

(2009) 06 AP CK 0008

Andhra Pradesh High Court

Case No: S.A. No"s. 481 and 486 of 1997

Parimi Vishnumurthy and
Another

APPELLANT

Vs

Vundavalli Dorayya and Another

RESPONDENT

Date of Decision: June 4, 2009

Acts Referred:

- Transfer of Property Act, 1882 - Section 53A

Citation: AIR 2009 AP 187 : (2009) 6 ALD 123 : (2009) 7 ALT 716 : (2010) 8 RCR(Civil) 2248

Hon'ble Judges: G.V. Seethapathy, J

Bench: Single Bench

Advocate: G. Krishna Murthy, for the Appellant; N.V. Suryanarayana Murthy, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

G.V. Seethapathy, J.

These two appeals arise out of the common judgment dated 20-12-1996 in A.S. Nos.71 and 72 of 1990, on the file of the Subordinate Judge, Kovvur, wherein both the appeals were dismissed, confirming the judgments and decrees dated 22-08-1990 in O.S. Nos. 607 of 1983 and 556 of 1986, on the file of the Principal District Munsif, Kowur.

2. The appellants in S.A. No. 481 of 1997 are defendants 2 and 3 in O.S. No. 607 of 1983, filed by the first respondent herein. The second respondent herein is the first defendant in O.S. No. 607 of 1983. The appellant in S.A. No. 486 of 1997, who is the plaintiff, filed the other suit O.S. No. 556 of 1986 against the respondent who is the plaintiff in O.S. No. 607 of 1983.

3. For the sake of convenience, the parties are hereinafter referred to as arrayed in the suits before the trial Court.

4. Undavalli Doraiah filed the suit O.S. No. 607 of 1983 against the appellants herein and the second respondent, with the following averments, in brief:

The plaintiff and defendants are natives of Ramannapalem. The southern portion of the plaint schedule bearing two thatched sheds is the ancestral property of the plaintiff and he has been in possession and enjoyment of the same for more than 30 or 40 years shown as A B C D in the plaint plan. E and Q are the thatched houses. The plaintiff purchased the northern portion marked as C D E F from the first defendant on 30-10-1968 under an agreement of sale for a consideration of Rs. 800/- and paid Rupees 700/-, agreeing to pay the balance of Rs. 100/- within six months. The first defendant delivered possession of C D E F site on the same day in the presence of Parimi Ramanna and Jawadi Suryaharayana, who are attestors and scribe of the agreement. The plaintiff has put up fencing around the entire site. The plaintiff was always ready and willing to complete the transaction, but D-1 left the village for Tungabhadra area in Karnataka State. The plaintiff has been in possession and enjoyment of C D E F site as owner u/s 53(A) of the Transfer of Property Act (for short "the Act"). The plaintiff has been raising banana plantation and vegetable creepers in C D E F site. There is also passage from the plaintiffs house through C D E F site. The plaintiff has perfected his title by adverse possession also. D-3 is the mother of D-1. D-2 and D-3 have been inimical towards the plaintiffs family and they high-handedly removed the boundary fencing along A B boundary. The plaintiff questioned the same and gave a police report also. Meanwhile, D-1 returned from Tungabhadra area. D-2 and D-3 colluded with D-1 and instigated her to cause obstruction to the plaintiffs enjoyment of the schedule property. The defendants were proclaiming that they would high-handedly remove the remaining fencing along with A E F B and dispossess the plaintiff. Hence; the plaintiff filed the suit for permanent injunction and also for mandatory injunction for restoration of A B fencing to its original condition.

