
(1955) 12 AP CK 0014

In the Andhra Pradesh High Court

Case No : Second Appeal No. 213/2 of 1953

Gokam Chinna Nagaiah

APPELLANT

Vs

Nagaram Baliga and Others

RESPONDENT

Date of Decision : 16-12-1955

Acts Referred:

Asami Shikmi Act — Section 23
Specific Relief Act, 1877 — Section 9
Transfer of Property Act, 1882 — Section 54

Citation : (1955) 12 AP CK 0014

Hon'ble Judges : Srinivasa Chari, J

Bench : Single Bench

Advocate : Marutirao Malkhare, for the Appellant; K. Madhava Reddy, for the Respondent

Final Decision : Dismissed

Judgement

Srinivasa Chari, J.—The Plaintiff is the Appellant before me. This appeal arises out of a suit filed for possession of 3 survey Nos. 9, 135 and 136 situated in Srinivasapur, Wanparthi Taluq, Mehboobnagar Dist. The Plaintiff alleged that the Defendants; mortgaged survey No. 9 with him on 17th Mehr 1346 F. and the Defendants sold survey Nos. 135 and 136 to him for Rs. 70/- by an unregistered sale deed and gave possession thereof. He further alleged that on 9th Mehr 1347 F. Defendant 1 sold survey No. 9 for Rs. 160/-.

The further allegation was that the Plaintiff mortgaged to Lakshmaiah all these lands on 27th Mehr 1350 F. for Rs. 248/-; that he redeemed these lands from the mortgage and leased out all the lands to Defendant 3 in 1354 F. for one year and that again in 1358 F. he gave them to him on batal. The Plaintiff filed this suit as a suit based on title claiming possession on the basis of ownership.

The Defendants denied the title of the Plaintiff and the execution of the sale deeds. They further urged that Defendant 3 was not entitled to: convey survey No. 9. The trial court found that the lands had been sold to the Plaintiff and

therefore decreed the Plaintiff's suit. On appeal the lower appellate court reversed the decree. Hence this second appeal.

2. A number of arguments were advanced before me by the learned advocates. It was urged by the learned advocate for the Respondents that no permission was obtained from the Taluqdar as required by law and no title passed to the Plaintiff. The answer to this argument is that the sale is purported to have been made in 1346 F. and the Land Alienation Restraint Act was applied to all Khalsa lands and also to Taluqas of sarfekhas on 1st Amardad 1347 F and in the notification applying the legislation to these areas it was stated that it would be applied to Samasthan etc. later and admittedly on the relevant dates of sale they were not applied to the Samasthan elakha where these lands were situated. Therefore this plea is of no avail.

3. The second argument of the learned advocate for the Respondents was that u/s 23 of the Asami Shikmi Act they could not be evicted because even according to the Plaintiff the land was given on lease in 1358 F. and therefore until a period of 10 years they could not be evicted. This argument also cannot stand for the simple reason that the Defendants did not admit they are the tenants but they claimed ownership in the lands. Such a plea would avail only a person who admits he has been a tenant and claims possession thereof under a lease.

4. The third argument advanced by the Respondents is that if the allegations of the Plaintiff were taken to be true then it would appear that these lands Nos. 135 and 136 were mortgaged with the Plaintiff on 2nd Amardad 1346 F. and that thereafter on 17th Mehr 1346 F. they were sold.

The Plaintiff was a mortgagee with possession. Therefore on the date when the Defendants are said to have conveyed the survey numbers there was only a sale of the right of redemption which was with the Defendants, if therefore, there was a purchase of the right of redemption it had to be by a registered document and the Hate of 17th Mehr 1346 F. by an unregistered document followed by possession would not pass the title in the property to the Plaintiff: vide Section 54, T.P. Act. With regard to this question there has been a conflict of opinion between the various High Courts.

The Calcutta and Madras High Courts have held that the equity of redemption is an intangible right which could not be transferred except by a registered deed of a sale, while the Allahabad and Bombay and Patna High Courts have taken the view that it is a tangible thing and therefore an unregistered sale followed by possession would convey the title. The Oudh Chief Court, however, has opined that whether it is a possessory mortgage or a simple mortgage equity of redemption which is an intangible thing could be transferred only by a registered document.

