

CASE NO.:
Appeal (civil) 3419 1988

PETITIONER:
HAMZABI AND ORS.

Vs.

RESPONDENT:
SYED KARIMUDDIN AND ORS.

DATE OF JUDGMENT: 28/11/2000

BENCH:
V.N.Khare, Ruma Pal

JUDGMENT:

RUMA PAL, J

The question to be determined in this case is whether Section 53-A of the Transfer of Property Act has any impact on the right of redemption granted by Section 60 of that Act. The right of the mortgagor to redeem had its origin as an equitable principle for giving relief against forfeiture even after the mortgagor defaulted in making payment under the mortgage deed. It is a right which has been jealously guarded over the years by Courts. The maxim of once a mortgage always a mortgage and the avoidance of provisions obstructing redemption as clogs on redemption are expressions of this judicial protection.[See: Pomal Kanji Govindji V. Vrajlal Karsandas Purohit AIR (1989) SC 436 in this context] As far as this country is concerned, the right is statutorily recognised in Section 60 of the Transfer of Property Act. The section gives the mortgagor right to redeem the property at any time after the principal money has become due by tendering the mortgage money and claiming possession of the mortgaged property from the mortgagee. The only limit to this right is contained in the proviso to the section which reads: Provided that the right conferred by this section has not been extinguished by act of the parties or by decree of a Court.

While the expression decree of Court is explicit enough, the phrase act of parties has given rise to controversy. One such act may be when the mortgagor sells the equity of redemption to the mortgagee. This Court in Narandas Karsondas V. S.A. Kamtam and Another AIR 1977 SC 774 has said that in India it is only on execution of the conveyance and registration of transfer of the mortgagors interest by registered instrument that the mortgagors right of redemption will be extinguished. Section 53-A provides for another equitable principle viz. the doctrine of part performance. The Chancery Court had developed the principle of part performance to deal with situations when a person took an unfair advantage of the transaction entered into and then denied the transaction itself. The party seeking to resist dispossession must have altered his position and done

some act under the contract so that it would amount to fraud in the opposite party to take advantage of the contract not being in writing. The principle was statutorily recognised in the United Kingdom by Section 4 of the Statute of Frauds, 1677. In India, Section 53-A similarly protects the possession of persons who may have acted on a contract of sale but in whose favour no legally valid sale deed may have been executed or registered. The section reads: 53A. Part performance. - Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

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

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

then, notwithstanding that 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 conditions necessary under this Section for making out the defence of part performance to an action in ejectment by the owner have been extricated in Nathulal V. Phoolchand 1969 (3) SCC 120 as: (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.

The language of the section is mandatory, and if the conditions are fulfilled 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 is debarred from enforcing against the transferee 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 See Sardar Govindrao Mahadik and Another V. Devi Sahai and Others 1982 (1) SCC 237.

This Court in Narandas Karsondas V. S.A. Kamtam and Another (supra) was not called upon to decide whether the equity of redemption could also be extinguished by part performance of a contract of sale under Section 53-A. When a mortgagor/vendee agrees to sell the mortgaged property to the mortgagee/putative vendee in possession, the mortgagee's status is subsumed or merged in his rights as a putative vendee under Section 53-A against the transferor, provided of course the pre-conditions for the application of Section 53-A are fulfilled. Given the mandatory language of Section 53-A, it must be held that in such a situation the equity of redemption in the mortgagor/vendee is lost to the extent that the mortgagor cannot reclaim possession of the mortgaged property. To hold to the contrary, would not only defeat the mandate of Section 53-A but would result in an anomalous situation. An owner who may not have mortgaged his property cannot be in a worse position vis-à-vis the vendee than an owner who may have mortgaged the subject matter of sale to the vendee. The only right left with the owner in both cases is to sue for the completion of the contract. Let us now consider the facts of this case. The subject matter of dispute is a house at Mohalla Boiwada, Aurangabad. The house belonged to one Mohd. Hussain. In 1951, Mohd. Hussain created a usufructuary mortgage of the house for 7 years in favour of the Petitioner No.1 for a consideration of Rs.700/-. If the amount were not repaid within the period of 7 years, the mortgagee would be entitled to retain the mortgaged house in her possession till the payment of amount or by filing suit for foreclosure get the same foreclosed. In 1953 Mohd. Hussain agreed to sell the house to petitioner No.1's husband Mohd. Yarkhan for Rs.825/-. The agreement is evidenced by a document dated 8th July, 1953 which records that Mohd. Hussain had received Rs.15/- as earnest from Mohd. Yarkhan and:

