

Karnataka High Court Narasimhasetty (Deceased) By ... vs Padmasetty on 20 February, 1998 Equivalent citations: AIR 1998 Kant 389, ILR 1998 KAR 3230, 1998 (3) KarLJ 73 Bench: G Bharuka, P V Shetty, C Ullal JUDGMENT

1. The present second appeal has been placed before this Full Bench under the orders of the Hon'ble Chief Justice, since the learned Single Judge, before whom the appeal was placed for hearing, has doubted the correctness of the law laid down by the Division Benches of this Court in the cases of A. Kareem Baig and Others v Dr. Mohammad Khizar Hussain, K. Guru Rao v M. Subba Rao and M. Azmathulla Khan (dead) by L.Rs v Thankamma Mathews. In the said decisions, it has been held that once the remedy by way of suit for specific performance of a contract for sale of an immovable property becomes barred by limitation as provided under the Limitation Act, then even the statutory right of the transferee, as given under Section 53A of the Transfer of Property Act, 1882 (in short 'the Act'), to defend the possession over the property taken or continued under the said contract as granted is lost, destroyed or gets extinguished. Facts 2. This is defendants' second appeal. The plaintiff/respondent had filed a suit being O.S. No. 195 of 1984 in the Court of Munsiff, Nanjangud, seeking a declaration of ownership over the suit property with consequential relief of recovery of possession and mesne profits. The suit property is a wet agricultural land ad measuring 1 acre 29 guntas in Sy. No. 11/2 of Sirimally Village, Hullahalli Hobli, Nanjangud Taluk, Mysore dist. 3. The defendants are the nephews of the plaintiff. Admittedly, about 20 years prior to the filing of the suit, consequent to a family partition, the suit land had fallen to the share of the plaintiff. According to the plaintiff, during the year 1975, the original defendant, namely the father of the appellants, took possession of the suit land by trespassing thereupon and since despite repeated requests for handing over of possession went in vain, the suit in question came to be filed seeking the reliefs as noticed above. The defence taken in the written statement by the defendant was that the plaintiff had borrowed a sum of Rs. 2,000/- from the defendant under a registered deed of mortgage/hypothecation dated 9-4-1973 by delivery of possession of the suit land to the defendant. According to the defendant, subsequently, on 29-12-1973 the contesting parties entered into a written agreement to sell whereunder the plaintiff agreed to sell the suit land to the defendant for a consideration of Rs. 7,025/- and part payment was made by adjustment of debt of Rs. 2,000/- and cash payment of Rs. 500/-. According to the defendant, it was also agreed that the remaining amount of Rs. 4,525/- was to be paid at the time of registration. The defendant further pleaded that the said remaining amount was also paid on 6-6-1974. The defendant claimed that in view of these facts, he is entitled to defend his possession over the suit property in view of the statutory provisions contained in Section 53A of the Act being a transferee having performed his part of the contract. 4. The Trial Court, on the basis of the evidence brought on record, accepted the defendant's case and dismissed the suit under its judgment and decree dated 24-10-1987. However, the plaintiff questioned the correctness of said judgment and decree by filing appeal in R.A. No. 53 of 1987 before the Civil Judge, Nanjangud, and succeeded therein. The appellate order which is impugned in this second

appeal is dated 21-10-1993. 5. The Appellate Court has decreed the plaintiffs suit in terms of the reliefs sought for in the plaint. Though the Court below has accepted the case of the defendant regarding agreement to sell and part performance of the said contract but according to it, since the sale deed which ought to have been executed on 5-6-1976 but had not been executed and the defendant had failed to file a suit for a specific performance of the contract seeking execution of the sale deed as a measure of specific performance within the period of limitation, therefore, he had lost his right to defend his possession by invoking the statutory provisions contained in Section 53A of the Act. This view has been taken by the appellate Court on the basis of various bench decisions of this Court which have been referred to in the opening paragraph of this judgment. 6. Since the learned Single Judge (H.N. Tilhari, J.) for the reasons assigned in his order dated 19-9-1995 entertained doubt about the correctness of the views taken by the Division Benches, therefore, he referred the entire second appeal for being heard and decided by a full bench to be constituted by the Hon'ble Chief Justice. Accordingly, records of the present appeal were placed before the Hon'ble Chief Justice, who on appreciating the reasons assigned by the learned Single Judge, has placed the present appeal for final disposal by this Full Bench. Re: Preliminary objection 7. Sri Papanna, learned Counsel appearing for the plaintiff/respondent, has seriously questioned the jurisdiction of this full bench to hear the present appeal on the ground that keeping in view the mandatory provisions contained in Sections 6 and 7 of the Karnataka High Court Act, 1961 and Rules 6 and 7 of the Karnataka High Court Rules, 1959, it was not competent either on the part of the learned Single Judge or even the Hon'ble Chief Justice to refer the present appeal to a Full Bench for final decision. According to him, in view of the proviso to Section 6 of the High Court Act, the only discretion available to the learned Single Judge was to refer the second appeal for hearing and disposal to a Division Bench and not to a Full Bench. According to him, it is only when there was a valid order of reference that the Chief Justice could have exercised his powers under Rule 7 of the High Court Rules for constituting a Bench. 