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**(1964) 08 P&H CK 0014**  
**In the Punjab And Haryana At Chandigarh**  
**Case No : Second Appeal No. 428 of 1964**

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|-------------------------------------|------------|
| Karam Chand Gurditta Mal and Others | APPELLANT  |
| Vs                                  |            |
| Banwari Lal Ram Rattan              | RESPONDENT |

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**Date of Decision :** 17-08-1964

**Acts Referred:**

Registration Act, 1908 — Section 17, 17(2)  
Transfer of Property Act, 1882 — Section 53

**Citation :** AIR 1965 P&H 117

**Hon'ble Judges :** Shamsher Bahadur, J

**Bench :** Single Bench

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## Judgement

(1) This is an appeal by a mortgagee and his two tenants directed against the judgment and decree of the lower Appellate Court, which while affirming the decree of the trial Judge with regard to the right of redemption of the mortgagor has reduced the rate of interest from 51/2 per cent to 3 per cent on the mortgage amount. The appeal, therefore, is concerned only with the rate of interest or the mortgage amount, whether it is payable at the rate of 51/2 per cent or 3 per cent.

(2) The respondent Banwari Lal mortgaged a double-storeyed shop in Kucha Lal Rura Mal in Ludhiana City with Karam Chand for a sum of Rs. 4,000/- by a document executed on the 9th of February 1942. The interest was payable at the rate of 3 per cent and the mortgage was described to be as one with possession. It seems, however, that the mortgagor remained in possession and continued to pay rent to the mortgagee till the 10th of August 1948 when the property was actually delivered to the appellant-mortgagee. The suit for redemption was brought by the mortgagor respondent on the 29th of November, 1961. The real dispute turned on the rate of interest which was payable on the mortgage amount of Rs. 4000/-. The plaintiff claimed that interest was payable at the rate of 3 per cent mentioned in the mortgage deed itself. The mortgagee, however, placed reliance on documents "A" and "B" which are letters written on the 19th of September and 2nd of October 1943 by the mortgagor himself in which he

reluctantly agreed on pressure from the mortgagee to raise the rate of interest from 3 to 51/2 per cent. These letters in the opinion of the trial Judge entitled the mortgagee defendant to claim a higher rate of interest and a decree was passed in accordance with this novation in the terms of the mortgage agreement embodied in these two letters. The rate of interest decreed by the trial Judge was 51/2 per cent. A decree for redemption of property was passed on payment of Rs. 2,298/8/9. On the mortgagor's appeal, the learned Additional District Judge of Ludhiana being of the view that these letters were inadmissible in evidence for want of registration, the rate of interest was reduced to 3 per cent. The decretal amount thus stood reduced to Rs. 653/11/9. There is no dispute in the matter of calculation and the mortgagee has come in appeal only on the point that the letters "A" and "B" could be used for a collateral purpose under the doctrine of "part performance" laid down in S. 53A of the Transfer of Property Act, 1882, as the mortgagor had in terms of the contract delivered possession of the property.

(3) It is contended by Mr. Thapar that the letters "A" and "B" of the 19th of September and 2nd of October 1943 by which the rate of interest was increased from 3 to 51/2 per cent were followed by delivery of possession on the 10th of August, 1948. In his arguments it has been stressed that the mortgagee having partly performed the contract by entering into the possession of the suit premises, the mortgagor at once became liable for payment in terms of the contract embodied in these two letters. On an examination of the provisions of S. 53A of the Transfer of Property Act, I do not find it possible to accede to this submission of the learned counsel for the appellant. Under this section :-

"Where any person contracts to transfer for consideration any immovable property by writing signed by him.

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 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

.....

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,....."

The first clause of this section makes it clear in my view that the contract which is sought to be enforced must itself constitute the transaction of transfer. The letters "A" and "B" are no more than an agreement to make the payment of a higher rate of interest; that clearly is not a contract of transfer. It is indisputable that the contract embodied in the two letters "A" and "B" is one which requires to be compulsorily registered being a document which creates an interest in Immovable property. It was held by their Lordships of the Supreme Court in Kashinath Bhaskar Datar Vs. Bhaskar Vishweshwar Karve, that if the rate of

interest is varied by a document, whether to the advantage or disadvantage of the mortgagee than his interest in the property is affected and consequently requires registration under S. 17(2)(v) (sic) of the Registration Act. The documents "A" and "B" being compulsorily registrable and not being registered are, therefore, clearly inadmissible in evidence. A case in point is also to be found in *Jeewanchand Jeetmal v. Smt. Kalibai Biharilal* 1963 MPLJ 418 where it was held that the variation of rate of interest which has effect on the interest in the equity redemption, amounts to an interest in the property. A document varying the rate of interest stated in the mortgage deed is compulsorily registrable u/s 17 of the Registration Act.

(4) This principle has not been challenged by Mr. Thapar but he says that the mortgagee having taken possession of the property, the mortgagor is bound to pay a higher rate of interest at any rate with effect from the 10th of August, 1948 under the doctrine of part performance. The plea of part performance was not taken up in the written statement and does not form part of the discussion either by the trial Judge or the lower Appellate Court. As stated in a Bench authority of *Reuben and Narayan JJ. in Sailajananda Pandey and Another Vs. Lakhichand Sao and Others*, objection under S. 53A cannot be raised for the first time in second appeal. it was further observed as under:

" The objection under S. 53A fails because it raises questions of fact which should have been put in issue at the trial. The shield which this section provides is available only against the transferor or any person claiming under him."

To a similar effect are the observations of Biswas J. in *Md. Serajul Haque and Others Vs. Dwijendra Mohan Sen Gupta and Others*, where it was said:

"A defence under S. 53A ought certainly to be raised in specific terms, as if involves questions of fact, and a defence which involves such questions of fact cannot be allowed to be raised for the first time in second appeal."

As I have already said the doctrine of part performance is inapplicable on the language of the section itself. Moreover in the penultimate paragraph of the judgment of the Supreme Court, to which reference has been made, Mr. Justice Bose observed.

"Section 53A of the Transfer of Property Act was referred to but it has no application, for the agreement we are concerned with is not a transfer. There are no words of conveyance in it also the mortgagor is not continuing in possession in part performance of the contract."

The letters "A" and "B" cannot be regarded as an instrument of transfer plainly because these letters only convey the intention of an agreement to raise the rate of interest. Though the mortgagee had entered into possession of the property, there is nothing to indicate anywhere in the pleadings or evidence that it was in pursuance of the contract of transfer. It has to be observed that the transferee entered into possession 5 years after the letters were executed and there was no

question of the mortgagee continuing in possession "in part performance of the contract", as said in the Supreme Court judgment. In my opinion, therefore this appeal must fail and is dismissed. Under the circumstances of the case I leave the parties to bear their own costs of this appeal.

(5) Appeal dismissed.