(1934) 12 CAL CK 0026

In the Calcutta High Court

Durgapada Karmakar APPELLANT

Vs

Nrisingha Chandra RESPONDENT

Date of Decision : 14-12-1934

Acts Referred:
Transfer of Property Act, 1882 — Section 53A

Citation : AIR 1935 Cal 541 : 159 Ind. Cas. 20

Hon'ble Judges : Nasim Ali, J

Bench : Division Bench

Judgement

Nasim Ali, J.—This is an appeal by defendants 1 and 2 in an action for ejectment. Plaintiffs case is that the plaint land was let out to the defendants at an annual rent of Rs. 3 that the tenancy was a tenancy at will and was determined by a notice to quit. On these allegations plaintiff brought the present suit for ejectment. The defendant pleaded inter alia that the plaintiff was not the owner of the entire land, that the northern portion of the land about 1 1/2 cottas in area was settled permanently by the predecessor in interest of the plaintiff in the name of the defendants'' eldest brother Ananda in 1319 B.S. by an unregistered patta. The defendants also claimed mokarari right on the basis of a new oral settlement by the plaintiff after his purchase. The defendants also claimed compensation for the structures raised by them on the disputed land. The trial Court decreed the plaintiffs'' suit. On"appeal before the lower appellate Court the learned Judge has come to the following findings:(a) That the plaintiff is the sole owner, (b) That the patta dated 1319 B.S. relied on by the defendant is one of doubtful origin, (c) That even if the patta be genuine it cannot create a permanent interest as it was not registered, (d) That the defendant cannot get the benefit of Section 53-A, T.P. Act. (e) That the incidents of the tenancy are governed by the Transfer of Property Act. (f) That the tenancy has been validly terminated by a notice to quit, (g) That the defendants being tenants at will are not entitled to claim any compensation for the structures raised. The learned Judge accordingly dismissed the appeal. Hence the present appeal by defendants 1 and 2.

2. Two points are raised by the learned advocate for the defendant in support of this appeal: (1) That the defendants are entitled to get the benefit of Section 53-A, T.P. Act. (2) That in any event the defendants are entitled to get compensation for the structures raised by them.

3. As regards the first point the line of reasoning adopted by the learned advocate for the appellant is this: The unregistered lease was found to be genuine by the trial Court. The lower appellate Court has not reversed this finding, though he had some doubt about the origin of this document. The patta must therefore be taken to be a genuine document. It created a permanent lease and though it was not registered the defendants came into possession on the basis of the said patta which was for consideration. There has been consequently part performance of the contract. Section 53-A is retrospective in its operation and applies to pending actions. Therefore, though the present suit was instituted on 10th June 1929, the plaintiff is debarred from ejecting the defendants.

4. Now, in view of the recent pronouncements of the Judicial Committee in Ariff v. Jadunath Mazumdar 1931 PC 79, Pir Bux v. Mahomed Tahar 1934 PC 235, it was not disputed that under the law as it stood before Section 53-A was introduced in the Transfer of Property Act by the amending Act of 1929, the plaintiff was entitled to eject the defendants. It is also conceded by the learned advocate for the plaintiff-respondent that if the defendants are entitled to the benefit of the provisions contained in Section 53-A plaintiffs'' suit must fail. The point for determination therefore is whether the defendants are protected by Section 53 A. The contention of the learned advocate for the appellant is that Section 53-A has retrospective effect. Now an Act may be retrospective in the sense that it applies to all transactions before it comes into operation and to all actions in Courts relating to these transactions whether such actions are started before or after the Act comes into operation. It may also be retrospective in the sense that it will bring within its operation all transactions completed before it begins to operate, provided these transactions had not been already the subject-matter of litigation before the Act comes into force. The present suit was started before Section 53 A came into operation. In the present appeal therefore I am concerned only with the question whether Section 53-A is retrospective in the sense that it affects pending actions. Section 53 A does not lay down simply a rule of procedure. It touches vested rights under the law as it stood before it came into operation.

5. No decision of this Court bearing on the question of the retrospective" operation of 8. 53-A was cited before me by the Advocates of the parties in this appeal. Certain decisions of other High Courts were cited but these decisions are not uniform. The Madras High Court has taken the view that Section 53-A does not at all affect transactions prior to 1st April 1930 when Act 20 of 1929 which introduced Section 53-A in T.P. Act of 1882, came into operation: see Kanji and Moolji v. Shunmugun Pillai 1932 Mad 734. The Allahabad High Court has followed the Madras case in Gauri Sankar v. Gopal 1934 All 701. The Patna High Court

appears to hold that the section does not apply to pending actions: see Mukteswar v. Barakar Coal Co. 1934 Pat 546. Wadia, J., of the Bombay High Court has applied Section 53-A to a suit instituted before it came into operation: see Soleman Haji v. P.N. Patel 1933 Bom 381. In Gajadhar v. Bechan 1934 All 768 the Allahabad High Court has applied the new section to a case started after it came into force.