8. On the other hand, Sri Sivappa, learned Counsel appearing for the defendants/appellants, has refuted the said stand on the jurisdictional aspect by relying on the Rule 6 of the Karnataka High Court Rules and a judgment of the Supreme Court in the case of Tribhovandas Purshottamdas Thakkar v Ratilal Motilal Patel and Others, which approves of an unfettered discretion available to the Chief Justice of the High Court regarding Constitution of Benches and allocation/distribution of judicial work either at the request of a Judge of the High Court or suo motu. 9. In order to examine the sustainability of preliminary objection raised at the Bar, it will be advantageous to reproduce the relevant provisions under the High Court Act and the Rules. These are the following: "Section 6. Second appeals.—All second appeals shall be heard and disposed of by a Single Judge of the High Court: Provided, that, if such Judge is satisfied that a substantial question of law is involved in the case, or that in the interest of justice, the case is to be heard and disposed of by a bench of Judges, he may refer the second appeal for hearing and disposal to such bench. Section 7. Reference to Full Bench.—(1) Where in

any proceeding pending before it, any question of law or usage having the force of law arises, a Bench consisting of not less than two Judges of the High Court may, if it thinks fit, and shall, if it differs from the view taken by a similar Bench of the High Court on the said question, refer to a Full Bench of the High Court the question of law or usage having the force of law. (2) The decision of the majority of Judges comprising a Full Bench of the High Court shall be the decision of the High Court. Rule 6. Benches shall be constituted and judicial work of the Court allotted or distributed to them by or in accordance with the directions of the Chief Justice. Rule 7. When a Single Judge refers a case to a Bench or when a Bench of Two Judges refers any question to a Full Bench, then the papers of the particular case shall be placed before the Chief Justice for a reference to a Bench or for the constitution of Full Bench". 10. It may be noticed here that the High Court Rules have been framed under Section 19 of the Karnataka High Court Act, 1884 which like some other Sections of this Act has not been repealed by subsequent High Court Act of 1961, as is evident from Section 14, being the repeal clause of the latter Act. The said Section reads as under.— "19. Rules for exercise by one more Judges of powers vested in High Court.—Except as herein or by any other enactment for the time being in force otherwise provided, the High Court may make rules to provide in such manner as it thinks fit, for the exercise, by one or more of its Judges, of any powers conferred on it by this Act or by any other enactment for the time being in force". 11. In the backdrop of the above noted statutory provisions, we are required to analyse the rival contentions to examine two independent aspects, namely, (i) the extent of the administrative power of the Chief Justice to allot judicial work of the High Court to the Judges sitting singly or forming benches, and (ii) the jurisdictional competence of the Judges to refer any case to a larger bench. 12. So far as the first question is concerned, Rule 6 of the High Court Rules in unambiguous terms confers an absolute power on the Chief Justice to constitute benches and allot/distribute judicial work amongst them. This power can be exercised only by the Chief Justice of the High Court and not by any puisne Judge or any bench comprised of them. The provisions made in the said Rule has now been recognised by the Supreme Court as an absolute procedural law ensuring maintenance of judicial discipline and proper functioning of the High Court in the case of *State of Rajasthan v Prakash Chand and Others*, on the review of catena of decisions on the point has approved the view taken by the Full Bench of Allahabad High Court in case of *Sanjay Kumar Srivastava v Acting Chief Justice* . In this decision it was *inter alia* held that.— "In view of the above, it is clear that the Chief Justice enjoys a special Status not only under Constitution but also under Rules of Court, 1952 made in exercise of powers conferred by Article 225 of the Constitution. The Chief Justice alone can determine jurisdiction of various Judges of the Court. He alone can assign work to a Judge sitting alone and to the Judges sitting in Full Bench. He alone has the jurisdiction to decide which case will be heard by two or more Judges. The conferment of this power exclusively on the Chief Justice is necessary so that various Courts comprising of the Judges sitting alone or in Division Bench etc., work in a co-ordinated manner and the Jurisdiction of one Court is not

