**(1952) 08 GUJ CK 0004**

**In the Gujarat High Court**

**Case No :** Second Appeal No. 137 of 1951

Kanbi Karshan Jaram and Others — APPELLANT

Vs

Kanbi Harkha Hari and Others — RESPONDENT

**Date of Decision :** 29-08-1952

**Acts Referred:**

Nawanagar State Registration Act, 1908 — Section 36, 49, 5, 53A

**Citation :** (1952) 08 GUJ CK 0004

**Hon'ble Judges :** M.C. Shah, C.J;J.A. Baxi, J

**Bench :** Division Bench

**Advocate :** H.P. Mankad, for the Appellant; M.I. Pandya, for the Respondent

## Judgement

J.A. Baxi, J.—This second appeal arises out of suit No. 50 of 1949 filed by the Appellants against the Respondents in the Court of the Civil Judge, Jr. Dn., Dhrol-Jodiya for recovery of possession of a certain agricultural land.

2. The land in question had been in possession of one Gordhan Premji since St. 1981 (1925) and after his death it is in the possession of the Respondents and they have been paying assessments to the State since then. The Appellants'' case was that the land was given to the above-mentioned Gordhan for cultivation as a licensee on condition that he should pay assessment to the State, that after the death of Gordhan, the Respondents entered into possession of the land and refused to restore it to the Appellants though they had agreed to do so. The Respondents denied that Gordhan was licensee and alleged that the land was sold to them under an unregistered sale deed dated Chaitra Vad 4 of St. 1931 (13-04-1925) and that they are in possession as Gordhan''s heirs, and they have produced the sale deed Ex. 17. The sale was compulsorily registerable under the Nawanagar State Registration Act and the Appellants have objected against its admissibility on the ground of non-registration.

The learned Civil Judge held that the deed was admissible to prove the character of possession of the Respondents and was evidence of part performance of the contract. He also held that Gordhan was in possession of the land in the character as a vendee and consequently Gordhan and after his death the Respondents were in its possession adversely to the Plaintiffs and therefore he dismissed their suit as barred by limitation. In appeal, the learned District Judge confirmed the Civil Judge''s decree and this second appeal is against the learned Judge''s appellate decree. It was urged that in view of the express provisions of the Nawanagar State Act Ex. 17 should not have been accepted in evidence; that Section 53-A could not, be retrospectively applied to it and the Respondents should therefore have been ordered to deliver possession of the land to the Appellants who continue as its owners.

3. When the sale deed was executed the Transfer of Property Act and the Indian Registration Act were not in force in the Nawanagar State which had its own Registration Act. After the merger of the Nawanagar State into the Saurashtra State, the Indian Registration Act and the Transfer of Property Act as amended by the Transfer of Property (Amendment) Supplementary Act, 1929 was applied to the whole of Saurashtra and when The present suit was filed, these enactments were in force.

4. Under the Nawanagar State Registration Act, the sale dead required to be compulsorily registered. The consequences of non-registration are stated in Section 36 as follows:

(Omitted, being in Gujrati).

These provisions are identical in terms with the provisions of Clauses (a) and (c) of Section 49 of the Indian Registration Act, 16 of 1908. There is of course no proviso to Section 36 similar to the proviso which was added to Section 49 of the Indian Registration Act by the amending Act of 1929.

5. The learned District, Judge was of the opinion that as the suit was filed after the coming into force of the Transfer of Property Act, the admissibility of Ex. 17 should be determined by the provisions of Section 53-A of that Act. We agree with this view. Mulla in his Transfer of Property Act, 3rd Edition, p. 278 cites a number of decisions and summarises the law in the following terms:

In considering whether the Section (53A) has retrospective effect or not, the question is to be considered only in reference to the circumstances which bring the provisions thereof into effect, i.e., to the filing of the suit. It is not the date of the making of the contract; but the date on which the suit is filed, that is relevant for the purpose. In this sense it has retrospective effect. Thus it applies to suits filed after 1 April 1930, although the transaction may be of an earlier date.

