



**JUDGMENT IN *DEEWAN ARORA v. TARA DEVI SEN*
– A CRITICAL STUDY**

Brief facts of the case

THE BRIEF facts of the case titled *Deewan Arora v. Tara Devi Sen*,¹ as per the suit averments, are as under:

On 14-02-2008, Tara Devi -the defendant no. 1 executed an agreement to sell her freehold property in favour of Deewan Arora -the plaintiff for a consideration of Rs. 23,50,000/-. A sum of Rs. 8,00,000/- was paid to the defendant in cash on 14-02-08 by the plaintiff and it was agreed that the defendant would hand over the vacant physical possession of the suit property to the plaintiff by 10-04-2008, which condition was complied with. Balance consideration of Rs. 15,50,000/- was to be paid on or before 10-05-08. Accordingly a sum of Rs. 9,30,000/- was again paid in cash on 02-05-08. When on 03-05-08 the plaintiff again visited the defendant no. 1 and her husband -the defendant no. 2 to pay the balance of the consideration amount, they were not there and could not be traced. Later it was discovered that the property was mortgaged with GE Money –the defendant no. 3 against a home loan of Rs. 13,50,000/-, whereas in terms of the agreement to sell, the suit property was stated to be free from all encumbrances, such as sale, mortgage, gift, lien, lease, litigation dispute, etc. Then plaintiff approached the defendant no. 3 and volunteered to repay the pending loan amount in full requesting that the original documents pertaining to the suit property should be handed over to him, which request was declined. In these circumstances, the plaintiff filed a suit seeking a decree of specific performance in terms of the Agreement to Sell dt. 14-02-08 along with a direction to the third defendant to hand over all the documents of the suit property on repayment of home loan taken by the defendant for the purchase of the suit property.

1. 163 (2009) DLT 520.



Observation of the court

Single judge of the High Court of Delhi while disposing off the suit made *inter alia* the following observations:

6. ...Deewan has, in the opinion of this Court, established the existence of the alleged Agreement to Sell dated 14.2.2008. However, it is noteworthy that the said Agreement to sell is an unregistered document which purports to also convey possession to the vendee (Deewan). By the Registration and Other Related Laws (Amendment) Act, 2001, section 17 of the Registration Act, 1908 was amended, by inserting the following provision (requiring compulsory registration of certain instruments):

“(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A...”

The same amendment inserted Item 23A in the schedule to the Stamp Act, which required payment of 90% of stamp on the transaction value, at the stage of execution and registration of an Agreement to Sell, wherever the sale was to be in the Union Territory. The overall effect of these two amendments is that such documents which mention that possession is given, are to be appropriately stamped and registered. The agreement to sell, in this case, is not so stamped; it is also unregistered.

Points in controversy

Though it was stated in para 7 of the judgment that the observations in para 6 were not dispositive, still they have precedential value, therefore, the author proposes to examine the observation of the judge that ‘the overall effect of these above mentioned two amendments is that such documents which mention that possession is given, are to be appropriately stamped and registered’. Secondly, whether in a case of specific performance, the agreement to sell requires registration and 90% of stamp duty as a conveyance if it purports to transfer possession of the property to the vendee. In other words, whether amended provisions of section 53A of the Transfer of Property Act, 1882 (hereinafter “TP Act” for



short) and subsequently inserted section 17(1A) of the Registration Act, 1908 and item 23A of the schedule to the Indian Stamp Act, 1899 apply *suo motu* in case an agreement to sell purports to transfer possession of the property to the vendee?

Position of laws relating to transfer and registration of properties before the amendment in 2001

Specific performance of contract

The usual remedy for a breach of contract is for damages as provided in section 73 of the Contract Act, 1872. The Specific Relief Act, 1963 provides for an *additional remedy* of specific performance, without affecting the right to claim damages. It is an equitable relief, given by the court to enforce against a defendant, the duty of doing what he agreed to do. Thus, the remedy of specific performance is in contrast with the remedy by way of damages for breach of a contract and where a party to a contract has a right to relief under his contract, other than specific performance, eg, rescission, termination, liquidated damages, forfeiture, etc. such rights would not be affected by the provision of the Specific Relief Act.²

The Registration and other Related Laws (Amendment) Act, 2001 (No. 48 of 2001) (hereinafter “the Amending Act” for short) has not made any change to the Specific Relief Act.