overlapped by other Court. If the Judges were free to choose their jurisdiction or any choice was given to them to do whatever case they may like to hear and decide, the machinery of the Court would collapse and the judicial functioning of the Court would cease by generation of internal strife on account of hankering for a particular jurisdiction or a particular case. The nucleus for proper functioning of the Court is the "self" and "judicial" discipline of Judges which is sought to be achieved by rules of Court by placing in the hands of the Chief Justice full authority and power to distribute work to the Judges and to regulate their jurisdiction and sittings". 13. After approving the above pronouncement of the Allahabad High Court, in para 24 of the judgment in the case of Prakash Chand, *supra*, the Supreme Court proceeded to lay down the following law which is to the following effect.—"No Judge or a bench of Judges can assume jurisdiction in a case pending in the High Court unless the case is allotted to him or them by the Chief Justice. Strict adherence of this procedure is essential for maintaining judicial discipline and proper functioning of the Court. No departure from it can be permitted. If every Judge of a High Court starts picking and choosing cases for disposal by him, the discipline in the High Court would be the casualty and the Administration of justice would suffer. No legal system can permit machinery of the Court of collapse". 14. In view of the said pronouncement of law by the Supreme Court, since the existence and proper functioning of an independent judiciary, like the High Court, is a part of the essential basic structure of our Constitution, all the legislative Acts and the administrative or executive orders concerning the High Court administration must conform with the law laid down by the Supreme Court. If there be any irreconcilable statutory provision or order, then the same has to be read down so as to give supremacy to the powers of the Chief Justice in constituting the Benches and allocation/distribution of judicial work among them. All the provisions of the High Court Act and the rules framed thereunder including the provisions for intra-Court appeal have to be read as being subject to the said power of the Chief Justice. 15. It also goes without saying that while exercising powers of allocation/distribution of judicial work among the benches, it is open for the Chief Justice to devise his own method of classification of cases to ensure quick and effective disposal of cases and for effective administration of justice. Such classifications can be based on any intelligible criteria like the nature of disputes involved, valuation of the subject-matter, age of the case, the areas from which the cases are arising, as also as to whether the cases pertain to private or public litigation, whether the jurisdiction to be exercised is revisional, appellate, or original, whether the cases are to be instituted on regular petitions or on informations received from known or unknown sources and the like, keeping in view the recent judgment of the Supreme Court in the case of Prakash Chand, *supra*. But it needs to be stressed here that the exercising of the said power by the Chief Justice by deviating from the normal rule based on the regular practice of the Court (*Commissioner of Income-tax, Bombay City v R.H. Pandit, Managing Trustee of Trust, Bombay*), or the statutory provisions must stand the test of reason and objectivity since such exercise will be always subject to mandates of Article 14 of the Constitution of India which absolutely

prohibits the exercise of powers in a discriminatory, arbitrary or mala fide manner and always entitle the aggrieved party to seek remedy against the same by approaching the appropriate forum. No Judge of the High Court can claim to himself any inherent power to take cognizance of a particular cause either on being moved or suo motu unless it is assigned by the Chief Justice to the Judge concerned. The extent of power of the Chief Justice and that of the Judges of the High Court has to be now treated as authoritatively determined and clearly delineated. But it may be clarified that if any learned Judge, either suo motu or on the basis of information coming to his possession, prima facie finds that any matter, not concerning the jurisdiction assigned to him, needs to be examined in the judicial side of the High Court, then, by recording his opinion in writing, he may refer the same to the Chief Justice for being placed before an appropriate Bench. 16. So far as the 2nd question regarding the competence of a Single Judge to refer a case to a full bench is concerned apart from the statutory provisions contained in Section 6 of the Karnataka High Court Act, by a catena of decisions, the Supreme Court has emphatically elaborated and settled the law in this regard. In the case of *Lata Shri Bhagwan and Another v Ram Chand and Another*, it has been held that.