

(1939) 02 AHC CK 0019
In the Allahabad High Court

Kashi Nath Tewari and Another	Vs	APPELLANT
Makchhed Tewari and Others		RESPONDENT

Date of Decision : 16-02-1939

Acts Referred:

Citation : AIR 1939 All 504 : (1939) 9 AWR 373

Hon'ble Judges : Mohammad Ismail, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Mohammad Ismail, J.—This is a defendants' appeal from a decree of the learned Civil Judge of Gorakhpur which affirmed a decree of a learned Munsif of that district. The plaint states that by deed of exchange dated 28th May 1915 the plaintiffs obtained plots in list B while the defendants became owners of plots in list A. The plaint further states that ever since the execution of the deed of exchange the parties have been in possession of the plots assigned to each other; that the Revenue Court for certain reasons have not given effect to the transfer in the revenue papers and that the defendants encouraged by the order of the Revenue Court have attempted to interfere with the plaintiffs' possession. On these allegations it is prayed that the plaintiffs may be granted declaration that they are owners of the plots enumerated in list B and that the defendants are not entitled to interfere in their enjoyment and possession of the aforesaid plots. In the alternative it is prayed that if for any reason the first relief is not granted to the plaintiffs they may be awarded a decree for possession of the plots comprised in list A together with Rs. 100 spent by the plaintiffs on the improvements. Defendants 2, 3 and 5 to 8 contested the suit. They pleaded inter alia that there was no exchange as alleged by the plaintiffs; that the defendants were in possession over plots in list A as occupancy tenants; that the plaintiffs were never in possession of the plots in list B and that the alleged deed of exchange was inoperative for want of registration and other legal defects.

2. As the defendants claimed to be the tenants of the plaintiffs with respect to

plots in list A the issue of tenancy was referred to the Revenue Court. The finding of the Revenue Court was in favour of the defendants. The trial Court accepted the finding of the Revenue Court. The lower Appellate Court did not consider it necessary to record a finding on that issue as in the opinion of the learned Civil Judge the decision of that issue was unnecessary in view of his findings on other issues. The deed of exchange on behalf of the plaintiffs was executed by one of the plaintiffs, namely Raghunandan. It is argued that Raghunandan alone was not competent to execute the deed on behalf of the plaintiffs and further that the deed of exchange is ineffective because it purports to transfer plots in list A which appertain to khewats 1 and 4 which belong to several cosharers including the plaintiffs. It is urged that Raghunandan had no right to transfer specific plots appertaining to a joint khewat, especially as several cosharers were in no way concerned with the transaction of the alleged exchange. In support of this contention several authorities have been cited. In *Midnapur Zamindary Co. Ltd. v. Kumar Naresh Narayan Roy* AIR (1924) P.C. 144 their Lordships of the Judicial Committee observed:

Where the lands in India are so held in common by cosharers each cosharer is entitled to cultivate in his own interests in a proper and husband like manner any part of the lands which is not being cultivated by another of his cosharers but he is liable to pay compensation in respect of such exclusive use of the lands. Such an exclusive use of the lands held in common by a cosharer is not an ouster of his cosharers from their proprietary rights as cosharers in the lands.

3. It was further observed:

No cosharer can as against his cosharers obtain any jote right, rights of permanent occupancy, in the lands held in common, nor can he create by letting the lands to cultivators as his tenants any right of occupancy in them.

4. The above-mentioned observations were made in a case in, which one cosharer brought a suit against another cosharer for a declaration that the defendants had no jote rights in any of the lands of which he sought partition and a decree for possession after partition by ejectment of the defendants. In *Qutubuddin Vs. Mangala Dubey and Another, Niamatullah J.* remarked:

One of several cosharers in an undivided mahal cannot transfer to stranger lands held by him in severalty and if he does so, the other cosharers are entitled to have the alienation set aside, to eject the transferees and to take joint possession with the transferors.

5. That was also a case between two co-sharers. In *Adit Singh Vs. Rai Bindayal Sahu and Others*, *Bajpai J.* reviewed a number of authorities on the subject and said:

A cosharer in an undivided property cannot alienate any defined portion of such property even though he might have been in exclusive possession of the same by an agreement amongst the various cosharers. It follows that if such an alienation

is made the alienation is subject to the right of the joiner cosharers to enforce a partition. If the mortgage is followed by a partition and the mortgaged properties are allotted to the other cosharers, they take those properties, in the absence of fraud, free from the mortgage, and the mortgagee can proceed only against the properties allotted to the mortgagors in substitution of his undivided share.