Doctrine of part performance

When the TP Act was enacted, section 53A did not find place in it. In its absence there arose difference of opinion among various courts in India as regards the application of English doctrine of part performance of contract as it was then prevailing in England. Therefore, the Government of India resolved to set up a special committee for making recommendations, amongst others - whether the British equitable doctrine of part performance be extended in India also. The committee was of the view that where a transferee in good faith, that lawful instrument i.e. a written contract would be executed by the transferor, takes possession over the property, the equity demanded that the transferee should not be treated as a trespasser by the transferor and subsequently evict him through process of law in the absence of lawful transfer instrument. The special committee was also of the view that even after expiry of period of limitation, the relationship between the transferor and transferee remains

2. See Mulla, *Indian Contract and Specific Relief Acts* 2408 (2006).



the same as it was within the period of limitation and, therefore, the possession over the property taken in part performance of an agreement is required to be protected even if the period of limitation for bringing an action for specific performance has expired.

The aforesaid recommendations of the special committee were accepted by the Government of India as the same is well reflected in the aims and objects of Amending Act, 1929, whereby Section 53A was inserted in the Act.³ The section provided that where a person takes possession of an immovable property in part performance of a written contract and he has performed or willing to perform his part of the contract, then the transferor shall be debarred from enforcing against him any right in respect of such transferred property notwithstanding that the contract, though required to be registered, has not been registered. Thus, the proposed transferee can use section 53A as a shield to protect his possession either as a defendant or as a plaintiff but not either for getting title or for getting possession if he is not actually in possession. However, it is submitted that even if section 53A did not have the above notwithstanding clause, such agreements never required registration under section 17 of the Registration Act until insertion of section 17(1A) in it. The reason is discussed under next heading.

Registration of agreement to sell

Section 17 of the Registration Act, 1908 lists those documents of which registration is compulsory. Relevant clauses are as under:

17. Documents of which registration is compulsory.-

(1) The following documents shall be registered, ... namely:-

...

(b) other non- testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(2) Nothing in clauses (b) and (c) of sub- section (1) applies to—

...

3. See *Shrimant Shamrao Suryavanshi v. Pralhad Bhairoba Suryavanshi* (2002) 3 SCC 676, para 13.



(v) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or

...

Explanation.-A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money.

A reading of clause (b) of sub-section (1), clause (v) and explanation to sub-section (2) of section 17 of the Act shows that the fact that the earnest money or entire consideration was paid and/ or the possession was transferred and/ or the words 'that the vendee shall from the date of the document have complete control over the property and enjoy the same with full rights' are not determinative or conclusive of the question whether the document constitutes a contract of sale. The essential element is that the document must transfer immovable property or an interest therein which should be *inter vivos* so as to constitute conveyance within the meaning of section 2(10) of the Indian Stamp Act, 1899. In other words, there should be vesting of title in one and divesting from the other who gives up title.⁴ For this reason, an agreement to sell did not require registration until amendment in 2001 even for the purposes of section 53A.

Now we may refer to section 49 of the Registration Act, which is as under:

49. Effect of non-registration of documents required to be registered.- No document required by Section 17 (or by any provision of the Transfer of Property Act, 1882 (4 of 1882) to be registered shall-

- (a) affect any immovable property comprised therein, or
- (b) confer any power to adopt, or
- (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered :

4. See *K. Sarojamma v. G. Muni Lakshama*, 1981 (2) An. WR 47 (NRC).



Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (1 of 1877), or as evidence of part-performance of a contract for the purposes of Section 53A of the Transfer of Property Act, 1882 (4 of 1882), or as evidence of any collateral transaction not required to be effected by registered instrument.

