay Kumar was not competent to enter into an agreement with Shankarlal. Evidence of PW1 Chainmal and DW2 Shankarlal are sufficient to prove the fact that Ramchandra Bhogha, owner of suit property had executed sale deed in favour of appellants after receiving consideration, at the time of such transfer, appellants were not having knowledge of aforesaid agreement to sell. Respondents have never performed part of their contract therefore, case of plaintiffs/appellants squarely covered by proviso to Section 53A of the Act of 1882 and rights of plaintiffs/appellants are not affected by alleged agreement to sell executed in favour of Shankarlal i.e. predecessor in-title of respondents No. 1 to 7.

19. As held in case of FGP LIMITED (Supra), proceedings provided under Section 53A of the Act of 1882 is available to transferee under the agreement against the transferor or the person claiming rights under him but in the present case, appellants are not persons who claiming rights under the transferee therefore, case of FGP LIMITED (Supra) is distinguishable on the ground of facts.

20. In the light of aforesaid discussions and proviso to Section 53A of the Act of 1882, respondents are not entitled to protect their possession under Section 53A of the Act of 1882, if it is presumed that at the time of such purchase, they were not in possession then even suit has been filed on 4/9/1976 within 12 years of such execution of right over the property therefore, suit for possession filed on behalf of appellants without previous possession was maintainable. Consequently, substantial question of law formulated for decision of this second appeal is decided as negative. On the basis of decision on substantial question of law, second appeal deserves to be allowed and is hereby allowed. Judgment and decree passed by Lower Appellate Court impugned is hereby set-aside and

judgment and decree passed by trial Court i.e. First Civil Judge, Class-II, Janjgir is hereby restored.

21. Parties shall bear cost of appeal.

22. Advocate fees if certified as per schedule or to the extent of certificate which ever is less.

23. Decree be drawn up accordingly.

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