transferred the possession of the mortgage of the house by way of as a sale (sic). The remaining amount will be received in cash before the competent authority at the time of registration. Hence, I have given these few sentences as an Isar Pawati. The registration will be effected on dated 15th July, 1953.

Mohd. Hussain died before any sale deed was registered. On 21st June, 1954 a sale deed was executed by Amir Hussain and Rabiya, the son and daughter of Mohd. Hussain in favour of Petitioner No.1. This document records that the sale of the house was effected for a consideration of Rs.900/- and that after adjusting the mortgage amount of Rs.700/- the remaining amount of Rs.200/- had been received in cash. The document, however, was not registered. According to the petitioners, after this, Mohd. Yarkhan improved the mortgaged property and made various additions and alterations and converted the two room house into a 15 roomed one. On 12th January, 1965 a sale deed was executed by which Amir Hussain, Rahimabi, Rabiya, Anisabi, and Hamidabi, all claiming to be the children of Mohd. Hussain, sold the house to the Respondent No.1 for a sum of

Rs.3000/-, out of which an amount of Rs. 600/- was retained by respondent No.1 for the purpose of redeeming the mortgage in favour of the petitioner No.1. Five months later, the respondent No.1 filed a suit against the petitioner No.1 for redemption of the mortgage and for possession of the house. The Trial Court dismissed the suit inter alia on the ground that the petitioner No.1 was not the true mortgagee but her husband Mohd. Yarkhan was. The respondent No.1 preferred an appeal before the District Judge. The District Judge, while upholding the finding that Mohd. Yarkhan was the actual mortgagee, reversed the decision of the Trial Court and passed a decree permitting the respondent No.1 to redeem the mortgage. The High Court in Second Appeal was of the view that because of the concurrent finding that the petitioner No.1 was really the benamidar of Mohd. Yarkhan, the suit should have been dismissed as Mohd.Yarkhan had never been made a party. It was noted that had Mohd.Yarkhan been a party, he could have claimed protection from eviction under Section 53-A of the Transfer of the Property Act. The parties conceded the position before the High Court. The appeal was accordingly allowed and the decree of the District Judge set aside. The suit was remanded to the Trial Court with a direction that the respondent No.1 should be permitted to add Mohd. Yarkhan as a party to the suit and if this was done then Mohd. Yarkhan should be given an opportunity to file his written statement and to raise all the contentions which were open and available to him and the suit should then be disposed of on merits. By the time the matter was remanded back, Mohd. Yarkhan was dead. As such his legal heirs namely the petitioners Nos.2 to 7 before us were added as defendants in the suit. They filed a written statement in which they inter alia claimed the right to retain possession of the house by virtue of Section 53-A of the Act. After framing of fresh issues, the Trial Court again dismissed the respondent No.1s suit on 31st October, 1977. The Trial Court held that the agreement of sale dated 8th July, 1953 was proved; that Rahimabi, Anisabi, and Hamidabi were also the children of Mohd. Hussain along with Amir Hussain and Rabiyyabi; that Amir Hussain and Rabiyyabi had executed the sale deed on 21st June, 1954 in favour of the petitioner No.1 as benamidar of Mohd. Yarkhan; that the respondent No.1 had purchased the house with notice of the agreement for sale dated 8th July, 1953 and the part performance thereof, that the petitioners had been able to establish all the ingredients of Section 53-A and that because of this the respondent No.1 was not entitled to redeem the house or seek possession of it. On appeal, the Assistant Judge by his judgment dated 20th December, 1980 upheld the findings of the Trial Court on all issues but held that the plea under Section 53-A of the Act was not available to the petitioners as there was no evidence that Mohd. Yarkhan was ready and willing to perform his part of the contract. This was based on the finding that the agreement to sell mentioned that the sale deed was to be executed and the sale completed on 15th July, 1953 and that there was no evidence that Mohd.Yarkhan had offered to pay the balance consideration and get the deed executed on 15th July, 1953 or during Mohd. Hussains lifetime. The Assistant Judge negatived the submission of the petitioners that the execution of the sale deed on 20th June, 1954 showed that Mohd. Yarkhan was willing to perform the contract dated 15th July, 1953. In reversing the decree of the Trial Court and allowing the respondent no.1 to redeem the mortgage by payment of Rs.600/- to the petitioner, the District Judge noted that: The evidence has been brought