The proviso to section 49 was added by the Transfer of Property (Amendment) Supplementary Act, 1929 (21 of 1929) following the Transfer of Property (Amendment) Act, 1929 (20 of 1929) which inserted section 53A. It provided that unregistered document effecting immovable property may be received as evidence of (1) *a contract in a suit for specific performance under the Specific Relief Act*, or (2) *as evidence of part-performance of the contract for the purpose of section 53A of the TP Act*, or (3) as evidence of any collateral transaction not required to be effected by registered instrument.

Position of laws relating to transfer and registration of properties after the amendment in 2001

The Amending Act has omitted from the non-abstente clause of section 53A the words “the contract, though required to be registered, has not been registered, or” and has also omitted from the proviso to the section 49 of the Registration Act the words “or as evidence of part performance of a contract for the purposes of section 53A of the Transfer of Property Act, 1882”. And article 23A in the schedule I of the Stamp Act has been inserted requiring 90% of the stamp duty as a conveyance on the contracts for the transfer of immovable property in the nature of part performance under section 53A of the TP Act.

The effect of above amendments is that now a purchaser cannot protect his possession of the property under the shield of section 53A of the TP Act if the agreement to sell is not registered and duly stamped. This is further fortified from the reading of section 17(1A) of the Registration Act which was inserted by the same Amending Act. It provides that if the documents containing contracts to transfer for consideration, any immovable property are not registered, then they shall have no effect *for the purposes of the section 53A of the Transfer of Property Act, 1882*.

Apparently, right to file a suit for specific performance on the basis of an unregistered agreement to sell is unaffected by the amendment.



Analysis of the present case

In the present case the plaintiff had filed the suit *not* for protecting his possession under section 53A but for execution of the sale deed in his favour through specific performance of the agreement to sell. In fact, there was no threat to his possession from the defendants who had disappeared and did not appear even before the court despite of service of summons. While hearing the suit for specific performance, the high court, it is submitted, might not have required the plaintiff to comply with the conditions precedent to section 53A of the TP Act. In the proviso to section 49 of the Registration Act, the legislature has clearly distinguished the difference between the two kinds of remedies by exempting *separately* the documents filed in evidence under both of them from registration. While the Amending Act has withdrawn the exemption of registration of a contract filed in evidence under section 53A, it did not affect the right of a person to file a suit for specific performance on the basis of an unregistered contract. It is submitted that remedies under 'equity of specific performance' and 'doctrine of part performance' neither supplant nor supplement each other. They stand on their own legs and crutches. Further distinctions between them can be discussed under following sub-headings.

Nature, object and sphere

It is submitted that nature and object of both the remedies is totally different. While the former is a sword, the latter is a mere shield. While the former results in transfer of title of the immovable property, the latter only maintains *status quo*. While the former enforces the rights of a part performer, the latter only limits the rights of the owner against the part performer. While the former lends a hand to the part performer only upto three years from the date of refusal of performance,⁵ the latter goes on with the transferee or any person claiming under him.⁶ While the former can be availed even for the enforcement of an oral agreement,⁷ the latter acknowledges only written one.⁸

It is further submitted that both the remedies operate in completely different spheres. While the former may be enforced by either party to the

5. Art. 54 of the Schedule to the Limitation Act, 1963.

6. See *Shrimant Shamrao Suryavanshi*. *Supra* note 3.

7. *Gadiraju Sanyasi Raju v. Kandula Kamappadu*, AIR 1960 AP 83.

8. *Murid Khan v. Usman Khan*, AIR 1962 Punj 475; *Ude Ram v. State of Haryana*, AIR 1994 P&H 175 at 178.



agreement,⁹ the latter can be invoked only by the proposed vendee. In granting relief under section 53A, the question whether the contract is specifically enforceable has no bearing at all, and the doctrine of part performance applies even if specific performance is not otherwise permissible.¹⁰ Similarly, in granting relief of specific performance, it is submitted that the question whether the shield of section 53A is available or not has no bearing at all.