6. In some cases a contrary opinion has been expressed. I however think that the facts of the present case are entirely distinguishable. It appears that Mt. Brijmani Tiwarin, Mt. Dulma Tiwarin and Thakur Dayal were at one time in possession of the plots in dispute. They were cosharers in khewats 1 and 4 along with certain other persons and the plots in dispute appertained to those khewats. On 25th May 1912 the aforesaid persons transferred the specific plots to the plaintiffs who obtained possession without any objection from any of the cosharers. On 28th May 1915 Raghunandan on behalf the plaintiffs executed the deed of exchange in favour of some of the defendants and the predecessors of others. No objection was made by any of the joint owners to the transfer by Raghunandan in favour of the defendants and the transferees continued in possession without any objection for the last 24 years. No objection is being raised even now by any of the cosharers. Under the circumstances, it is not open to the defendants to raise a point which might have been available to the cosharers at the time of the transfer. On the authority of the cases cited above, if a suit has been instituted by the cosharers other than those who were a party to the sale or the deed of exchange, it is possible that these transactions might have been cancelled. But in view of the long silence of all the interested parties it must be assumed that they agreed to the transfers and it is too late to question them now. In my opinion the defendants cannot be allowed to resile from the agreement after a lapse of so many years. The Courts below have come to a concurrent finding that the deed of exchange was acted upon and the plaintiffs have been in possession of the plots comprised in list B in pursuance of the deed of exchange. That being so the deed of exchange cannot be held to be invalid because some of the cosharers were no parties to it. As stated above the plots in list A were transferred on behalf of the plaintiffs but the deed of exchange was executed only by Raghunandan who was the karta of the family and represented all the plaintiffs. The plaintiffs applied to the Revenue Court confirming the transfer made by Raghunandan on their behalf and in the present suit they state that Raghunandan was authorized to execute the deed of exchange. In my judgment the deed of exchange is not inoperative because other plaintiffs did not join Raghunandan in executing it.

7. The next question stressed by learned Counsel is that the deed of exchange is inadmissible in evidence because it is neither stamped nor registered. The Courts below have held that the plaintiffs are entitled to the benefit of Section 53-A, T.P. Act. Section 53-A runs as follows:

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 therefore 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 on which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract.

8. Learned Counsel for the appellants contends that this Section can be used only as a shield and not as a sword and that it is not possible for a person who is entitled to the benefit of that Section to bring a suit as plaintiff for the purpose of enforcing his right under that Section. In AIR 1933 29 (Privy Council) . Lord MacMillan observed:

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 (Amendment) Act (20 of 1929) which has inserted a new Section 53-A in the principal Act 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.

9. Sir Dinshaw Fardoonji Mulla in his commentary says:

By virtue of this Section part performance does not give rise to an equity as in England but to a statutory right. This right is more limited than the English equity in two respects : (1) the contract must be in writing; (2) it is available only as a defence.

10. The deed of exchange is in writing and (embodies the necessary terms of the contract, but in view of the observations quoted above the plaintiffs cannot take advantage of it. This view was taken by a Bench of the Calcutta High Court in Dantmara Tea Co. Ltd. v. Probodh Kumar Das (1936) 41 C.W.N. 54. Learned Counsel for the respondents has relied upon Kaura Ram v. Chaman Lall AIR (1934) Lah. 751 and Mastram v. Ma Ohn (1934) Rang. These authorities no doubt help the plaintiffs, but having regard to the observations of their Lordships of the Judicial Committee I must hold that the plaintiffs cannot claim the benefit of Section 53-A and that the Courts below have taken an erroneous view of law on this point. The matter however does not end here. The Courts below have held that the plaintiffs have been in peaceful possession as proprietors over the plots in list B since 1915 and that they have openly asserted their title to this property to the knowledge and with the consent of the defendants. Even if the deed of exchange did not confer a legal title to them in the lands in dispute in my

judgment they have acquired full title to the property by contiguous possession for over 12 years openly and adversely to the vendor. It would be most inequitable and unjust if the dishonest plea of the defendants prevails and the plaintiffs lose possession of the property which they acquired in exchange and also their own property which they gave in exchange. In *Mt. Jasoda Kuar Vs. Janak Missir and Others*, a Bench of that Court held:

Even when a registered sale deed is found to be illegal the purchaser gets full title to the property purchased if he is put in possession in pursuance of the registered deed and continues to be in possession for over 12 years openly and adversely to the vendor.

11. In *Kandasami Pillai v. Chinnabba* AIR (1921) Mad. 82 a Bench of that Court held:

An unregistered sale cannot be set up as a transaction having effect of itself to transfer any interest in the property; but it is permissible to consider it, as showing the nature of the transferee's subsequent possession, i.e. when the sale is of mortgaged property to the mortgagee that it was not as a mortgagee, but as full owner. That being established it would after the expiry of 12 years ripen into full title and bar mortgagor's right of redemption.

12. In *Qadar Bakhsh v. Mangha Mal* AIR (1928) Lah. 495 this case has been followed. In the present case as the deed of exchange did not convey any title the possession of the plaintiffs over the plots in dispute was without title. It has been found that the plaintiffs were in undisturbed possession for over 12 years; in my judgment they must be held to be the proprietors of the plots enumerated in list B. The plaintiffs are therefore entitled to the declaration claimed by them. The decree of the Court below must accordingly be affirmed. In the result the appeal fails and is dismissed with costs.