

## Swaran Singh Vs Sub-Registrar Jammu And Others

**Court:** Jammu And Kashmir High Court

**Date of Decision:** July 16, 2020

**Acts Referred:** Transfer Of Property Act, 1882 â€” Section 53(A), 54, 138, 138(1)  
 Registration Act, 1908 â€” Section 81

**Hon'ble Judges:** Sindhu Sharma, J

**Bench:** Single Bench

**Advocate:** K. S. Johal, Karman Singh Johal, C. M. Gupta

**Final Decision:** Dismissed

### Judgement

Sindhu Sharma, J

1. This Appeal filed by the plaintiff is against the judgment and decree dated 05.10.2012 passed by the Principal and District Judge, Jammu dismissing

the First Appeal filed by the plaintiff against the dismissal of his suit by the Court of 3rd Sub-ordinate Judge, Jammu on 07.10.2009. For the facility of

reference, parties hereinafter to be referred to as 'the plaintiff and defendants'. The plaintiff first filed suit for permanent prohibitory injunction

restraining the defendant-Tilak Raj and his attorney Suresh Kumar or their agents from transferring, alienating, trespassing upon or interfering in his

possession of the land measuring 23 Kanals 18 Marlas comprising Khasra No. 324 and also 19 Marlas comprising Khasra No. 325 situated at Village

Seora, Tehsil and District Jammu, commanding the respondents to execute the Sale Deed of the aforementioned land in favour of the plaintiff.

2. The suit appears to have been filed on 14.09.2009 when the Sub-Judge, Jammu took up the application for grant of interim relief and passed the

order, the operative portion of which is reproduced below:-

".....issue notice to the non-applicants for filing objections and in the meanwhile the non-applicants shall temporarily restrained from selling or

alienate as well as dispossessing the applicant from the suit property till next date. This order is however, subject to objections from the other side and

shall be effective from the moment it is served upon non-applicants. Applicant/Plaintiff shall furnish copies of this order, application, along with the

copies of plaint and documents etc. to the non-applicants/defendants either personally or through registered post. Put up on 22nd September 2009."

3. It appears that Sale deed executed by defendant Tilak Raj in favour of one Gurdeep Singh for land measuring 04 Kanals out of the suit land

comprising Khasra No. 324 Min was presented for registration by the vendor on 14.09.2009. As soon as the document was taken up for registration,

Mr. K. S. Johal, learned counsel for the plaintiff appeared before the Sub-Registrar, Jammu and objected to the registration. The Sub-Registrar 1st

Additional Munsiff, Jammu heard Mr. K. S. Johal and by order dated 23.09.2009 rejected the application and posted the document for registration on

10.10.2009. Since Sub-Registrar, Jammu was not a party in the suit, the restraint order was only against the defendants.

4. The plaintiff filed a fresh suit before the Sub-Registrar 1st Additional Munsiff, Jammu, impleading Tirlok Chand-vendor and S. Gurdeep Singh, the

vendee as defendants.

5. It being a suit for declaration seeking the relief that Sale Deed Dated 12.08.2009 executed by the defendant No. 2 in favour of defendant No. 3 in

respect of land measuring 04 Kanals comprising Khasra No. 324-Min Khewat No. 83 and Khata No. 215-Min situated in Villate Seora, Tehsil and

District Jammu and the order dated 23.09.2009 passed by the defendant No. 1 be declared as null and void. However, after hearing arguments, suit

was dismissed by the Court of 3rd Civil Subordinate Judge (Excise Magistrate), Jammu on 07.10.2009 the day on which it was filed mainly on the

ground that Section 54 of the Transfer of Property Act specifically provides that a contract for sale of immovable property does not by itself create

any interest or charge in such property and, therefore, the defendant-Tilak Raj continues to be the owner and could sell any part of the suit property,

as such, the plaintiff, therefore, had no cause of action.

6. The appeal filed by the plaintiff against the judgment and decree dated 07.10.2009 passed by the Trial Court was dismissed by the Principal and

District Judge, Jammu vide the Judgment and decree dated 05.01.2012 which is impugned in the appeal.

