

eventuality, the petitioners who were next in the select panel after four appointees could be considered for appointment against all or some vacancies on the basis of their qualifying the type test on 6.11.1993. This is the one circumstance which needs to be considered in favour of the petitioners. However, the reply filed on behalf of the High Court is little confusing wherein it is stated that two vacancies were available during the 1993-94 without disclosing the date. In the totality of the circumstances, this petition is disposed of with the following directions:-

Establishment Section of the High Court will work out the vacancies of Clerks from promotional quota available during calendar year 1993 and if vacancies were more than four as filled on the basis of type test held on 6.11.1993, the petitioners on the basis of their merit in the panel prepared pursuant to test held on 6.11.1993 be considered for notional promotion against such vacancies/vacancy in addition to four vacancies filled up by promotion from the panel. If the petitioner(s) is/are found entitled to promotion against any such available vacancy, he/they will be deemed to have been promoted with effect from the said date, though only notionally, without any monetary benefit. However, the salary etc. of such petitioners shall be fixed by giving them notional benefits of promotion etc. The entire exercise be completed within a period of two months from the date a certified copy of this order is received by the competent authority.

M. Jain

Before Nawab Singh, J.

SUKHWINDER KAUR,—*Petitioner*

versus

AMARJIT SINGH AND OTHERS,—*Respondents*

C.R. No. 2616 of 2011

12th January, 2012

Constitution of India - Art. 227 - Code of Civil Procedure, 1908 - O. 7 Rl. 11 - Indian Registration Act, 1908 - S. 17(1A) & 49 - Transfer of Property Act, 1882 - S. 53-A - Specific Relief Act, 1877

- Application for rejection of plaint on the ground that the Agreement to sell in question contains recital that the possession of property in dispute has been delivered to the plaintiff - Agreement to sell was not registered - The same requires registration as per Section 17 (1A) of the Registration Act, 1908.

Held, The the effect of the amendment is that now if any person takes possession in pursuance to a contract which is required to be registered but has not been registered, the transferee has no right to remain in possession of the property. To give effect to this principle Section 17 (1A) of the Registration Act has accordingly been inserted in the Act which mandates that such contract is now required to be registered. If such a contract entered into after the amendment is not registered then as per Section 49 of the Act, the same can neither affect any immovable property comprised therein nor will it be received as evidence of any transaction affecting such property or conferring such power.

(Para 8)

Vishal Sharma, Advocate, *for the petitioner.*

NAWAB SINGH J. (ORAL)

(1) This defendant No.4's revision is directed against the order dated March 25th, 2011 (Annexure P-5) passed by Civil Judge (Junior Division), Ludhiana whereby application filed by the defendants No.1, 3 and 4 under Order 7 Rule 11 of the Code of Civil Procedure for rejection of plaint, was dismissed.

(2) Amarjit Singh-plaintiff-respondent No.1 filed suit for possession by way of specific performance of agreement to sell dated July 22nd, 2008 executed by Sangeeta-defendant No.1 through her attorney Sharanjit Singh Sodhi in favour of the plaintiff with respect to the property mentioned in the head note of the plaint. The plaintiff also sought a decree of declaration to the effect that sale deed dated December 20th, 2010 subsequently executed by defendant No.1 in favour of defendants No.3 and 4 be declared null and void. A decree of permanent injunction was also sought against the defendants.

(3) During pendency of suit, the defendants moved application (Annexure P-3) seeking rejection of the plaint on the ground that the agreement to sell in question contains a recital that the possession of property in dispute has been delivered to the plaintiff. Hence, the same requires registration as per Section 17(1A) of the Registration Act, 1908 (for short “the Act”).

(4) As afore-stated, by impugned order (Annexure P-5), the application has been dismissed.

(5) Learned counsel for the petitioner has urged that vide Amendment Act No.48 of 2001, Section 53-A of the Transfer of Property Act, 1882 (for short “ the TPA”), Section 17 and Section 49 of the Act have been amended. After the amendment, an agreement to sell which contains a recital regarding possession of the property is required to be compulsorily registered. If the agreement to sell is not registered then the same cannot be received as evidence of any transaction affecting such property.

(6) In support of the contention, reliance has been placed on **Gurbachan Singh versus Raghbir Singh (1)**, wherein a single Bench of this Court held that an unregistered agreement does not give a right to seek decree for specific performance and as a necessary corollary, the plaintiff is not entitled to retain possession under the garb of such an agreement.

(7) To understand the controversy, Section 53-A of TPA, Section 17 and Section 49 of the Act are reproduced as under:-

Section 53A of Transfer of Property Act, 1882.

Part Performance - Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

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

(1) 2010 (3) CCC 731

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

then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract :

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.]”

Section 17 of Indian Registration Act, 1908

17. Documents of which registration is compulsory .(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely,

- (a) instruments of gift of immovable property;
- (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;
- (c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and
- (d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

[(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates 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:]

Provided that the [State Government] may, by order published in the [Official Gazette] , exempt from the operation of this sub-section any leases executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

[(1-A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53-A of the Transfer of Property Act, 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 53-A.]