5. The first defendant filed a written statement contending, in brief, as follows:

D-1 never executed any agreement in favour of anyone regarding C D E F site. The alleged document dated 30-10-1968 is, a rank forgery. D-1 is in possession of C D E F site until she executed a sale deed in favour of D-2 on 18-11-1983. Ever since, D-2 and D-3 have been in possession and enjoyment of the said site. D-1 was living in Ramannapalem village itself till recently. The plaintiff has no passage through C D E F site to reach his house. His passage is on the eastern side, of the fencing. D-2, filed a written statement raising similar contentions and claiming, that he purchased C D E F site from the first defendant under a registered sale deed dated 18-11-1983 for a consideration of Rs. 1256/- and ever since he, has been in possession and enjoyment of the same in his own right and D-3 filed a memo adopting the written statement of D-2.

6. On the strength of the above pleadings, the trial Court framed the following issues:

- i) Whether the plaintiff Is entitled for permanent injunction prayed for?
- ii) Whether the plaintiff is entitled for mandatory injunction prayed for?
- iii) To what relief?

7. Parimi Vishnu Murthy, the second defendant in O.S. No. 607 of 1983 filed the other suit O.S. No. 556 of 1986 with the following averments:

The 1st item of the plaint schedule originally belonged to one Undavalli Suranna, who sold the same to M. Brahmanna under a registered sale deed dated 16-09-1953 and Brahmanna sold the same to Setti Rajeswari under a registered sale deed dated 15-03-1963 and from said Rajeswari, the plaintiff i.e., Parimi Vishnu Murthy purchased the same under a registered sale deed dated 18-11-1983. The 2nd item of plaint schedule was purchased by the plaintiff i.e., Parimi Vishnu Murthy from Ramarao, Satyanarayana and Suryarao, who are sons of Undavalli Rayadumma, under a registered sale deed dated 13-03-1972 and obtained delivery of possession. Thus, the plaintiff became entitled for both items 1 and 2 of the plaint schedule. The defendant, i.e., Undavalli Doraiah sold 123½ sq.yards of site under a registered sale deed dated 08-12-1953 to Jawadi Suryanarayana and 200 sq.yards to Mumareddy Peda Veeraju. The defendant was left with no site after the above sales. The defendant, however, filed O.S. No. 607 of 1983 for injunction, making a false claim of ownership and possession in item 1 of plaint schedule and a portion in item 2. Hence, this suit is filed for declaration of the plaintiffs title to the suit property so that the real dispute can be thrashed out.

8. The defendant, Undavalli Doraiah, who is the plaintiff in the other suit, filed a written statement raising the self-same objections as that of his plaint in O.S. No. 607 of 1983 claiming his ownership and possession under an agreement of sale dated 30-10-1968 said to have been executed by Setti Rajeswari and contending that the sale deed executed by Setti Rajeswari in favour of defendant is collusive and not binding.

9. On the strength of the above pleadings, the trial Court framed the following issues:

- i) Whether the plaintiff has got title in the schedule property?
- ii) Whether the plaintiff is entitled for recovery of possession?
- iii) To what relief?

10. During trial, P.Ws. 1 to 4 were examined on behalf of the plaintiff in O.S. No. 607 of 1983 and Exs.A-1 to A-11 were marked. D.Ws. 1 to 7 were examined and Exs.B-1 to B-3 were marked on behalf of the defendants. On a consideration of the evidence available on record, the trial Court held that Parimi Vishnu Murthy, who is second defendant in O.S. No. 607 of 1983 and plaintiff in O.S. No. 556 of 1986, is entitled for declaration of title in respect of item 2 of plaint schedule property in O.S. No. 556 of 1986 and that he has no right in respect of item 1, which is part of the plaint