7. In Para-2 of this appeal as many as 12 substantial questions of law have been formulated while the grounds for challenging the impugned judgment

and decree are given in para 5(v) (a) to (g). The main question for consideration is whether the questions formulated in the appeal are substantial

questions of law, therefore, before dealing with the grounds of challenge as stated in para 5, it is necessary to refer and decide the alleged substantial

questions of law which are reproduced below:-

i) Whether Agreement to Sell whereunder the possession of the land has been handed over by the one party to the other party after receiving the total

sale consideration creates an enforceable right in favour of the proposed vendee in the Court of law?

ii) Whether after the execution of the Agreement to Sell in favour of the one party by the owner of the property and handing over the possession of

the property after receiving the total sale consideration amount, can the owner execute a Sale Deed in favour of the third party?

iii) Whether the Sub-Registrar under the Stamp Act could register a document of Sale Deed despite the fact that the interim restrain order was

obtained from the civil Court by the appellant against the respondents in the suit by ignoring the order passed by the Civil Court?

iv) Whether the person in whose favour the agreement to sell has been executed by the vendor after sale consideration obtained and possession of the

property handed over, has no locus-standi to file the suit?

v) Whether the Courts below could ignore the ratio of the Full Bench of the Hon'ble High Court reported in AIR 1973 Page 11 while passing the

judgments and decrees impugned?

vi) Whether the fraud can be allowed to be played by the proposed vendor to the vendee after receiving the payment and handing over the possession

of the land in question.

vii) Whether the Courts can allow the fraud to perpetuate by dismissing the suit seeking protection against the fraud played by the defendants in the

suit?

viii) Whether any finding could be returned against the appellant where the proposed vendor voluntarily executed an agreement to sell in favour of the

proposed vendee and received the entire amount of sale consideration and handed over the possession of the property?

ix) Whether the proposed vendee can be allowed to repudiate the fiduciary obligations arising out of the contract and the Court can aid him in

dispossessing the prospective vendee who had done all that was required to have been done for the purpose of executing the sale deed in respect of

the property?

x) Whether the proposed vendor can refuse to execute a sale deed in favour of the proposed vendee when the proposed vendee is in permissible

possession of the property?

xi) Whether in the facts and circumstances of the case the provisions of Section 54 of the Transfer of Property Act are attracted?

xii) Whether the Registering Authority Officer appointed under the Registration Act when knew that the property has virtually been sold out by

handing over the possession and receiving the sale consideration into could ignore the provisions of Section 81 of the Registration Act?

8. I am of the opinion that neither of these questions are substantial questions of law in view of the law laid down by Hon'ble the Supreme Court

in Santosh Hazari vs Purushottam Tiwari, 2001 (3) SCC 179.

Para 14 whereof is reproduced below:

“14. A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be

substantial a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material

bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law

involving in the case there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of

fact arrived at by Court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new

points raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore,

depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount

overall consideration being the need for striking a judicious balance between the indispensable obligation to do just at all stages and impelling necessity

of avoiding prolongation in the life of any lis.”

9. Question Nos. (i) and (xi), these questions in fact are only one and are taken up together. The question to be considered is whether the agreement

to sell creates an enforceable right and the owner can execute the sale in favour of third party. Similar question was considered by Hon'ble the

Supreme Court in Rambhau Namdeo Gajre V Narayan Bapuji Dhotra, 2004 (8) SCC 614, para 13 of which reads as under:

“13. The agreement to sell does not create an interest of the proposed vendee in the suit property. As per Section 54 of the Act, the title in

immovable property valued at more than Rs 100 can be conveyed only by executing a registered sale deed. Section 54 specifically provides that a

contract for sale of immovable property is a contract evidencing the fact that the sale of such property shall take place on the terms settled between

the parties, but does not, of itself create any interest in or charge on such property. It is not disputed before us that the suit land sought to be conveyed

is of the value of more than Rs 100. Therefore, unless there was a registered document of sale in favour of Pishorilal (the proposed transferee) the

title of the suit land continued to vest in Narayan Bapuji Dhotra (original plaintiff) and remain in his ownership.”

