

NATHULAL

v.

PHOOLCHAND

October 16, 1969

[J. C. SHAH AND K. S. HEGDE, JJ.]

Transfer of Property Act 4 of 1882, ss. 4 and 53A—Defence of part performance under s. 53A—Conditions for—When defendant is deemed to be ready and willing to perform his part of contract—Effect of s. 4 on provisions of Indian Contract Act, 1872—Sequence in which parties to agreement are to carry out their parts of contract—Effect of ss. 70(4) and 70(8) of Madhya Pradesh Land Revenue and Tenancy Act 66 of 1950—Repeal of Act 66 of 1950 by Madhya Pradesh Land Revenue Code 1959 whether retrospective.

The appellant agreed in writing to sell a ginning factory situated in Madhya Pradesh and the agricultural land on which it stood, to the respondent for a sum of Rs. 43,077. The land in question stood entered in the revenue records in the name of the appellant's brother. The respondent made part payment at the time of the execution of the agreement and promised to pay the balance by a fixed date. On the ground that the balance was not paid on the due date, the appellant rescinded the contract and commenced an action in the Court of the District Judge. The defence of the respondent was that he had made arrangements to pay the balance of the agreed amount and had offered to pay it; it was the appellant who had failed to fulfil his part of the agreement inasmuch as he had not taken steps to get deleted the name of his brother from the revenue records. The trial court decreed the suit but the High Court reversed the decree. The appellant filed the present appeal with certificate. Dismissing the appeal,

HELD : The respondent was entitled to rely on the doctrine of part performance in s. 53A of the Transfer of Property Act, and s. 70(8) of the Madhya Pradesh Land Revenue and Tenancy Act, 1950 was not a bar to that defence. Section 70(8) only requires that not only the conditions prescribed by s. 70 but registration of sale deed in accordance with the land of registration for the time being in force is a condition required to be complied with before a sale is deemed valid. There was no sale in the present case and the respondent was not relying on any sale. He was relying upon a contract of sale and the equity for defending his possession against the claim made by the appellant. [858 B-D]

There was in the present case a contract to transfer for consideration immovable property by writing signed by the appellant from which the terms necessary to constitute the transfer could be ascertained with reasonable certainty. In part performance of the contract the respondent had taken possession of the property and he had in pursuance thereof paid an amount of Rs. 22,011. The contention raised on behalf of the appellant that the act done in pursuance of the contract must be independent of the terms of the contract could not be accepted. The first three conditions for the defence of part performance to be effectively set up by the respondent therefore existed. [859 B]

The fourth condition in s. 53A—that the transferee has performed or is willing to perform his part of the contract—was also satisfied in the case because :

A (i) In considering whether a person is willing to perform his part of the contract the sequence in which the obligations under a contract are to be performed must be taken into account. By virtue of s. 4 of the Transfer of Property Act the chapters and sections of the Transfer of Property Act which relate to contracts are to be taken as part of the Indian Contract Act, 1872. If therefore under the terms of the contract obligations of the parties have to be performed in a certain sequence, one of the parties to the contract cannot require compliance with the obligations by the other party without in the first instance performing his own part of the contract which in the sequence of obligation is performable by him earlier.

B (ii) The appellant had expressly undertaken to have the revenue records rectified by securing the deletion of his brother's name from the revenue records, and it was further an implied condition of the contract that the appellant would secure the sanction of the Collector to the transferor under s. 70(4) of the Madhya Bharat Land Revenue and Tenancy Act, 66 of 1950. The first condition was not fulfilled in due time and the second condition was never fulfilled. The repeal of Act 66 of 1950 by the Madhya Pradesh Land Revenue Code, 1959 did not have retrospective operation.

C (iii) In view of the arrangement made by the respondent it was clear that he had at all relevant times made necessary arrangements for paying the amount due, but so long as the appellant did not carry out his part of the contract the respondent could not be called upon to pay the balance of the price. It must therefore be held that the respondent was at all times ready and willing to carry out his part of the contract. [859 E-H]

D *Motilal & Ors. v. Nanhelal and Anr.* L.R. 57 I.A. 333, *Mrs. Chandhee Widya Vatl Madden v. Dr. C. L. Katial & Ors.* [1964] 2 S.C.R. 495 and *Bank of India Ltd. & Ors. v. Jamsetji A. H. Chinoy and M/s. Chinoy and Co.* L.R. 77 I.A. 76, 91, referred to.

E CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2345 of 1966.

Appeal from the judgment and decree dated December 3, 1965 of the Madhya Pradesh High Court, Indore Bench in First Appeal No. 56 of 1961.

F *I. N. Shroff* and *B. L. Joshi*, for the appellant.

R. Gopalakrishnan, for the respondent.

The Judgment of the Court was delivered by

G **Shah, J.** Nathulal—appellant in this appeal—was the owner of a Ginning Factory constructed on a plot of agricultural land bearing *Khasra* No. 259/1. The land stood entered in the revenue records in the name of Chittarmal—brother of Nathulal. On February 26, 1951, Nathulal agreed to sell to Phoolchand the land and the Ginning Factory for Rs. 43,011/-. He received in part payment Rs. 22,011/-, and put Phoolchand in possession of the property. Phoolchand agreed to pay the balance on or before May 7, 1951. The terms of the agreement were reduced to writing in counter-part and were duly signed by the parties.

H

On the plea that Phoolchand had failed to pay on the due date the balance of price, Nathulal rescinded the contract on October 8, 1951 and commenced an action in May, 1954 in the Court of the District Judge, Nimar, for a decree for possession of the land and the factory and for mesne profits from the date of delivery till possession was restored to him, alleging that Phoolchand was a trespasser because he had contrary to the express terms of the agreement made default in payment of the balance of the purchase price on or before May 7, 1951. Phoolchand contended that Nathulal had failed to get the name of Chittarmal "deleted" from the revenue record according to the terms of the agreement, that he, Phoolchand, was ready and willing to pay the balance of Rs. 21,000/-, that he had sent a telegram on May 7, 1951, offering to pay the balance against execution of the sale deed, that the agreement had been unlawfully altered by Nathulal after execution by adding a clause by which the possession of Phoolchand in default of payment of money on or before May 7, 1951, was declared unlawful.

The Trial Court decreed the suit holding that Phoolchand committed breach of contract in that he failed to pay the balance due by him on or before the due date. In appeal the High Court of Madhya Pradesh reversed the decree. The High Court declared that Nathulal was entitled to the balance of the consideration as also 'mesne profits' at the rate of Rs. 1,500/- per annum from May 7, 1951 till the date on which Rs. 21,000/- were deposited by Phoolchand within two months of the passing of the decree. Subject to this direction Phoolchand was allowed to retain possession of the entire property, i.e., land *Khasra* No. 259/1 including the Ginning Factory and structures standing on the land. It was directed that if Phoolchand, committed default Nathulal may claim possession of the entire property with mesne profits at the rate of Rs. 3,000/- per annum from the date he was out of possession and till the date on which possession was delivered. The cross-objections filed by Nathulal relating to mesne profits were disposed of in the light of the directions given in the decree. With certificate granted by the High Court this appeal has been preferred by Nathulal.

In the view of the Trial Court Phoolchand was unable to procure the amount of Rs. 21,000/- which he had agreed to pay on or before May 7, 1951 and on that account he had committed breach of the contract. The High Court held that Nathulal was not guilty of breach of contract, for, Phoolchand had arranged with a Bank to borrow upto Rs. 75,000/-, when needed by him, and Phoolchand had on that account sufficient resources at his disposal to enable him to pay the amount due. The Trial

- A** Court and the High Court have held that Phoolchand failed to pay the amount on or before May 7, 1951. The have also held that he had not made the tender as pleaded by him.

- Under the terms of the agreement Nathulal had undertaken to get the name of his brother Chittarmal removed from the revenue records and to get his own name entered, but the lands continued to stand recorded in the name of Chittarmal till October 6, 1952, and before that date Nathulal rescinded the contract. Again by virtue of s. 70 (4) of the Madhya Bharat Land Revenue and Tenancy Act 66 of 1950, Phoolchand not being an agriculturist the land could not be sold to him without the sanction of the State Government. In the absence of any specific clause dealing with this matter, a condition that Nathulal will secure the sanction under s. 70(4) after paying the appropriate fee must be implied in the agreement for it is well-settled that whereby statute property is not transferable without the permission of the authority, an agreement to transfer the property must be deemed subject to the implied condition that the transferor will obtain the sanction of the authority concerned : see *Motilal and Others v. Nanhelal and Another*⁽¹⁾ and *Mrs. Chandhee Widya Vati Madden v. Dr. C. L. Katial & Others*⁽²⁾.
- B**
- C**
- D**