—“It is hardly necessary to emphasise that considerations of judicial propriety and decorum require that if a learned Single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a Single Judge, need to be reconsidered, he should not embark upon that enquiry sitting as a Single Judge, but should refer the matter to a Division Bench, or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety“. 17. Therefore, if a learned Single Judge of a High Court hearing a matter feels that the earlier judgment of a Division Bench of the Court requires reconsideration, then in absence of any statutory provision empowering him to refer the same to a Larger Bench, he can place the relevant papers before the Chief Justice to enable him to constitute a larger bench to examine the question. 18. Coming to the facts of the present case, it cannot be disputed that the learned Single Judge himself could not have referred the present appeal to a Full Bench for final disposal. But it is a matter of record that on perusal of the order passed by the learned Single Judge, the Hon’ble Chief justice has directed for placing of the present appeal for final disposal before this Full Bench. As held by the Supreme Court in the case of *Tribhovandas Purshottamdas Thakkar*, supra, the adoption of such a course is quite permissible in law. In para 10 of the judgment, it has been held by the Supreme Court that.—“When it appears to a Single Judge or a Division Bench that there are conflicting decisions of the same Court, or there are decisions of other High Courts in India which are strongly persuasive and take a different view from the view which prevails in his or their High Court, or that a question of law of importance arises in the trial of a case, the Judge or the Bench passes an order that the papers be placed before the Chief Justice of the High Court with a request to form a special or Full Bench to hear and dispose of the case

or the questions raised in the case. For making such a request to the Chief Justice, no authority of the Constitution or of the Charter of the High Court is needed, and by making such a request a Judge does not assume to himself the powers of the Chief Justice. A Single Judge does not by himself refer the matter to the Full Bench: he only requests the Chief Justice to constitute a Full Bench for hearing the matter. Such a Bench is constituted by the Chief Justice. The Chief Justice of a Court may as a rule, out of deference to the views expressed by his colleague, refer to the case; that does not mean, however, that the source of the authority is in the order of reference". 19. For the aforesaid reasons, we do not find any merit in the preliminary objection taken by the learned Counsel for the respondent. Accordingly the objection is rejected. Re: Merits of the appeal 20. Now coming to the merits of the present appeal, in order to examine the scope and extent of rights under Section 53A of the Act, it will be more advantageous to reproduce the same which reads as under:"53-A. 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, 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 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. 21. Section 53A was inserted for the first time in the Act by the Transfer of Property (Amendment) Act, 1929. As held by the Privy Council in the case of *Pir Bux v Mahomed Tahar*, by incorporating the said Section in the Act, the English equitable doctrine of part performance was partially imported into India "whereby the defendant in an action of ejectment may in certain circumstances, effectively plead possession under an unregistered contract of sale in defence to the action". 22. It may be noticed here that in case of *Pir Bux*, *supra*, it was specifically held by the Privy Council that but for the incorporation of Section 53A in the Act there was no room for application of the English equitable doctrine that "contract of sale of real property makes the purchaser the owner in equity of the estate". It was further held that the underlining principle upon which the said rule depended was inapplicable to the sale of real estate in India in view of the express enactment contained in Section 54 of the Act. 23. The Privy Council, again in its judgment rendered in case of *Probodh Kumar Das and Others v Dantmara Tea Company Limited*, held that.— "In their Lordships' opinion, the

amendment of the law effected by the enactment of Section 53A conferred no right of action on a transferee in possession under an unregistered contract of sale. Their Lordships agree with the view expressed by Mitter, J. in the High Court that "the right conferred by Section 53A" is a right available only to the defendant to protect his "possession". They note that this was also the view of their late distinguished colleague, Sir Dinshah Mulla, as stated in the second edition of his treatise on the Transfer of Property Act, at page 262. The section is so framed as to impose a statutory bar on the transferor; it confers no active title on the transferee. Indeed, any other reading of it would make a serious inroad on the whole scheme of the Transfer of Property Act". 24. The Supreme Court has also taken the same view in the case of *Maneklal Mansukhbhai v Horumsje Jamshedgi Ginwalla and Sons*, wherein it has been held that.