6. In- Rustomji Dossabhai Billimoria Vs. Bai Moti, it was held that Section 53A which was introduced by Section 16 of the Amending Act, 1929 applied to a transaction which took place before 01-04-1930, provided the suit in which the question arose was commenced after 1st April. In arriving at this decision, the

 

learned Chief Justice considered the terms of Section 63 of the Amending Act and came to the conclusion that the Legislature intended Section 53A to apply to transactions which took place before 01-04-1930 where the suit was filed after that date.

7.- John Gurney Wakefield Vs. Kumar Rani Sayeeda Khatoon, is a decision to the same effect. We may incidentally mention that a decision to the contrary in- Kanji and Moolji Brothers Vs. T. Shanmugam Pillai, which the learned Advocate had referred to was dissented from in Rustomji''s case as well as in the Patna case referred to above. We may also refer to- Hormasji Jamshedji Ginwalla Vs. Maneklal Mansukhbhai, where Section 53A of the Transfer of Property Act has been held to be retrospective in operation. The learned Advocate however referred us to the Privy Council decision in- AIR 1931 79 (Privy Council) . That case no doubt is an authority for the principle that the effect of the provisions of Indian Statutes cannot be allowed to be modified by importing English equitable doctrines.

That decision was however in respect of a suit which was filed in 1923 when the Transfer of Property Act was not yet amended. Moreover, we are not importing provisions of any foreign statute or English equitable principles but are deciding this case according to the express provisions of Section 53A of the Transfer of Property Act which is the law that governs this case. We were further referred to- Ramji Mavji v. Valji Harji AIR 1950 Kut 66 by the learned Advocate for the Appellants who argued on the strength of that decision that the doctrine of part performance enumerated in Section 53A could not be imported to override the express provisions of the Nawanagar State Registration Law. In the Kutch case, an unregistered document which required to be registered under the Kutch law was not allowed to be received as evidence of part performance of the contract u/s 53A of the Transfer of Property Act, and the learned Judicial Commissioner refused to follow the rule laid down in proviso to Section 49 of the Indian Registration Act enabling the Court to consider the document as showing the nature of possession.

That case however was under the Kutch Registration Act, Section 5 of which said that not only unregistered documents, the registration of which was compulsory, would not be admitted into evidence but that those documents should not be given effect to whatever in any Court of law. Under the Kutch Act, such a document was without any force whatever and could not be acted upon. There was an express prohibition against acting upon the document in any manner under the Kutch Act and the principles of British Indian enactments which did not constitute the law in Kutch were not applied to override the express statutory provisions of the Kutch Registration Act. The conditions are however entirely different in this case. We are not importing a rule of foreign statute but are applying the Transfer of Property Act which governs that suit. The Kutch decision therefore does not apply.

8. Certain rulings were also cited on behalf of the Appellants to show that Section

 

53A has not retrospective effect but we hold the view that Section 53A applies to suits filed after the application of the Transfer of Property Act to Saurashtra even though the transaction may have taken place earlier. In this view of the law, the admissibility of Ex. 17 must be decided with reference to Section 53A of the Transfer of Property Act. The terms of the transfer can be ascertained from Ex. 17. Gordhan had performed his part of the contract by paying consideration and he entered into possession in part performance of the contract. Thus, all the ingredients of Section 53A have been satisfied in this case and Ex. 17 would be admissible as evidence of the part performance of the contract by the Respondents.

9. Apart from the application of the doctrine of part performance to Ex. 17, the document is admissible to show the nature of the Respondents'' possession. The proviso to Section 49 which was added by the Amending Act of 1929 says in clear terms that an unregistered document affecting immovable property and required by the Registration Act to be registered may be received in evidence as evidence of any collateral transaction not required to be effected by registered instrument. Collateral transaction means a transaction which does not create rights in immovable property. Therefore though Ex. 17 cannot be used as evidence of the sale, it can be used to show the nature of Gordhan''s entry and the subsequent continued possession by him and his heirs.