- Phoolchand could be called upon to pay the balance of the price only after Nathulal performed his part of the contract. Phoolchand had an outstanding arrangement with his Banker to enable him to draw the amount needed by him for payment to Nathulal. To prove himself ready and willing a purchaser has not necessarily to produce the money or to vouch a concluded scheme for financing the transaction : *Bank of India Ltd. & Ors. v. Jamsetji A. H. Chinoy and Messrs. Chinoy and Company*⁽³⁾.
- E**

- F** The High Court proceeded to decide the case largely upon the view that Nathulal committed breach of contract. But the question whether Nathulal had committed the breach is not of much significance. Nathulal was the owner of the land : he had executed no conveyance in favour of Phoolchand in the land or the factory. Nathulal had sued for possession relying upon his title, and Phoolchand could defeat that claim if he established his defence of part-performance under s. 53A of the Transfer of Property Act.
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- H** The argument raised by counsel for Nathulal, that by virtue of s. 70(8) of the Madhya Bharat Land Revenue and Tenancy Act, the plea of part performance is not available to a person put

(1) L.R. 57 I.A.333

(2) [1964] 2 S.C.R. 495.

(3) L.R. 77 I.A. 76, 91.

in possession of the property under a contract of sale, has, in our judgment, no force. Section 70(8) provides : A

“No sale under this section shall be deemed to be valid until the sale deed effecting such a sale has been registered in accordance with the law of registration in force for the time being”. B

But this clause only requires that not only the conditions prescribed by s. 70, but registration of sale deed in accordance with the law of registration for the time being in force is a condition required to be complied with before a sale is deemed valid. There is no sale in the present case, and Phoolchand is not relying upon any sale. He is relying upon a contract of sale and equity which he may set up to defend his possession against the claim made by Nathulal. To the making of such a claim, relying upon the doctrine of part performance in s. 53A of the Transfer of Property Act, there is nothing in s. 70(8) of the Madhya Bharat Land Revenue and Tenancy Act 66 of 1950 which may operate as a bar. C
D

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

(1) that the transferor has contracted 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; E

(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; F

(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. G

If these 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 H

- A** transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract.

There is in this case a contract to transfer for consideration immoveable property by writing signed by Nathulal from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty. In part performance of the contract, **B** Phoolchand has taken possession of the property and he had in pursuance thereof paid an amount of Rs. 22,011/-. The argument raised by counsel for Nathulal that the act done in pursuance of the contract must be independent of the terms of the contract cannot be accepted. The first three conditions for the defence of part performance to be effectively set up by Phoolchand **C** exist. Mr. Shroff for Nathulal however contends that Phoolchand was not willing to perform his part of the contract.

Nathulal had expressly undertaken to have the revenue records rectified by securing the deletion of Chittarmal's name, and it was an implied condition of the contract that Nathulal will **D** secure the sanction of the Collector to the transfer under s. 70 (4) of the Madhya Bharat Land Revenue and Tenancy Act 66 of 1950. The first condition was not fulfilled till October 6, 1952 and the second condition was never fulfilled. We are unable to agree with Mr. Shroff that the repeal of the Madhya Bharat Act 66 of 1950 by the Madhya Pradesh Land Revenue Code, **E** 1959, has retrospective operation.

In considering whether a person is willing to perform his part of the contract the sequence in which the obligations under a contract are to be performed must be taken into account. The argument raised by Mr. Shroff that Nathulal was bound to perform the two conditions only after the amount of Rs. 21,000 - **F** was paid is plainly contrary to the terms of the agreement. By virtue of s. 4 of the Transfer of Property Act the chapters and sections of the Transfer of Property Act which relate to contracts are to be taken as part of the Indian Contract Act, 1872. If, therefore, under the terms, of the contract the obligations of the parties have to be performed in a certain sequence, one of the **G** parties to the contract cannot require compliance with the obligations by the other party without in the first instance performing his own part of the contract which in the sequence of obligations is performable by him earlier.

In view of the arrangement made by Phoolchand it was clear **H** that he had at all relevant times made necessary arrangements for paying the amount due, but so long as Nathulal did not carry out his part of the contract, Phoolchand could not be called upon to pay the balance of the price. It must, therefore, be held, that

Phoolchand was at all relevant times willing to carry out his part of the contract. A

The appeal fails and is dismissed with cost.

Appeal dismissed.

Y.P.