—"The section is a partial importation in the statute law of India of the English doctrine of part performance. It furnishes a statutory defence to a person who has no registered title deed in his favour to maintain his possession if he can prove a written and signed contract in his favour and some action on his part in part performance of that contract". 25. The Supreme Court, again quite recently in the case of *Patel Natwarlal Rupji v Shri Kondh Group Khedi Vishayak and Another*, by referring to its earlier pronouncements regarding the scope, extent and purport of Section 53A of the Act, has clearly held that the said section gives statutory right to a transferee for consideration in possession of the property under a contract and it also correspondingly imposes a bar on the transferor to recover the possession of the immoveable property from the said transferee. It has been held by their Lordships at para 6 that:—"Though the doctrine of part performance embodied in Section 53A of the Act is part of equitable doctrine in English Law, Section 53A gives statutory right which is available to the transferee for consideration in possession of the property had under the contract. In terms of the section, so long as the transferee has done and is willing to perform his part of the contract or, in other words, is always ready to abide by the terms of the contract and has performed or is always ready and willing to perform his part of the contract, the transferee is entitled to avail of this statutory right to protect his possession as a shield but not as a sword. The right to retain possession of the property rests on the express provisions of the Act and on his compliance thereof. A person who pleads equity must come to the Court with clean hands and he" alone is entitled to the benefit of this section. The section does not create a right or title in the defendant. It merely operates as a bar to the plaintiff to assert his title. The transferor is barred from enforcing his rights other than those expressly provided by the contract. The section, therefore, imposes a bar on the transferor, when the conditions mentioned in the section are fulfilled by the transferee, and section bars the transferor to enforce his rights against such transferee or person deriving right, title and interest from such transferee. It would, therefore, be clear that Section 53A confers a right on the transferee, to the extent it imposes a bar on the transferor, to protect the transferee's right to retain possession of the property under the contract. It would thus be clear that Section 53A confers no title on the transferee but imposes a statutory bar on the transferor to seek possession of the immoveable

property from the transferee. Equally, Section 53A does not confer any title on the defendant in possession nor can he maintain a suit on title“. (emphasis supplied) 26. From the above authoritative pronouncements of the Privy Council and the Supreme Court, it can unhesitatingly be held that Section 53A of the Act creates a statutory right in favour of transferee though the inspiration for incorporating the same might have been derived from the English equitable doctrine of part performance. But, it is now more than settled that in India the right of a transferee to defend his possession over a immovable property acquired pursuant to a contract and subject to fulfilment of statutory conditions contained in the said section is statutory in nature and cannot be whistled down on the equitable concept of laches or implied limitation. 27. The above view of ours finds squarely supported by the pre-enactment history of Section 53A of the Act. The special committee constituted for suggesting amendments in the Act in its report (published in Gazette of India, 1929, Part V, page 71) had, on question at hand in the present appeal, observed that (page 85).—”There is some conflict of decisions in the Indian Courts with regard to the period within which equitable relief can be given to parties to a transaction when there has been no registered instrument. One view is that such relief can be given only within the period during which a suit for specific performance would lie, the other view being that such relief can be given even after the period has expired. It seems to us that the first view to which we propose to give effect by adding Section 30-A to the Specific Relief Act, 1877, does not go far enough, in all cases, to afford the relief which the equities arising out of the part performance require. Because, even after the period of limitation, when part performance has taken place, the parties stand in the same relation to each other as they did within the period of limitation and the equities which arose within that period remain the same. In fact, the longer the possession in part performance, the higher will be the equities. We, therefore, think that in order that the relief may be effective, it ought to be available at all times during which the transferee is in possession in part performance of the contract and subject to the other conditions which we have proposed. In 46 Mad. 919 and 23 CWN 284, the Court took the view that the relief was available even after the period of limitation for specific performance was over. We feel that, in order that the relief may be real, it ought to be available as between the parties to the transaction even after such period of limitation“. 