In so far as this question is concerned it is needless for me to go into this question but suffice it to say that the possession contemplated by Section 54, T.P. Act is actual possession. For the purposes of Section 54 constructive or

symbolic possession would not do. The words occurring in Section 54 are "delivery of tangible Immovable property takes place when the seller places the buyer or such person as he directs in possession of the property".

Therefore this contemplates the buyer being put in actual possession of the property. It would appear that in this case according to the Plaintiff he was in possession of the property as a mortgagee. Where therefore the mortgagee has been in possession of the property by virtue of the mortgage & thereafter a sale is effected of the property the vendee cannot invoke the provisions of Section 54, T.P. Act and get title of the property by means of an unregistered sale deed unless some overt act of possession is established. In this connection I might refer to a decision of the Bombay High Court reported in Bhikhabhai Nanabhai v. Chimanlal Maganlal AIR 1653 Bom 437 (V 40) (A). Delivery is the essence of the transaction. I might refer also to a decision of the Privy Council in the case AIR 1921 8 (Privy Council) where their Lordships observed:

Their Lordships cannot accept the suggestion made on behalf of the Appellant that for the purposes of Section 54, some sort of constructive possession resulting from the delivery of the alleged instrument of transfer might be sufficient. For this purpose there must be a real delivery of property

I am, therefore, of the opinion that in this case there could be no transfer of ownership by the unregistered sale deed of 17th Mehr 1343 F. of survey Nos. 135 and 136.

5. As regards survey No. 9 the objection raised is that Defendant 1 the alienee conveyed it and therefore Defendants 2 and 3 were not bound by it. The learned advocate for the Plaintiff contended that Defendants 2 and 3 had consented; if therefore there was a consent by them the sale must be held to be valid. With regard to this question I must point out that there is no allegation in the plaint of the sale having been made by one of the brothers and the others having consented.

The sale deed does not speak of the property having been sold by the manager of the joint family. Under those circumstances it would not be open to the Plaintiff to say that because the other Defendants consented the sale must be held to be binding on them also. If an allegation had been made to this effect it would have been open to the Defendants to say as to under what circumstances they gave their consent and other matters would have been gone into by the courts below. I am not prepared to allow the Plaintiff to rely upon the consent where he has not made an allegation in the plaint.

6. One other argument was advanced by the learned advocate for the Plaintiff and that was, at the worst he would be entitled to possession treating the suit as a suit based upon possessory title. I am of opinion the Plaintiff cannot succeed because this was a suit which he based upon his title to the suit property and not as a suit on the basis of possession. Section 9, Specific Relief Act, merely provides a speedy and expeditious remedy in cases of forcible and high-handed

possession.

It is to prevent a person after taking forcible possession to smack his fingers at the man from whom he acquired forcible possession and say "you had better file a suit. to establish your title". Ordinarily in such cases the question of ownership is not relevant. Plaintiff has merely to prove possession. A distinction has to be drawn between a suit based upon possessory title and a suit u/s 9 of the Specific Relief Act.

In the one case the Plaintiff would be entitled to a decree only where Plaintiff's possession was sufficient proof of his title while in the other case viz., in the latter case the court has merely to see whether the Plaintiff was in possession six months prior to the date of the suit. In this case it would appear the question of the title of the Defendants has been gone into and the courts have come to the conclusion that the Plaintiff has no title. Under those circumstances this suit which was primarily a suit based on title cannot be allowed to be converted into a suit based on possession u/s 9, Specific Relief Act.

It would also not be in the interests of justice to grant a decree to the Plaintiff in this case regarding it as a suit u/s 9, Specific Relief Act, for it would amount to this that where title had been agitated by the parties and the court had gone into the question of title and given a finding, if a simple decree for possession were given, the Defendants would necessarily have to go and establish his title over again although the question of title had been gone into in this case.

It is in order to avoid an anomaly like this that a suit based upon title could not be allowed to be converted into a suit u/s 9, Specific Relief Act. It is also in the interests of justice that unnecessary litigation should be avoided. Where therefore the title has been gone into, it would be futile to rest the case merely upon the question of possession and drive the parties to another suit for the establishment of title.

This view is very well supported by a decision of the Allahabad High Court in the case of Lachman v. Shambhu Narain 33 All 174 (C) wherein it has been laid down that where a Plaintiff sues for possession on the basis of title and fails to establish title he cannot be granted a decree for possession under 1st paragraph of Section 9, Specific Relief Act.

7. For all these reasons I am of the opinion that this appeal should fail. It is, therefore, dismissed with costs.