schedule in O.S. No. 607 of 1983. The trial Court further held that there is no evidence to show that fencing was removed by the defendants and, therefore, the plaintiff in O.S. No. 607 of 1983 is not entitled for the relief of mandatory injunction for restoration of the said fencing. Accordingly, the suit O.S. No. 607 of 1983 was decreed-in-part in respect of relief of permanent injunction, restraining the defendants therein from interfering with the plaintiffs possession and enjoyment of the plaint schedule property and dismissing the said suit in respect of the relief of mandatory injunction. Similarly, the other suit O.S. No. 556 of 1986 was decreed-in-part declaring the rights of plaintiff therein i.e., Parimi Vishnu Murthy in respect of second item of plaint schedule property and rejecting the relief of declaration in respect of item 1. Aggrieved by the same, Parimi Vishnu Murthy (D-2) and Parimi Naramma, (D-3) in O.S. No. 607 of 1983 filed the appeal A.S. No. 71 of 1990. Parimi Vishnu Murthy, the plaintiff on O.S. No. 556 of 1986 filed the other appeal A.S. No. 72 of 1990. The learned Subordinate judge by the impugned judgment dated 20-12-1996 dismissed both the appeals. Aggrieved by the same, the present second appeal S.A. No. 481 of 1997 is filed by Parimi Vishnu Murthy and Naramma, who are defendants 2 and 3 in O.S. No. 607 of 1983 and S.A. No. 486 of 1997 is filed by Parimi Vishnu Murthy, who is plaintiff in O.S. No. 556 of 1986.

11. Arguments of the learned Counsel for the appellants and the learned Counsel for the respondent are heard. Records are perused.

12. As the two appeals arise out of the common judgment passed by the first appellate Court, and as they involve common questions of fact and law pertaining to the selfsame property, they are heard together and are being disposed of by this common judgment.

13. As seen from the grounds of appeal in both matters, the substantial question of law projected in both the appeals are one and the same viz. whether the plaintiff in O.S. No. 607 of 1983 i.e. Undavalli Doraiah can take shelter under the provisions of Section 53(A) of the Act to claim rights over the plaint schedule land in O.S. No. 607 of 1983 and seek injunction in the absence of any recital regarding delivery of possession in the agreement of sale Ex.A-2 and in the absence of any, decree for specific performance based on the said agreement of sale and whether the plaintiff has perfected his title by adverse possession in the absence of any animus and whether the suit for injunction without questioning the "sale deed in favour of the defendants is maintainable.

14. Undavalli Doraiah, the plaintiff claims to have purchased the vacant site, shown in the plaint schedule in O.S. No. 607 of 1983 (which is item 1 of the schedule in O.S. No. 556 of 1986) under the agreement of sale-Ex.A-2 dated 30-10-1968 from Setti Rajeswari, first defendant in O.S. No. 607 of 1983. He further claims that out of the sale consideration of Rs. 800/-, he paid Rs. 700/- on the date of agreement and obtained delivery of possession and in spite of his readiness and willingness to pay the balance consideration of Rs. 100/- and Obtain a sale deed, the first defendant

Rajeswari had not executed the sale deed as she migrated to Karnataka State shortly after execution of Ex.A-2 and ever since she has been residing there for the last 15 years prior to filing of the suit O.S. No. 607 of 1983. He further pleads that as the suit site is contiguous to his ancestral property, he has been enjoying the suit site along with his ancestral property by raising banana plantation and vegetable creepers therein. Doraiah filed the suit O.S. No. 607 of 1983 for permanent injunction seeking to restrain the appellants/D-2 and D-3 from interfering with the possession and enjoyment of the suit site and also for restoration of the fencing around the suit site, which is alleged to have been removed by D-2 and D-3. The appellants/D-2 and D-3, on the other hand, would dispute the genuineness of the agreement-Ex.A-2 and deny the plaintiffs possession of the suit site and contend that they purchased the suit site from Rajeswari, the first defendant, under a registered sale deed-Ex.B-1 dated 18-11-1983 for a valuable consideration and took delivery of possession from D-1 and have been enjoying the said site in their own right and in order to defeat their purchase, the plaintiff Doraiah brought Ex.A-2-agreement of sale into existence by fabrication. It is significant to note that within five days after execution of the sale deed-Ex.B-1, the plaintiff, Doraiah, filed O.S. No. 607 of 1983 on 23-11-1983 seeking injunction to protect his possession and three years later in 1986, the appellants/D-2 and D-3 filed the other suit O.S. No. 556 of 1986 for declaration of title and recovery of possession of the disputed site, which is shown as item 1 in the said suit schedule, but also another extent shown as item 2.