It is further submitted that at one point of time, a part performer can seek both the remedies simultaneously. The former for getting title deeds and the latter for protecting his possession till such title deeds are conveyed. In case he has an unregistered agreement to sell, it is submitted that he may be awarded decree of specific performance if he complies with the other necessary conditions laid down by the Specific Relief Act, but shall be refused shield of section 53A. It is further submitted that if in the present case under examination the proposed vendor had filed the suit for specific performance, then he could not have been denied remedy for want of registration and stamp of the agreement of sale as done to Deewan - the plaintiff.

Transfer of possession

The court laid heavy emphasis on the fact that the agreement to sell had purported to convey possession to the vendee and after noticing section 17(1A) of the Registration Act reached the conclusion that such documents which mention that possession is given, are to be appropriately stamped and registered. It is submitted that section 17(1A), inserted by the Amending Act, itself clearly says that the documents containing contracts to transfer for consideration any immovable property *for the purposes of section 53A of the TP Act* shall be registered and if such documents are not registered, then, they shall have no effect *for the purposes of the said section 53A*. Thus, the documents containing contracts to transfer any immovable property may be received as evidence of a contract in a suit for specific performance. Transfer of possession affects the invocation of remedies of specific performance and part performance in different square. While the former can be availed of whether possession has been transferred or not but prior transfer of possession is *sine qua non* for invoking the latter. Thus, the remedy of specific performance is independent of transfer of possession. At the best it strengthens the case of the part performer for specific performance.

9. See s. 19(a) of the Specific Relief Act, 1963.

10. *Durga Prasad v. Kanbaiyalal*, AIR 1979 Raj 200.



It is also submitted that under section 22(1)(a) of the Specific Relief Act, the plaintiff can seek possession of the property, if he is already not in possession, in addition to the specific performance of a contract for transfer of immovable property. But under section 53A, a person can only retain-not seek possession of the property.

Quilibet potest renunciare juri pro se introducto

The maxim of *quilibet potest renunciare juri pro se introducto* says that any one may, at his pleasure, renounce the benefit of a stipulation or other right introduced entirely in his own favour. Thus, a defendant may, as a rule, decline to avail himself of a defence which would be at law a valid and sufficient answer to the plaintiff's demand, and waive his right to insist upon that defence. Similarly, a man may also renounce a claim which might have been substantiated or exclude some more extensive right, which the law would otherwise have conferred upon him.¹¹ Therefore, it is submitted that nobody can be compelled to avail a particular relief which is available to him and then consequently be put under burden to satisfy the conditions precedent to grant such unsought for relief. Therefore, in the present case the plaintiff could not have been required to fulfil the conditions precedent to section 53A which was never invoked by him. It is further submitted that if the plaintiff had chosen to file a suit for damages, an additional statutory remedy which was available to him, he need not have to comply with the conditions precedent to a decree of specific performance.

Conclusion

In light of above discussion, the current position of laws relating to registration and stamp duty on transfer of immovable properties is summed up as under:

1. An agreement to transfer immovable property without transfer of actual physical possession, in general, requires neither registration nor 90% of stamp duty as a conveyance.
2. An agreement to transfer immovable property with transfer of actual physical possession does require registration and 90% of stamp duty as a conveyance for invoking section 53A of the TP Act.

11. *Broom's Legal Maxims* 477-78, (10th edn. Reprint 2008).



3. An agreement to transfer immovable property with or without transfer of actual physical possession requires neither registration nor 90% of stamp duty as a conveyance for seeking damages for breach of contract.
4. An agreement to transfer immovable property with or without transfer of physical possession requires neither registration nor 90% of stamp duty as a conveyance for seeking specific performance of the contract.

Therefore, the author begs to differ with the observation of the Delhi High Court in para no. 6 of the judgment that ‘the overall effect of these abovementioned two amendments is that such documents which mention that possession is given, are to be appropriately stamped and registered’. It is submitted that it is not transfer of possession but threat to transferred possession which awakens the section 53A to act like a sentry. Section 17(1A) and item 23A are *exclusive* twin pulling horses of its chariot.

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