10. Their lordships in the aforesaid judgment relied on Para-7 of the judgment in State of Uttar Pradesh v. The District Judge & ors., 1997 (1) SCC

496. The relevant portion of which is extracted below:

“7. Having given our anxious consideration to the rival contentions we find that the High Court with respect had patently erred in taking the view

that because of Section 53-A of the Transfer of Property Act the proposed transferees of the land had acquired an interest in the lands which would

result in exclusion of these lands from the computation of the holding of the tenure-holder transferor on the appointed day. It is obvious that an

agreement to sell creates no interest in land. As per Section 54 of the Transfer of Property Act, the property in the land gets conveyed only by

registered sale deed. It is not in dispute that the lands sought to be covered were having value of more than Rs 100. Therefore, unless there was a

registered document of sale in favour of the proposed transferee agreement-holders, the title of the lands would not get divested from the vendor and

would remain in his ownership. There is no dispute on this aspect.

However, Section 53-A has not been incorporated in the State, as such, no further reference is made out.

11. So it is the law which has been settled by the highest court of the country that as per Section 54 of the Transfer of Property Act, the property in

the land gets conveyed only by registering Sale Deed and not by Agreement to Sell.

12. Similarly, the Full Bench judgment of this Court in Shiv Kumar and others V. Ajodhia Nath and others, AIR 1972 JK 125 has held that:

“7. A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between

the parties.

It does not, of itself, create any interest in or charge on such property

13. The Bench further held that:

“9. It is therefore, clear that even after an agreement to sell, title clearly, resides in the vendor and even though he may have parted with

possession, the possession of the proposed vendee is under the agreement and not being a transfer of interest, it is at the utmost, that of a licensee and

is therefore clearly permissive. Where, therefore, the origin of possession of the proposed vendee is proved to be permissive, it will be presumed to be

so unless something occurred to make it adverse

14. Since the Agreement to Sell is dated 16.03.2006, the question of it being adverse does not arise as the suit was filed on 07.10.2009 and was

dismissed on the same date. Since the Tirlak Chand-defendant continues to be the owner of the suit land, therefore, he was competent to alienate the

suit land or part thereof in breach of the agreement.

15. So neither of the aforesaid questions are substantial questions of law or even questions of law in view of the law laid down in 2004 (8) SCC 614,

2001 (3) SCC 179 and the judgment of this Court reported in AIR 1972 JKHC 125 (FB) and also the law laid down in Santosh Hazari & Ors case

(supra).

16. Question No. (iii), it is also not a question of law because documents of sale is not to be registered under the Stamp Act. Stamp Act only

prescribes the duty to be charged on the documents referred in Schedule-1. A sale deed is to be registered under the Registration Act and regarding

the restraint order, the Sub-Registrar, Jammu passed a speaking order dated 23.09.2009 and instead of challenging the order in appeal before the

Registrar, the plaintiff filed a fresh suit for declaration which was dismissed on 07.10.2009. Since there was no restraint order on 10.10.2009 as the

fresh suit was dismissed on 07.10.2009, therefore, the judgment reported in 2013(14) SCC 689 has no application to the facts of the case. So even this

question is not a substantial question of law.

17. Question No. (iv), the question of locus standi to file suit on the basis of possession of the suit property would arise only when a suit for possession

is filed against the plaintiff. The Suit for restraining the recorded owner against alienation or to set aside the sale deed executed by the owner-Tilak

Raj is not maintainable as per the law declared by the Apex Court because if the fact that the title of the land remained with the defendant No. 2-Tilak

Raj, the Sale Deed executed by him could not be declared as void, therefore, the suit for declaration was rightly dismissed.

18. Question Nos. (v), (vi) & (vii), these are also not the substantial questions of law in view of the law laid down by Hon'ble the Supreme Court

in State of UP v. The District Judge & ors., 1997 (1) SCC 496 and Rambhau Namdeo Gajre V Narayan Bapuji Dhotra, 2004 (8) SCC 614.

19. Mr. Johal, learned counsel for the plaintiff has relied on Paras-8 & 9 of the judgment titled Ghulam Qadir and another V. Ghulam Hussain, AIR

1973 JK 11 which are reproduced below:

"8. We find ourselves in complete agreement with the observations made by their Lordships in the aforesaid case. It is manifestly clear that where

the plaintiff voluntarily executes a contract of sale puts the proposed vendee in possession of the property and receives the entire consideration money,

there is no special equity in his favour to allow him to turn round and claim the property after a long time merely because the price of the property has

increased. He cannot be allowed to repudiate the fiduciary obligation arising out of the contract nor can the court aid him to commit fraud by

dispossessing a prospective vendee who has done all that was required of him to do for purchasing the Property.