10. On the question whether this proviso is retrospective or not Mulla in his Registration Act, 5th Edition, p. 182 observes that it has been held that it is not retrospective as to documents executed before the date on which the Amending Act came into operation i.e. 01-04-1930 but the correct view, according to the learned author, is that it is not retrospective only with regard to suits instituted before the Act came into force. It would therefore appear that the document would be governed by the proviso if the suit is instituted after that date though the document may have been executed earlier. Assuming however that the proviso has no retrospective effect, even then in the words of Beaumont C.J. in-Rustomji Dossabhai Billimoria Vs. Bai Moti, cited above:

The amendment of Section 49, Registration Act, was only passed ''ex abundante cautela'' and was not necessary.

In-Vishwanath Haibatrao Deshpande v. Ranganath Dhondo Deshpande ILR 1942 Bom 595 Broomfield J. observed as follows.

There is now a proviso to Section 49 of the Indian Registration Act to the effect that an unregistered document may be looked at as evidence of any collateral transaction not required to be effected by registered instrument. That is merely a statement of what was held to be the law even before this proviso.

This is the view of the learned author of Mulla''s Indian Registration Act, 5th Edition (p. 186). Therefore, whether the proviso to Section 49 is retrospective in operation or not, the law contained therein was always held to have governed the provisions of Section 49. The provisions of Section 36 of the Nawanagar

 

State Act, are identical in terms with Section 49 of the Registration Act, and therefore even if the admissibility of Ex. 17 must be construed with reference to the Nawanagar State Act, the provisions of Section 36 of that Act must be regarded as subject to the rule contained in that proviso. Therefore, Ex. 17 must be held as receivable as evidence of a collateral transaction which in this case is the origin of Gordhan''s entry into the land and the character of his subsequent possession.

11. The leading case on the law as to the admissibility of documents which are not registered though their registration is compulsory is-Varada Pillai v. Jeevarathnammal ILR Mad 244. The question in that case was whether the recitals of a gift in petitions to the Collector praying for mutation of names in his records could be admitted in evidence. The holdings which were purported to have been given away to the donee were transferred to her name as a result of these petitions. The following observations of their Lordships in that case show the extent of the admissibility of these petitions:

It should be added that although the petitions of 1895 and the change of names made in the register in consequence of those petitions are not admissible to prove gift, they may nevertheless be referred to as explaining the nature and character of the possession thenceforth held by Duraisani (donee). In other words, although the petitions and order do not amount to a gift of the land they lead to the inference that the subsequent receipt of the rents by Duraisani was a receipt in the character of donee and owner of the land, and therefore in her own right and not as trustee or manager for her mother and aunt.

In-Vishwanath Haibatrao v. Ranganath Dhondo ILR 1942 Bom. 595, already referred to above, Broomfield J. sums up the effect of this decision in the following terms:

Their Lordships of the Privy Council in-''Varatha Pillai''s case'' held that one of the collateral purposes for which an unregistered grant could be received in evidence was the purpose of showing the character of the possession taken and held by the grantee. There, it was a case of a gift, but on principle there seems to be no reason why there should be any distinction in this respect between a gift deed and a permanent lease.

In Vishwanath''s case the Bombay High Court received the unregistered lease for the purpose of showing the character of the tenants original entry and continuance on the land as a permanent tenant (mirasdar). The lease in that case was executed in 1918 i.e., before the addition of proviso to Section 49 by the Amending Act and the suit was filed on 22-01-37 after the Amending Act came into force. This case therefore applies to the facts before us and we hold that Ex. 17 is receivable in evidence for the purpose of showing that Gordhan''s entry into the land was in his character as a vendee and his continued possession and the possession of the Respondents after his death was in the assertion of the right as owners adversely to those of the Appellants. The Appellants'' case that

 

Gordhan was a licensee fails and his suit is barred by limitation and the Respondents'' title is perfected by adverse possession.

12. We therefore confirm the decree of the learned District Judge and order the appear to be dismissed with costs.

Shah, C.J.

13. I agree.

 