15. There is no dispute regarding the ownership of appellants/D-2 and D-3 in respect of item 2 of the plaint schedule in O.S. No. 556 of 1986. The disputed site which is shown in the plaint schedule in O.S. No. 607 of 1983 corresponds to item 1 of O.S. No. 556 of 1986. The first defendant though sailed along with D-2 and D-3 and filed written state merit opposing the plaintiffs claim based on the agreement-Ex.A-2, however, did not choose to give evidence and did not participate in the trial. Thus, the first defendant Rajeswari has not entered the witness box to deny the execution of Ex.A-2 by her or receipt of Rs. 700/- towards sale consideration under Ex.A-2 or even to deny the plaintiffs possession of the suit site. The trial Court on a careful scrutiny of the evidence available on record and duly taking into consideration the testimony of P.W.2, the scribe, and P.W.3, the attester, who in fact, is related to the appellants/defendants and also the admissions contained in the evidence of D.Ws.1 & 7, coupled with the other circumstances like the executant, the first defendant herself not disputing the genuineness of Ex.A-2 at the time of trial/had rightly re-corded a finding that the evidence on record established the genuineness of the suit agreement of sale-Ex.A-2. The first appellate Court, on proper re-appraisal of the evidence, concurred with the above said finding of the trial Court. The said concurrent finding recorded by the Courts below on a question of fact viz., the truth of execution of the suit agreement of sale-Ex.A-2 on proper appreciation of the evidence available on record does not call for any

interference in the present second appeal. Consequently, the Courts below have rightly held that the sale deed-Ex.B-1 executed by D.-1 in favour of D-2 and D-3, ignoring the agreement of sale-Ex.A-1 in plaintiffs favour, is not valid and binding on the plaintiff.

16. The appellants would contend that admittedly Ex.A-2 agreement does not contain any recital regarding delivery of possession and as such the claim of the plaintiff that he was in possession of the suit site by the date the suit was filed by him in O.S. No. 607 of 1983, cannot be believed. It is not disputed that Ex.A-2 does not contain specific recital to the effect that possession was delivered to the plaintiff on the date of agreement. The Courts below recorded a concurrent finding that shortly after execution of Ex.A-2, the vendor Rajeswari migrated to Sindanuru area in Karnataka State and was residing there and, in fact, the sale deed-Ex.B-1 Under which the appellants/D-2 and D-3 claimed to have purchased the suit site also described D-1-Rajeswari as resident of Karnataka State and the evidence on record establish the plea of plaintiff Doraiah that he took delivery of possession of the suit site which is adjacent to his ancestral property, in pursuance of the agreement-Ex.A-2, having paid almost the entire sale consideration, but, however, the sale deed could not be registered due to non-availability of the vendor Rajeswari, owing to her migration to Karnataka State. The Courts below also found that the report of the Advocate-Commissioner, who was appointed to make local inspection of the topographical features, also supported the claim of plaintiff that he was in possession and enjoyment of the suit site by raising banana plantation and vegetable creepers and there was no fencing separating the suit site from the other admitted site of the plaintiff. As D-2 and D-3 claimed to have purchased the suit, site and entered upon the same only five, days prior to filing of the suit O.S. No. 607 of 1983, the question of their raising banana plantation and vegetable creepers, which were found existing as on the date of filing of the suit, as per the Commissioner's report and plan, does, not arise. Similarly,, as the evidence on record established that the vendor Rajeswari was residing only in, Karnataka State since 1968, the claim of D-2 and D-3 that she was in physical possession of the suit site till her sale under Ex.B-1 dated 18-11-1983 and delivered possession of the same to D-2 and D-3 on that date, was rightly disbelieved by the Courts below. The concurrent finding recorded by the Courts below on a question of fact pertaining to possession and enjoyment of the suit site by the plaintiff by the date of filing the suit O.S. No. 607 of 1983, also does not call for any interference in the second appeal, as the said finding is based on proper appreciation of the evidence available on record.