28. The Selection Committee entirely approved the above view as is apparent from its second report which was present before the Legislative Assembly on 2nd of September, 1929, along with the bill. 29. Therefore, while incorporating Section 53A in the Act, the Legislature accepted the judicial view expressed by the Madras and the Calcutta High Courts in *Vizagapatnam Sugar Development Company v Muthutamareddi and Shafikul Huq Chowdhry v. Krishna Gobinda Dutt* . We find it advisable to reproduce the relevant passages on the point from the said two judgments. In the case of *Vizagapatnam Sugar Development Company*, supra, the Full Bench of the Madras High Court has held that (at page 928).—”It is now contended by Mr. Narayanamurthi that the applicability of the doctrine of part performance is limited to cases where the right to sue for specific performance is not barred on the date of the subse-



quent suit and he relies on *Gajendra Nath Dey v Moulvi Ashraf Hossain* and *Syamkisor v Dines Chandra*. In neither case was this proposition specifically considered, whereas in *Meher All Khan v Arutunnessa Bibi*, there is a decision of a Single Judge to the contrary, we can find no such limitation in any of the judgments of the Privy Council cited, and to impose such a limitation would, in effect, confine the equity to cases in which the party had a subsisting legal right which he could enforce, and consequently be a denial of justice in other cases. This is hardly consistent with the doctrines of equity and we are not prepared to accept this plea“. 30. Similarly, the Calcutta High Court in the case of *Shafikul Huq Chowdhry*, supra, held that (at page 289).—”As to the argument that the defendant 1 cannot rely on the agreement because it is too late for him to sue for specific performance, it may be that he cannot now actively enforce his rights under the agreement by legal proceedings but the answer to the argument seems to be that possession is itself a title (at any rate to remain in possession) which a plaintiff must displace before he can succeed. Here the plaintiff fails because equities founded on the agreement block his way. The possession which the defendant 1 was allowed to retain lulled him into security or partial security and there is no reason for denying him any advantage which that possession gives him“. 31. Nonetheless, the three successive Division Benches of this Court in the cases of *A. Kareem Baig*, *Guru Rao* and *Azmathulla Khan*, supra, has taken a contrary view. 32. In the case of *Kareem Baig*, supra, the first decision in the series, it was found that the transferee-defendant has taken no steps to enforce the agreement of sale (Ext. D-1) against the owner-plaintiff within a period of three years from the date of knowledge of repudiation of the agreement. Keeping this factual aspect in view it was held that.—”As a result thereof, defendant 4 has lost her right, if any, under Ex. D-1 and it cannot now be enforced. The doctrine of part performance is a doctrine of equity. Delay defeats equity. Therefore, when the agreement. Ex. D-1 has become unenforceable by, reason of Law of Limitation, the defence of part performance which is founded on Ex. D-1 cannot be permitted to be enforced as the agreement. Ex. D-1 has lost all its efficacy in as much as the right of defendant 4 to enforce it is lost by the law of limitation. The doctrine of part performance which is a doctrine of equity cannot be permitted to be invoked under these circumstances“. 33. The 2nd Division Bench judgment in the case of *Guru Rao*, supra, apart from adopting the ratio laid down in the case of *Kareem Baig*, supra, has held that.—”Therefore, filing of suit by the plaintiff seeking possession of the suit schedule property from the defendant who was in possession of it pursuant to the agreement of sale and the possession was sought on the basis that it was an illegal possession, amounted to repudiating the agreement of sale. Therefore, the defendant was required to enforce the agreement within a period of three years from the date of knowledge of the denial of the agreement. In our view, the plaint averment and relief sought in the suit did clearly and unequivocally amount to denial of the agreement dated 16-12-1972. Therefore, the defendant was required to exercise his right under the agreement by filing a suit for specific performance within three years from the date he was served with the suit summons. Section 53A incorporates doctrine of equity. Therefore, in order to invoke the protection

under the doctrine of part performance, the person invoking must possess the right to enforce the agreement of sale. If the right under the agreement is lost in Law of Limitation, even if it is lost during the pendency of the suit, it is open to the party to take advantage of the same and the Court to take note of it. The delay defeats equity. When the person in possession of the suit property loses his right to remain in possession, he cannot resist the suit of the true owner for possession of the same. xxx xxx xxx Therefore, on the expiry of the period of three years, the defendant lost all his right under the agreement. Consequently, he could not resist the suit for possession filed by the plaintiff because the defendant ceased to have any right to enforce the agreement as that right had become barred by time“. 