

Before G. R. Majithia, J.  
RAJ KUMAR,—Appellant.

*versus*

SHANTI SAROOP GANDHI AND OTHERS,—Respondents.

Regular Second Appeal No. 2030 of 1978.

21st November, 1990.

*Transfer of Property Act, 1882—S. 55—Agreement to sell—Possession of land with tenant and this fact in the knowledge of vendee—Vendor agreeing to deliver vacant possession on stipulated date—Vendee only entitled to formal or symbolic possession.*

*Held*, that S. 55 of the Transfer of Property Act is founded upon the principle of natural justice. As soon as the relationship of buyer and seller is established between the parties, they acquire reciprocal rights and both are bound to protect interests of each other. The contract referred to in the expression "in the absence of any contract to the contrary" may either be express or implied. Clause (f) of sub-section (1) of S. 55 says that the seller is bound to give, on being required, the buyer such possession of the property as its nature admits. Under this clause, the word "as its nature permits" refer to physical or actual possession in the case of tangible property and formal or symbolical possession in the case of intangible property. Possession does not necessarily import actual possession or personal occupation. So, when the buyer has notice of a tenancy, he is only entitled to formal or symbolical possession. Moreover, the words "in the absence of any contract to the contrary" in the section shows that the operation of this clause can be excluded by a contract between the parties. So, where it is made clear that actual possession of the property was in possession of the tenant, the rigours of the clause stood excluded. (Para 7)

*Regular Second Appeal from the order of the Court of Shri Romesh Chand Jain, Additional District Judge, (II) Hissar dated 11th day of September, 1978 affirming that of the Court of Shri V. K. Kaushal, Sub Judge, 1st Class, Hissar dated the 6th May, 1972, dismissing the suit of the plaintiff but leaving the parties to bear their own costs.*

*Claim : Suit for recovery of Rs. 11,450 detailed as :—*

*Principal Rs. 10,000 and interest Rs. 1,450 and additional Court fee of Rs. 19.50 has been fixed for further claim of interest.*

*Claim in Appeal : For setting aside the orders of the both the Courts below.*

*Hari Mittal, Advocate with Prabhodh Mittal, Advocate, for the Appellant.*

*H. L. Sarin, Sr. Advocate with Hemant Sarin, Advocate and Ashish Handa Advocate, for the Respondents.*

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**JUDGMENT**

*G. R. Majithia, J.*

(1) The unsuccessful plaintiff has come up in second appeal against the judgment and decree of the first appellate court affirming on appeal those of the trial court whereby his suit for recovery of Rs. 11450 was dismissed.

(2) The facts :—

... Predecessor-in-interest of respondent No. 1 executed an agreement to sell dated February 21, 1968 in favour of the plaintiff and defendant No. 2. He agreed to sell land measuring 124 acres situated in village Talwandi Rana at the rate of Rs. 820 per acre. Rs. 10,000 were paid as earnest money to him and it was agreed that the sale deed would be executed on or before June 30, 1968. The agreement recited that in case the vendor failed to execute the sale deed within the time prescribed he would be liable to pay to the vendees Rs. 10,000, the advance money, and Rs. 10,000 more as damages. In case, the vendees failed to get the sale deed executed in their favour the vendor would forfeit the earnest money paid to him. It was further stated in the plaint that the vendor agreed to deliver vacant possession of the land at the time of execution of the agreement to sell, but later on he found himself incapable of delivering the vacant possession since it was in possession of the tenants and, therefore, he failed to execute the sale deed in favour of the plaintiff and defendant No. 2. On June 26, 1968, Sawan Mal gave a telegram to the plaintiff to get the sale deed executed. In reply to the telegram the plaintiff intimated Sawan Mal telegraphically that he had promised to deliver vacant possession and that he was ready to get the sale deed executed provided he (Sawan Mal) satisfied him that he would deliver vacant possession of the land agreed to be sold. Sawan Mal did not reply to this telegram but he was present in the office of Sub Registrar, Hisar on June 30, 1968 to execute the sale deed. The vendees did not turn up and therefore, the sale deed could not be executed. The plaintiff further claimed that the amount in question was a charge on the property in question by virtue of Section 55(6)(b) of the Transfer of Property Act and that he could recover this amount by sale of the property regarding which the agreement to sell was executed in his favour by Sawan Mal deceased.