17. The only substantial question of law which is urged by the learned Counsel for the appellants/D-2 and D-3 is that the protection, u/s 53(A) of the Act claimed by the plaintiff is not available to him, as the agreement of sale-Ex.A-2 does not refer to delivery of possession whereas Section 53(A) contemplates taking of possession by the transferee under, the terms of the contract which shall be certain and unambiguous. Section 53(A) of the Transfer of Property Act reads as follows:

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 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.

As seen from the above, the expression used is that "transferee has, In part performance of the contract taken possession of the property or any part thereof. A plain reading of the above provision does not disclose that the act of delivery of possession by the vendor is not contemplated as a sine quo non nor does the provision require any recital to be contained in the instrument for applicability of the doctrine. What all the above provision requires inter alia for the applicability of the doctrine is that the transferee, in part performance of the contract, must have taken possession of the property or part thereof. The positive act of taking possession is a requirement on the part or at the instance of the transferee and there is no similar requirement of performance of any positive act of delivery of possession by the transferor. There is also no stipulation that the act of taking possession shall be contemporaneous with the execution of the agreement of sale. The transferee is required to take possession in part performance of the contract or if already in possession, he shall continue to be in possession in part performance of the contract. The other requirement is that he has done some act in furtherance of the contract. The absence of any recital in Ex.A-2 regarding delivery of possession by Rajeswari in favour of the plaintiff Doraiah, does not, therefore, make any difference. It is always open to the plaintiff to establish by evidence that in part performance of the contract under Ex.A-2, he has taken possession of the suit site. The plaintiff by adducing necessary evidence has established that he has taken delivery of possession of the suit site in pursuance of Ex.A-2, as per the concurrent finding recorded by the Courts below. There is no uncertainty or ambiguity in the terms and conditions of Ex.A-2. The trial Court relying upon the decision in [Nagar Khan and Others Vs. Gopi Ram Agarwala](#), held that it is not correct to say that

delivery of possession contemplated u/s 53(A) must be at the instance of the vendor in part performance of the contract and also the decision in *Ratanlal v. Krishnalal and Ors.* AIR 1962 Raj 141 wherein it was held that Section 53(A) of the Act does not lay down that the contract must contain a direct covenant regarding transfer of possession and it only requires that possession should have been taken in part performance of the contract. The finding of the trial Court which is affirmed by the appellate Court that the agreement of sale does not necessarily contain any covenant regarding delivery of possession for the applicability of Section 53(A) of the Act and the vendee can himself take possession of the property despite the absence of any covenant in the agreement, is thus based on proper interpretation of the provisions of Section 53(A) of the Act and correct application of the principles of law governing the subject. The contention of the learned Counsel for the appellants/D-2 and D-3 that in the absence of any recital in Ex.A-2 agreement regarding delivery of possession the said agreement suffers from the vice of ambiguity and uncertainty and, therefore, renders the protection contained in the doctrine of part performance u/s 53(A) inapplicable, is untenable. When once the plaintiff is able to establish the genuineness of the agreement-Ex.A-2 and that he paid most of the sale consideration and was ready and willing to perform his part of the contract by paying the balance sale consideration, of Rs. 100/- the sale deed could not be executed because of the non-availability of the vendor Rajeswari, who migrated to Karnataka State and that he has duly taken possession of the suit site which is contiguous to his own ancestral site and has been in possession and enjoyment of the same ever since execution of Ex.A-2 by raising vegetable creepers and other plants, he is certainly entitled to invoke the doctrine of part performance u/s 53(A) as a measure of protection to his possession.