9. For these reasons we find that even though the possession of the defendant may be permissive, since the plaintiff has received the entire

consideration money and allowed the position to be changed to the prejudice of the defendant, he will be stopped from repudiating the sale transaction

and recovering possession from the defendant. On this ground alone, in our opinion, the defendant is entitled to succeed.

20. So it being a suit for possession filed by the owner after 22 years after having parted possession, it was dismissed on the ground that there was no

equity in favour of the plaintiff. However, the Bench did not even notice the law laid down by the Board of Judicial Advisors. The highest Court of the

State in *Khan Abdul Aziz Mantoo V. Dr. Shiv Ji*, 5 JKL 185 holding that:

“Having examined the terms of Section 138 of the Transfer of Property Act, the Board are of opinion that the application of the

doctrine of part performance is excluded by the mandatory provisions contained in the aforesaid section and that it is not possible to make a distinction

between a plaintiff invoking the aid of that doctrine and the defendant who may have the advantage of being in possession of the property alleged to

have been transferred without a registered instrument. On the whole the Board are satisfied that the view taken by the High Court is not open to

challenge. Accordingly they humbly advised His Highness to reject the petition for special leave to appeal with cost.

21. The moot question, however, is whether breach of agreement, constitutes a fraud specially when the owner-Tirlok Chand is the real owner of the

suit land in view of the law declared by the highest court of the country. In case of breach of agreement, the remedy is available to the plaintiff under

law especially when the breach of agreement is within a period of less than 04 years.

22. Question No. (viii), Agreement to Sell is always a voluntarily act because unless both the parties agree there cannot be any agreement. But since

the alternate remedy is available against the breach of agreement, therefore, suit has been rightly dismissed because Section 54 of Transfer of

Property Act provides that Agreement to Sell does not create any right or charge in the property in favour of the proposed vendor as held in *Khan*

*Bahadur Mian Pir Bux V. Sardar Mahomed Tahar*, AIR 1934 PC 235:

“Section 54 of the Transfer of Property Act expressly enacts that a contract for sale of immovable property does not itself create any interest in or

charge on such property. There is, therefore, no room for the application of the English equitable doctrine that a contract for sale of real property

makes the purchaser the owner in equity of the estate. The underlying principle upon which this rule depends is in applicable to the sale of real estate

in India in view of express enactments.

So even grant of temporary injunction was ruled out by the highest court of the country.

23. Question Nos. (ix) and (x), since the Agreement to Sell does not create any right or charge in the property in favour of the proposed vendee so the

owner was not deprived of the title in the land, therefore, he could legally repudiate the contract subject to the right of the proposed vendee to claim

damages for breach of agreement.

24. Question No. (xii), Agreement to Sell is not a sale in terms of Section 138 of the Transfer of Property Act, therefore, the registering authority was

not obliged to consider that Agreement to Sell as virtual sale as claimed as long as sub-section 1 of Section 138 existed in the State Transfer of

Property Act. Section 81 of the Registration Act has no application to the facts of the case because registration of the Sale Deed could not be refused

as the vendor under law was the owner and registering officer had no reason to refuse the registration after the vendor had just received consideration

amount and was ready to suffer the consequences of the restraint order of which he was apprised by the Sub-Registrar. However, even so the Sub-

Registrar wisely postponed the registration to 10.10.2009 by which time the fresh suit was filed though it was dismissed, as such, there was no

restraint order on 10.10.2009.

25. None of the aforesaid questions can be termed as substantial questions of law in view of the judgment of Hon'ble the Supreme Court in

Santosh Hazari vs Parshotam Tiwari, 2001 (3) SCC 179. Para 23 reiterated in Hero Vinoth (Minor) V. Seshammal, 2006 (5) SCC 545 in para 23,

which are reproduced below:

23. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material

bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law

involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact

arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point

raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on

the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall

consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of

avoiding prolongation in the life of any lis.

26. Having considered all the questions, I may now take up grounds of appeal as pleaded in Para 5(1)(v). All these grounds have been dealt with while



considering the questions which in fact are the arguments in support of the appeal and not even questions of law, hence no new ground of the appeal

arises for consideration.

27. In view of the above, there is no merit in this appeal and the same is, accordingly, dismissed alongwith IA.

28. Original record of the Court below be remitted back forthwith.