34. In the case of Ajmathulla Khan, supra, the aforesaid two decisions were attacked as decisions per incuriam with the request to have a second look on the aspect but it did not find favour with the Bench. In Para 35 of the judgment it has been held that.—“It is no doubt true that in the decision of the learned Single Judge of the Punjab and Haryana High Court, Hyderabad High Court and Bombay High Court reported respectively in , AIR 1955 Hyderabad 101 and and the Division Bench decisions of the Bombay and Assam High Courts in and AIR 1949 Assam 8, it has been held that though the relief to obtain specific performance of the contract is barred by limitation, the vendee who has obtained possession of the property could resist the suit filed by the vendor by virtue of the doctrine of part performance under Section 53A of the Transfer of Property Act. After having gone through these decisions, we are not, with all respect to the learned Judges of these Courts persuaded to accept their view point in this regard for more than one reason. It may be noticed that in none of these decisions the impact of doctrine delay defeats equity has been considered. Further, for fulfilment of the essential ingredient of this Section viz, that the transferee is willing to perform his part of the contract, cannot be satisfied if the right of transferee to get specific performance of the contract is extinguished by lapse of time prescribed under the Law of Limitation. Therefore, we are in respectful disagreement with the proposition propounded in these decisions relied upon by the learned Advocate for the appellant. Therefore, we are not persuaded by the argument of the learned Advocate for the appellant that the proposition enunciated in the two decisions in. A. Kareem Baig and K. Guru Rao cases, supra, require a second look or reconsideration. On the other hand, we respectfully agree with everyone of the reasons given in the two decisions for the proposition that a transferee who has obtained possession of immovable property in part performance of the contract cannot resist the suit for possession filed by the vendor if his right to obtain specific performance is barred by limitation and we reiterate the said principle“. 35. In our opinion, the first aspect to be attended to is as to whether only because of failure on the part of the transferee to bring a suit for specific performance of the contract within the period of limitation prescribed therefor under the Limitation Act, 1963 leads to extinction of his statutory right created by the legislature by incorporating Section 53A in the Act. The answer to this question need not detain us too long since it is well-settled that the right and the remedy for enforcement therefor are mutually exclusive jurisprudential concepts. Remedies

are availed for exercise or enforcement of legal rights. There are authoritative judicial pronouncement to substantiate that even if a statutory remedy is lost because of limitation or some other procedural bar, the right subsists. This legal principle has been accepted by the Privy Council in the case of Mahanth Singh v U. Ba Yi. In this case, the respondent had raised a plea of the contract having become void since the action pursuant thereto was not brought within the period of limitation. The plea was based on Section 2(j) of the Contract Act, which reads as under.—“Section 2(j): A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable“. 36. Their Lordship of the Privy Council rejected the aforesaid plea by holding that.—“If the premises accurate the conclusion might follow, even though some of the results would be startling and unexpected. One such result would be that when the period of limitation had run out, not only would the remedy be barred, but the debt would be gone and with it all right to retain anything given as security for the debt, and all right to set off a counter liability against it. This possibility was indeed envisaged in 5 Bom. 647, but the point was left undecided. A still more startling result, however is brought about on this construction if Section 2(j) is read with Section 65, Contract Act, since in such a case not only would every unenforceable contract become void but each party would be under the obligation of restoring or making compensation for any benefit received, no matter how much had been done towards the performance by either party. But, it is not necessary to adopt a construction leading to such surprising results. The solution is in their Lordship’s view, to be found in the wording of Section 2(j) itself. Not every unenforceable contract is declared void, but only those unenforceable by law, and those words mean not unenforceable by reason of some procedural regulation, but unenforceable by the substantive law. For example, a contract which was from its inception illegal, such as a contract with an alien enemy, would be avoided by Section 2(g) and one which became illegal in the course of its performance, such as a contract with one who had been an alien friend but later became an alien enemy, would be avoided by Section 2(j). A mere failure to sue within the time specified by the statute of limitations or an inability to sue by reason of the provisions of one of the Orders under the Civil Procedure Code would not cause a contract to become void“. (emphasis supplied) 37. From the above pronouncement and discussion it is quite clear to us that notwithstanding the fact that a transferee in possession pursuant to a contract of sale fails to file a suit for specific performance within the prescribed period of limitation, still in law, the contract remains valid and operative entitling him to exert his right to retain the possession over the property in exercise of his statutory right conferred by Section 53A of the Act by way of defence in a suit brought against him by his transferor for recovery of possession. 