on record to the effect that certain improvements have also been made by the mortgagees in the mortgaged property and that therefore the plaintiff is not entitled to get the possession of the suit property as it exists now. This question will be finally decided while passing a final decree ordering the delivery of possession.

The petitioner No.1 had died during the proceedings before the Trial Court. The remaining petitioners challenged the decision of the Assistant Judge before the High Court. The High Court held that as a matter of law the equity of redemption was not extinguished even if the conditions under Section 53-A of the Act had been fulfilled by the petitioners. As such, the High Court was of the view that the respondent No.1 was entitled to redeem the mortgage and dismissed the appeal. The petitioners have impugned the decision of the High Court before this Court. After granting special leave on 27th September, 1988, it was found necessary to have a factual finding of the High Court whether the appellants were ready and willing to perform their part of Agreement dated the 8th July, 1953. Presumably this was because the principle of law enunciated by the High Court was unacceptable. The appeal was directed to be heard after the finding of the High Court on the point was received, on the evidence on record and within the ambit of Second Appeal keeping in view the findings recorded by the Trial Court. The High Court by its decision dated 3rd February, 1989 came to the conclusion that the petitioners were not ready and willing to perform the agreement dated 8th July 1953. The High Court deduced this from the fact that in the written statement filed by petitioner No.1 in 1965 there was no mention regarding willingness to perform the part of the contract either on the petitioner No.1s or Mohd. Yarkhans part. The second ground for finding against the petitioners was that the balance consideration was not paid even when Amir Hussain and Rabiya executed the unregistered sale deed in favour of the petitioner No.1 on 20th June, 1954. The basic facts as narrated in this judgment have been accepted by all the Courts. The question remains whether the Assistant Judge and the High Court were right in drawing the inference from the established facts that the Mohd. Yarkhan was not ready and willing to perform his part of the contract dated 8th July, 1953. If the inference was perverse and the petitioners are therefore entitled to the protection of Section 53-A, then for the reasons stated earlier, the respondent No.1s right of redemption does not survive and the appeal must be allowed. The decision in Mahadiks (supra) is instructive as that was a case where the question of readiness and willingness of the mortgagee/vendee was in issue. In that case, the owner, Mahadik, had mortgaged his house to Sahai. The mortgage was not a usufructuary mortgage. Although Sahai was given possession of the house nevertheless he was accountable to Mahadik for the rent earned from the house. The mortgagor, Mahadik was also required to pay interest on the rent amount to secure which the mortgage has been created. A draft deed of sale was prepared on 5th October 1945 under which Mahadik purportedly sold the house to Sahai in consideration for finalising the accounts of the mortgage, repaying the other creditors of the mortgagor and payment of the balance consideration money in cash at the time of registration. The sale deed was not registered. In the suit filed by Mahadik for redemption and possession, Sahai claimed protection under Section 53A of the Act. The High Court found in favour of Sahai. This Court reversed the finding