- (2) Nothing in clauses (b) and (c) of sub-section (1) applies to
- (i) any composition deed; or
 - (ii) any instrument relating to shares in a joint stock company, notwithstanding that the assets of such company consist in whole or in part of immovable property; or
 - (iii) any debenture issued by any such company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immovable property except insofar as it entitles the holder to the security afforded by a registered instrument whereby the company has mortgaged, conveyed or otherwise transferred the whole

or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or

- (iv) any endorsement upon or transfer of any debenture issued by any such company; or
- (v) [any document other than the documents specified in subsection (1-A)] 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
- (vi) any decree or order of a Court [except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subjectmatter of the suit or proceeding] ; or
- (vii) any grant of immovable property by the [Government] ;
or
- (viii) any instrument of partition made by a Revenue Officer; or
- (ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871, or the Land Improvement Loans Act, 1883; or
- (x) any order granting a loan under the Agriculturists Loans Act, 1884, or instrument for securing the repayment of a loan made under that Act; or
- [(x-a) any order made under the Charitable Endowments Act, 1890, vesting any property in a Treasurer of Charitable Endowments or divesting any such Treasurer of any property; or]

- (xi) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgagemoney, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage; or
- (xii) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue Officer.

[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.]

- (3) Authorities to adopt a son, executed after the first day of January, 1872, and not conferred by a will, shall also be registered.

Section 49 of Indian Registration Act, 1908

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 :

[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 (3 of 1877) or as evidence of any collateral transaction not required to be effected by registered instrument.]”

(8) Section 53-A of the TPA before amendment prescribed that where in pursuance to part performance of the contract, the transferee has taken possession of the property and has done some act in furtherance of the contract, and the transferor has performed or is will to perform his part of the contact then despite the fact that the contract was required to be registered and has not been registered, the transferrer shall be debarred from enforcing against the transferee any right other than a right expressly provided by the contract. Meaning thereby, Section 53-A of the TPA recognized part performance of the contract even though the contract used to be unregistered and the transferee's rights to remain in possession was protected. By the amendment Act No.48 of 2001 (w.e.f. 24.9.2001), the words "**the contract, though required to be registered, has not been registered, or**" have been omitted from the provision. The effect of the amendment is that now if any person takes possession in pursuance to a contract which is required to be registered but has not been registered, the transferee has no right to remain in possession of the property. To give effect to this principle, Section 17(1A) has accordingly been inserted in the Act which mandates that such contract is now required to be registered. If such a contract entered into after the amendment is not registered then per Section 49 of the Act, the same can neither affect any immovable property comprised therein nor will it be received as evidence of any transaction affecting such property or conferring such power.

(9) Now the question arises as to whether the provision of Section 53-A of the TPA has any applicability on the facts of the present case. The answer is in the negative for the reasons that in the case in hand, the plaintiff is seeking possession of the property by way of specific performance of the agreement to sell. He is not seeking protection of his possession on the basis of agreement to sell. A person seeking protection of his possession on the basis of unregistered agreement is a different situation and where a person seeks possession of the property by way of specific performance of the agreement which is unregistered is a different eventuality. In the latter class of cases, the agreement to sell is not required to be registered as it does not fall within the ambit of either Section 53-A of the TPA or Section 17(1A) of the Act and does not require any registration. Such agreement to sell falls under the mischief of Section 17(2)(v) of the Act. It itself does not create, declare, assign, limit or extinguish any right, title or interest in the property. Rather it creates a right to obtain another document which

will, when executed, create, declare, assign, limit or extinguish. Not only that, proviso to Section 49 of the Act makes the things more clear. It envisages that an unregistered document affecting immovable property and required by this Act or the TPA 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. A conjoint reading of Section 17(2)(v) and proviso to section 49 of the Act leaves no room for doubt that an agreement to sell property itself does not create any right, title to the property. It is the sale-deed which when executed will create right, title and interest in the property. Hence, an agreement to sell is not required to be registered and the same is receivable in evidence in a suit for specific performance under Chapter II of the Specific Relief Act, 1877.

(10) In **Gurbachan Singh's case (supra)**, the provisions of Section 17(2)(v) and proviso added to Section 49 of the Act got overlooked leading to intermingling of two distinct situations. One is: where in pursuance to a contract which is unregistered, the transferee takes possession, the law mandates that now such a transferee cannot protect his possession on the basis of unregistered contract and the same is required to be registered. Two: an agreement to sell is executed between the parties. The agreement to sell does not itself create, declare, assign, limit or extinguish any right, title or interest in the property rather it gives a right to obtain another document which will when executed, create, declare assign, limit or extinguish any such right, title or interest. Such agreement to sell is not required to be registered per Section 17(2)(v) of the Act and the same is received in evidence.

(11) This Court would like to observe that the application itself is not maintainable as the same does not disclose any of the situations mentioned in Order 7 Rule 11 of the Code. The question as to whether the agreement to sell in question being unregistered was receivable in evidence was required to be adjudicated at the time of evidence as such, the application (Annexure P-3) was not maintainable.

(12) For the reasons mentioned above, the order under challenge is perfectly justified and does not require any interference. Hence, the revision is dismissed.

A.K. Jain