38. The above view taken by us is fully supported by the Division Bench Judgment of the Calcutta High Court in the case of Nakul Chandra Polley v Kalipada Ghosal . Nasim Ali, J., in his concurring judgment has held that:”As regards the second branch of contention that the defedant in the present suit cannot avail himself of the statutory right to retain possession of the land under Section 53A of the Transfer of Property Act, in view of the bar of limitation it may be pointed out

that limitation does not generally apply to a plea in defence – *Sri Kishan Lal v Ml. Kashmiro*. Section 53A has imported in a modified English doctrine of part performance into this country. It confers only a passive right and is available to a defendant to protect his possession. Article 113, Limitation Act, certainly cannot apply to such a right. Mr. Roy however contended that this right was in substance the right to get specific performance of the contract in pursuance of which the purchaser was put into possession. Lord Selbourne however pointed out in *Maddison v Alderson*, that the basis of the doctrine of part performance was not the contract but the acts subsequent to the contract. This right is not an equitable right in this country as in England. It is a right conferred by the Statute law of this country whatever might have been its source in England and the reason in its importation into this country. There is nothing in Section 53A to indicate that the assertion of this right in defence is dependent on the original contract or is subject to any law of limitation. Limitation bars the remedy but not the right in possession, Section 28, Limitation Act, does not apply to this right. The contention of Mr. Roy that the defence based on the statutory right under Section 53A is not available on account of the bar of limitation cannot therefore be accepted“. 39. It is also now a well-settled principle that the law of limitation does not apply to a defence raised under Section 53A of the Act since the Section does not provide for any limitation on expiry whereof the defence contemplated in the Section will be lost or will extinguish – (1970)74 Cal. WN 734, (1967)2 Andh. WR 2, , , AIR 1955 Hyd. 101, AIR 1951 Nag. 403, AIR 1949 Assam 8. 40. Therefore, keeping in view the pre-enactment history of Section 53A of the Act and the binding judicial pronouncements of Privy Council and the Supreme Court, one has to concede that the right of the transferee to defend his possession envisaged under the above provision is statutory in nature and it has not been subjected to any limitation either express or implied. In that view of the matter, the Division Bench decisions of this Court noticed in the opening paragraph of this judgment cannot be said to have laid down a good law and are accordingly overruled on the legal issue involved herein. 41. It is also of importance to notice here that the conditions necessary for making out a defence for possession contemplated under Section 53A of the Act in a suit for ejectment by the owner have been clearly spelt out by the Supreme Court in the case of *Nathulal v Phoolchand*, which are the following:“(1) that the transferor has contracted to transfer for consideration any immoveable 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; (2) that 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; (3) that the transferee has done some act in furtherance of the contract; and, (4) that the transferee has performed or is willing to perform his part of the contract“. 42. In the above case, it has also been held that.–“If these conditions are fulfilled 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 therefor by the law for the time being in force, the

transferor or any person claiming under him is debarred from enforcing against the transferee 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“. 43. Coming to the facts of the case, the Trial Court has found that the defendant has fulfilled all the conditions which are statutorily required to be complied with to defend his possession. Without disturbing the said findings of the Trial Court, the lower Appellate Court has decreed the suit on the plea of limitation which, according to us is not tenable. 44. Since we have already answered the only question of law which has been dealt with by the Appellate Court, in our opinion, it will be more appropriate that the present appeal is now placed before the learned Single Judge for its final disposal after considering any other question which may be arising on the facts of the present case. Let the papers of the present appeal be placed before the Hon'ble Chief Justice for the appropriate orders in the said regard.