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(3) Defendants No. 1 and 3 to 10 contested the suit. The execution of the agreement to sell was not denied. It was, however, denied that defendant No. 2 transferred his rights under the agreement to sell in favour of the plaintiff. It was denied that the vendor agreed to deliver vacant possession of the land in dispute. It was further pleaded that the plaintiff and defendant No. 2 visited the land in dispute at the time of agreement and also verified from the entries in the revenue record that the same was in possession of tenants. Vendor Sawan Mal used to reside in Delhi in those days and the land in dispute was situated in village Talwandi Rana and it was known to the vendees that the tenants were in possession of the same. The vendor was not legally bound to deliver vacant possession of the land or get the deed of attornment executed from the tenants in favour of the plaintiff and defendant No. 2. The plaintiff's claim for recovery of earnest money with interest was refuted. It was disputed if the amount can be a charge on the property in question. Defendants No. 4 to 10 claimed themselves to be *bonafide* purchasers for consideration without any notice of the alleged agreement in favour of the plaintiff and defendant No. 2. Personal liability of defendant No. 2 for payment of the amount was also disputed.

(4) The trial judge framed the following issues:—

1. Is the plaintiff not entitled to rescind the contract because the defendants did not deliver the possession to the plaintiff, nor obtained attornment from tenants on the suit property in favour of the plaintiff before the deed could be registered by the due date ? OPD.
2. If issue No. 1 is decided against the defendant, is the plaintiff not entitled to claim refund of earnest money ? OPD.
3. If issue No. 1 is decided in favour of defendant, whether the plaintiff is still entitled to claim refund of his earnest money ? OPD.
4. If issue No. 1 and 2 are decided against the defendants, is the plaintiff entitled to interest on earnest money ? If so, at what rate ? OPP.
5. If issue No. 2 and 4 are decided in favour of plaintiff, whether the amount due to the plaintiff cannot be charged on the property in question ? OPD.

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6. Whether the plaintiff has acquired the right and interest of defendant No. 2 to recover earnest money and interest of his share from the defendants, and as such can claim the entire amount of earnest money and interest ? OPP.
  7. Whether the defendants have sold the suit property to another person, if so, when and with what effect ? OPD.
  8. If issue No. 7 is proved in favour of the defendant, whether the subsequent transferee is a necessary or proper party ? OPD.
  9. If issue No. 8 is decided in favour of the defendant and the plaintiff is held entitled to return of earnest money and interest, whether his claim cannot be a charge on the suit property in the hands of the subsequent transferee also ? OPD.
  10. Whether the defendants No. 3 to 10 are *bonafide* purchasers for value without notice of the agreement in question between the plaintiff and defendant No. 2 on one side and defendant No. 1 on the other side, if so, with what effect on their rights and on the rights of the plaintiff? OPD.
  11. Whether the agreement to sell entered into between the plaintiff and defendant No. 2 and Sawan Mal proposed vendor is inadmissible in evidence on account of being insufficiently stamped and registered, if so, what is its effect ? OPD.
  12. Whether defendant No. 1 being the LR of the original proposed vendor is also personally liable for the amount claimed ? OPP.
  13. Relief.