18. The Courts below also recorded a concurrent finding on yet another question of fact, that the plaintiff was always ready and willing to perform his part of the contract and it was only Rajeswari, the first defendant, owing to her migration to Karnataka State, was not available to execute the sale deed.

19. The learned Counsel for the appellant/D-2 and D-3 would next contend that the suit for mere injunction filed by the plaintiff is not maintainable and his remedy, if any, is to file a suit for specific performance. In that regard he relied on a decision of this Court in [Challa Chinababu and Another Vs. Kovila China Suryanarayana and Others](#), wherein it was held that the doctrine of part performance u/s 53-A of T.P. Act is only a defence and does not give a right to claim title, by invoking the said provision. It was further held in the above decision that permanent injunction can be asked for where a legally enforceable "obligation" exists in favour of plaintiff in respect of possession sought to be protected invoking Section 53-A of T.P. Act. It was also held in the above decision that the equitable relief of injunction cannot be granted when plaintiff has not shown his readiness and willingness to perform his part of contract by seeking specific performance of agreement of sale.

20. In the above case, on facts, it was found that the suit agreement of sale was a sham transaction and, therefore, the benefit u/s 53-A of the Act was not available. It was further held on a question of fact that the plaintiff was not shown to be ready or willing to perform his part of the contract. The proposition of law that the doctrine of part performance u/s 53-A of the Act is only a defence and also does not give a right to claim title, is not disputed. The other proposition of law that even in a suit for perpetual injunction the question of title can be incidentally gone into, is also not disputed. But the decision cited is not applicable to the facts of the present case for the reason stated supra. In the present case, the suit agreement-Ex.A-2 is found to be genuine and the plaintiff was also found to be always ready and willing to perform his part of the contract. The possession of the suit site taken by the plaintiff is, therefore, entitled to be protected by invoking the doctrine of part performance, more particularly against appellants/D-2 and D-3, who are total strangers. May be against the vendor Rajeswari the remedy for plaintiff is to file a suit for specific performance, but as against the appellants/D-2 and D-3, who are strangers, the plaintiff is certainly entitled to maintain a suit for injunction to protect his possession.

21. In [Shrimant Shamrao Suryavanshi and Another Vs. Pralhad Bhairoba Suryavanshi by Lrs. and Others](#), the Apex Court in a similar fact situation held as under:

Section 53-A was inserted in the Transfer of Property Act on the basis of recommendations of the Special Committee set up by the Government of India. The Special Committee's report which is reflected in the aims and objects of the Amending Act, 1929 shows that one of the purposes of enacting Section 53-A was to provide protection to a transferee who in part performance of the contract had taken possession of the property even if the limitation to bring a suit for specific performance has expired. Therefore, Section 53-A is required to be interpreted in the light of the recommendation of the Special Committee's report and aims, objects contained in the Amending Act, 1929 of the Act and specially when Section 53-A itself does not put any restriction to plea taken in defence by a transferee to protect his possession u/s 53-A even if the period of limitation to bring a suit for specific performance has expired.

But, there are certain conditions which are required to be fulfilled if a transferee wants to defend or protect his possession u/s 53-A of the Act. The necessary conditions are:

- (1) there must be a contract to transfer for consideration of any immovable property;
- (2) the contract must be in writing, signed by the transferor, or by someone on his behalf:

- (3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;
- (4) the transferee must in part performance of the contract take possession of the property, or of any part thereof;
- (5) the transferee must have done some act in furtherance of the contract; and
- (6) the transferee must have performed or be willing to perform his part of the contract.

If the conditions enumerated above are complied with, the law of limitation does not come in the way of a defendant taking plea u/s 53-A of the Act to protect his possession of the suit property even though a suit for specific performance of a contract is barred by limitation.