having determined from the facts that no action had been taken by Sahai in furtherance of the sale deed. Sahai had not settled the mortgage accounts nor had he paid the creditors of the mortgagor. Sahai's possession was also not relatable to the contract of sale. In an application filed by Sahai in proceedings subsequent to the execution of the sale deed, Sahai had claimed that an amount of Rs.27,792.23 was due under the mortgage from Mahadik. This Court also found that the agreement on which Sahai had relied was not a concluded contract because the parties were not ad idem. According to Mahadik, the agreement did not correctly reflect the negotiations between the parties which was that there would be a conditional sale. That was why Mahadik had refused to execute the deed of sale. Sahai's defence was negatived but it is apparent that Mahadik's case proceeded on the basis that had Sahai been successful in establishing his claim under Section 53-A, Mahadik would not have been entitled to possession. In the present case, there is no dispute that the agreement of sale dated 8th July 1953 was a concluded contract. Yarkhan, the actual mortgagee and putative vendee had acted in terms of the agreement for sale dated 8th July, 1953. The reason given by the Assistant Judge for holding that Yarkhan was not ready and willing to perform his part of the contract of sale was that in terms of the agreement dated 8th July 1953, the sale was to be completed by 15th July 1953 and that there was no evidence that Yarkhan had called upon Mohd. Hussain to execute the sale deed on that date. This inference of lack of readiness and willingness assumes that the time mentioned in the contract was of the essence of the contract. There is no evidence in support of this. On the other hand, the agreement does not state that if the registration were not effected on 15th July 1953, there would be no sale. The mentioning of the date appears to be a term in favour of the vendee casting a duty on the vendor to complete the vendee's title within the time specified. The term cannot be construed against the vendee to limit his right to have the sale completed on a subsequent date. The reasoning of the High Court is equally unacceptable. Yarkhan was not a party to the suit as originally filed. The High Court in remanding the matter to the Trial Court had specifically held that Yarkhan should be added as a party and that he should be permitted to raise the defence of Section 53-A. This was done. To reject the plea of the willingness of Yarkhan on the basis of the earlier written statement filed by the petitioner No. 1 was, to say the least, erroneous. The second reason given by the High Court is factually incorrect. The balance consideration had in fact been paid to Amir Hussain and Rabiya when the unregistered sale deed was executed as averred by Yarkhan and admittedly recorded in the sale deed dated 20th July 1954. The contract for sale required Mohd. Hussain to pay Rs.15/- as earnest money. This had been done. Yarkhan had paid not only the consideration envisaged under the agreement of sale but an additional amount as demanded by two of the heirs of Mohd. Hussain. Yarkhan had drafted the deed of sale and taken it for registration to the Registration Office. Two of the heirs had even executed the deed of sale. It is also in evidence that subsequent to the deed, Mohd. Yarkhan had exercised rights of ownership and altered his position under the contract by adding several rooms to the existing structure at some expense. Yarkhan had, therefore, asserted his possession qua-owner. This was also in terms of the agreement of sale. Short of actual registration of the deed of sale, there was nothing else that Yarkhan could do. As

stated in Maneklal Mansukhbhai vs. Hormusjii Jamshedji Ginwalla & Sons AIR 1950 SC 1: The defendant and his predecessor in interest were willing to perform their part of the contract. As a matter of fact, they have performed the whole of it. All that remains to be done is the execution of a lease deed by the lessor in favour of the lessee and of getting it registered.

The four conditions under Section 53-A of the Act having been fulfilled by the petitioners pre-decessor in interest, it must be held that the respondent No.1 is debarred from claiming possession of the mortgaged property. The judgment of the High Court is accordingly set aside and the appeal allowed without any order as to costs.

JUDIS