6. The object of Section 53-A was to alter the statute law in the country by the partial importation of the English doctrine of part performance:

Now the law as it existed when the action was commenced must decide the rights of the parties unless the legislature expresses a clear intention to vary the relation of litigant parties to each other: per Lord Danman, C.J., in Hitchcock v. Way (1837) 6 A & E 943.

It is a general rule that where the legislature alters the rights of the parties by taking away or conferring any right of action its enactments unless in express terms they apply to pending actions do not affect them: per Jessel, M.R., in Re Joseph Sucha & Co. Ltd. (1875) 1 Ch D 48.

It certainly was considered in many cases that where a person had commenced an action he had a vested right and that any subsequent statute ought not to be construed as retroactive so as to alter that right. This is not an inflexible rule and it does not apply if the language of statute is clear and express: per Pollock, B., in Attorney-General v. Theobold (1890) 24 QBD 557.

7. In the light of the principles laid down in the above English cases I will now proceed to determine whether in Act 20 of 1929 the legislature has given a clear indication that Section 53-A would apply to pending actions. The only section which has got any bearing on the point under discussion is Section 63 of the Act. Section 63 is in these terms:

Nothing in any of the following provisions of this Act, namely, Ss. B, 4, 9, 10, 15, 18, 19, 27 and 30, Clause (C) of Section 31, Sections 32, 33, 34, 35, 46, 52, 55, 57, 58," 59, 61 and 62 shall be deemed in any way to affect: (a) the terms or incidents of any transfer of property made or affected before 1st April 1930; (b) the validity, invalidity, effect or consequences of anything already done or suffered before the aforesaid date; (c) any right, title, obligation or liability already acquired, accrued or incurred before such date, or (d) any remedy or proceeding in respect of such right, title, obligation or liability; and nothing in any other provision of this Act shall render invalid or in any way affect anything already done before 1st April 1930, in any proceeding in a Court on that date; and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued as the case may be, as if this Act had not been passed.

8. It appears from the first portion of the section that it does not include Section 16, which introduces Section 53-A. This section therefore comes under the

operation of the words "in other provisions of this Act" in Clause (d) of section. From the clause it appears to me that Section 16 is not intended to render invalid or in any way affect anything already done before 1st April 1930, in any proceeding in a Court on that date and any such proceeding may be enforced or continued as if the Act had not been passed. So even if it be assumed that by necessary intendment Section 53-A is to be applied to transaction completed before 1st April 1930 the provisions of that section cannot be applied to pending actions. This, conclusion seems to be supported by the following observations of the Judicial Committee in Pir Bux v. Mahomed Tahar 1934 PC 235 to which reference has already been made:

As the law of India stood at the date of this case it is in their Lordships'' opinion no relevant defence to an action by a land owner for ejectment to plead that the plaintiff has agreed to sell to the defendant the land of which the plaintiff seeks to obtain possession.... It remains to take note of the fact that since the present suit was brought the law in India has been altered by the Transfer of Property Act (Amendment) 20 of 1929 which has inserted a new Section 53-A in the principal section whereby a defendant in an action of ejectment, may in certain circumstances effectively plead possession under an unregistered contract of sale in defence to the action. Their Lordships'' view as enforced in the present case must therefore be understood to be referable to the state of the law before the partial importation into India of the English equitable doctrine of part-performance.

9. The case before their Lordships was brought in 1921, the decision of the trial Court was given on 11th September 1926. The Act came into operation on 1st April 1930. Their Lordships decided the case in 1934. If really Section 53-A applied to pending actions it is difficult to understand why their Lordships decided the case under the law as it stood when the suit was brought. If an enactment is intended to apply to pending, actions, the fact that the action is pending in appeal at the time when the Act comes into operation makes no difference. See the observations of Atkin, L.J., in Stovin v. Fairbrass (1919) 88 LJ KB 1014:

Though the Act was passed after the judgments both of the County Court Judge and of the Division Court I think we must determine the appeal in accordance with its provisions.

10. I am therefore of opinion that the defendant is not entitled to rely on the doctrine of part performance as embodied in Section 53-A to resist the plaintiffs'' claim for ejectment. The first contention therefore fails. In support of the second point the learned advocate for the appellant placed much reliance upon a recent decision of the Court in the case of Badal Chandra v. Debendra Nath 1933 Cal 612 and argued that in any view of the case the defendants were entitled to get compensation for the structures built by them. In this case however it has not been found that the structures are permanent, neither has it been found that the defendants were led into belief that they had permanent tenancy and that they

raised the structures under that belief. The Courts below were therefore right in rejecting the defendants'' claim for compensation. The result therefore is the appeal is dismissed with costs.