(5) Under issue No. 1 it was held that Sawan Mal was not bound to deliver vacant possession of the land agreed to be sold to the plaintiff and that the plaintiff could not rescind the contract. He could get the sale deed executed and obtain symbolical possession of the land and ask the tenants to attorn in his favour; issue No. 2 was decided against the plaintiff in view of the finding under issue No. 1; issue No. 3 was decided against the plaintiff since it was found under issue No. 1 that he was not entitled to the refund of earnest money; issues No. 4 and 5 were decided against the plaintiff; issue No. 6 was answered in favour of the plaintiff and against the defendant and it was held that the agreement to sell was executed on a non-judicial stamp paper and was admissible in evidence; issues No. 7 and 8 were decided against the plaintiff and, *vide* order dated November 19, 1970 it was directed that the subsequent vendees be impleaded as party defendant to the suit; no finding was given on issue No. 9 in view of findings on issues No. 3 and 8; issue No. 10 was answered in favour of the defendant and it was held that defendants No. 4 to 10 were *bonafide* purchasers for value without notice of the agreement to sell in favour of the plaintiff and defendant No. 2; issue No. 11 was answered in favour of the plaintiff as it was held that the agreement to sell was admissible in evidence on payment of penalty and stamp duty which was duly paid and the document was admitted into evidence; issue No. 12 was answered to the effect that the successor-in-interest of the vendor was not personally liable to pay the disputed amount but was liable only to the extent to which the property of the deceased had devolved upon him. In view of findings on issues No. 1 to 4, it was held that the plaintiff was not entitled to the relief sought for and the suit was dismissed by the trial Court.

(6) The appellate Court on appraisal of the evidence came to the conclusion that the land agreed to be sold was in occupation of the tenants at the time of execution of the agreement to sell to the knowledge of the plaintiff and defendant No. 2 and they were quite conscious of the fact that the vacant possession was not to be delivered to them. It was further found from the contents of the agreement, attending circumstances and the evidence that there was agreement to the contrary, i.e., a contract not to deliver vacant possession. This is essentially a finding of fact based upon evidence and is not open to exception in second appeal.

(7) The learned counsel for the plaintiff urged that in a case of agreement to sell of immovable property the vendor is bound to deliver vacant possession of the land agreed to be sold to the

vendee. Since the vendor was not in a position to deliver the vacant possession, the vendees could rescind the contract and in support of his submission he relied upon *Jogemaya Dasee v. Akhoy Coomar Das* (1), *Lallubhai Rupchand v. Mohanlal Sakarchand* (2), *Munnalal Bhagirath v. Zamklal Gumchandji and another* (3), and *Sohan Lal and others v. Bal Kishan Ghanu Mal*, (4). There is no dispute with regard to the proposition of law laid down in these authorities but of its applicability to the facts of the instant case. Section 55 of the Transfer of Property Act is founded upon the principle of natural justice. As soon as the relationship of buyer and seller is established between the parties, they acquire reciprocal rights and both are bound to protect interests of each other. The contract referred to in the expression "in the absence of any contract to the contrary", may either be express or implied. Clause (f) of sub-section (1) of Section 55 says that the seller is bound to give, on being required, the buyer such possession of the property as its nature admits. Under this clause, the word "as its nature permits" refer to physical or actual possession in the case of tangible property and formal or symbolical possession in the case of intangible property. Possession does not necessarily import actual possession or personal occupation. So, when the buyer has notice of a tenancy, he is only entitled to formal or symbolical possession. The first appellate Court has found that the buyer had notice of the tenancy on the land agreed to be sold and it was not possible for the seller to deliver physical possession to the buyer. Moreover, the words "in the absence of any contract to the contrary" in the section shows that the operation of this clause can be excluded by a contract between the parties. So, where it is made clear that actual possession of the property was in possession of the tenant, the rigours of the clause stood excluded. The first appellate Court has found on evidence that in the instant case there was an agreement to the contrary and vacant possession could not be delivered to the vendees. No exception can be taken to this finding.

(8) For the reasons aforementioned, I find that the appeal is devoid of any merit and the same is dismissed. Parties are, however, left to bear their own costs.

P.C.G.

- (1) 1917 (XL) I.L.R. Calcutta 140.
- (2) A.I.R. 1935, Bombay, 16.
- (3) A.I.R. 1952, Madhya Bharat 145.
- (4) A.I.R. 1960, Punjab 275.