It was further held thus:

The matter may be examined from another angle. The established rule of limitation is that law of limitation is not applicable to a plea taken in defence unless expressly a provision is made in the statute. The law of limitation applies to the suits and applications. The various articles of the Limitation Act show that they do not apply to a defence taken by a defendant in a suit. Thus, the law of limitation bars only an action in a court of law. In fact, what the Limitation Act does is, to take away the remedy of a plaintiff to enforce his rights by bringing an action in a court of law, but it does not place any restriction to a defendant to put forward any defence though such defence as a claim made by him may be barred by limitation and cannot be enforced in a court of law. On the said principle, a defendant in a suit can put forward any defence though such defence may not be enforceable in a court of law, being barred by limitation.

In the above case also, the appellant before the Apex Court purchased the property and obtained possession in pursuance of the agreement and subsequently the respondent/purchaser attempted to sell the property and the appellant filed a suit for injunction and obtained an order of injunction, but in spite of it, the vendor sold the property to the respondent and later the respondent/purchaser filed a suit for recovery of possession. The trial Court dismissed the suit and the same was upheld by a learned single Judge of the High Court, but, however, Letters Patent Appeal Bench allowed the further appeal filed by the subsequent purchaser, holding that protection as regards possession was not available to the appellant/agreement holder as the suit for specific performance was barred by limitation. The question of law which arose in the above decision was "whether in a suit brought by a transferor for recovery of possession of the suit property, a defendant transferee can defend or protect his possession over the suit property obtained in pursuance of a part performance of an agreement to sell u/s 53-A of the Transfer of Property Act, even if a suit for specific performance of an agreement to sell is barred by limitation." The

above question of law is akin to the question which arise for consideration in the present second appeal as well, inasmuch the appellants/D-2 and D-3, as the subsequent purchasers, filed the suit O.S. No. 556 of 1986 for recovery of possession based on their sale deed-Ex.B-1 and the respondent/plaintiff is resisting the same and seeking to protect his possession by invoking the doctrine of part performance u/s 53-A of the Act. A similar contention is raised by the learned Counsel for the appellants/D-2 and D-3 that such defence is not open to the respondent/plaintiff, inasmuch as the suit for specific performance is not filed by him and the same is barred by limitation. The Apex Court held that "the Limitation Act does not extinguish a defence, but only bars the remedy. Since the period of limitation bars a suit for specific performance of a contract, if brought after the period of limitation, it is open to a defendant in a suit for recovery of possession brought by a transferor to take a plea in defence of part performance of the contract to protect his possession, though he may not be able to enforce that right through a suit or action." In the above case, it was found, on facts, that the transferee has taken possession over the property in part performance of the contract and the transferee has not brought any suit for specific performance of the agreement to sell within the period of limitation and the transferee was always ready and willing to perform his part of the contract. In the present case also, the respondent/plaintiff, who is defendant in O.S. No. 556 of 1986, has taken possession of the suit property in part performance of the contract-Ex.A-2, but he has not filed any suit for specific performance of agreement of sale within limitation and he was always ready and willing to perform his part of the contract. It is, therefore, open to the respondent/plaintiff, Doraiah, who is defendant in O.S. No. 556 of 1986, to resist the said suit filed by the appellants for recovery of possession and seek to protect his possession by invoking the doctrine of part performance u/s 53(A) of the Act, though he may not be able to enforce the said right by filing a suit for specific performance, owing to bar of limitation.

22. In view of the principles laid down by the Apex Court in the above decision, it is held that the contentions raised by the appellants pertaining to the substantial questions of law stated above, are not tenable. The judgments and decrees passed by the Courts below are held not liable to be interfered with, as the findings recorded therein are based on proper appreciation of the evidence and are in accordance with law.

23. In the result, S.A. Nos. 481 and 486 of 1997 are dismissed, subject to the modification that the relief of permanent injunction granted by the Courts below shall be operative as against the appellants/D-2 and D-3, but not D-1. There shall be no order as to costs.