

(1962) 06 AP CK 0008

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 821 of 1960

Kondapally Vasudev Reddy

APPELLANT

Vs

Baireddy Venkata Reddy and Another

RESPONDENT

Date of Decision : 20-06-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2, Order 15 Rule 3, 115
Hyderabad Tenancy and Agricultural Lands Act, 1950 — Section 47
Transfer of Property Act, 1882 — Section 53A

Citation : AIR 1963 AP 232

Hon'ble Judges : Munikanniah, J

Bench : Single Bench

Advocate : K. Madhava Reddy, for the Appellant; Triambak Rao Deshmukh, for the Respondent

Final Decision : Allowed

Judgement

Munikanniah, J.—This revision petition raises not only some interesting points but certain intricate question also. It seeks to revise the order of the District Munsif, Mahabubabad, which purported to decide one issue in each of the suits O. S. No. 33 of 1959 and O. S. No. 1 of 1960 on its file.

2. Peculiarly an objection as to the maintainability of this Revision petition had been taken on behalf of the respondents herein towards the very end of the arguments. Ordinarily, such an objection would precede other arguments; but nevertheless, I will proceed to consider the objection so raised.

3. Mr. Triambak Rao Deshmukh pointed out that since the findings of the lower Court in regard to an issue in each suit which could be said to have been treated as preliminary issues are attacked the proper course is to file appeals and not question them in any Revision petition. Undoubtedly, it is indisputable that a revision wilt not lie if there is provision for an appeal. Therefore, the first thing which has to be looked into, while on this point, is to find out from the nature of the order which has been passed by the lower Court whether it is appealable.

4. A few facts relating to the procedure adopted by the lower Court need, therefore, special mention in this connection. O. S. No. 33 of 1959 is filed by the respondents herein for recovery of possession of the suit land and mesne profits, past and future, alleging that the defendant had no right or title whatsoever to the suit land and that the defendant is in illegal occupation of that land. The defendant pleaded in his written statement that though formerly the plaintiffs were the owners of the suit lands, the plaintiffs alienated the properties on receiving a consideration of Rs. 1,100/-and executed an unregistered document on 23-4-1955 and gave possession of the properties to the defendant and put the defendant also in peaceful possession of the same. The defendant further contended that he had never occupied the suit land illegally and that the plaintiffs have willingly, in accordance with the terms of the agreement entered into with the defendant, put him in possession of the suit lands. The defendant further contended that he had every right to hold the land, and no question of the defendant vacating possession of the lands arose. He denied the right of the plaintiffs to claim mesne profits. The defendant, however, set up a right in himself to enforce a specific performance of that contract and reserved his rights to file a suit therefor.

5. The material issue in O. S. No. 33 of 1959 which has been treated as if it is a preliminary one is issue No. 1. That is as follows :

"Whether the defendant purchased the suit land from the plaintiffs on 23-4-1955 as alleged by him and whether the sale transaction is valid and binding on the plaintiffs?"

6. As a counter-blast to this suit filed by the respondents herein the defendant thereafter instituted O. S. No. 1 of 1960 praying therein for specific performance of the contract of sale, which he already referred to in the written statement filed in the other suit as rendering his possession of the suit properties valid. The respondents herein admitted that an agreement of sale in favour of the present petitioner was executed on 23-4-1955, but that he was not put in possession of the suit lands in pursuance thereof. They, however, denied that they executed any document and the agreement of sale put into Court is a forgery. Inter alia they also raised the contention that any alienation of agricultural lands without the previous sanction of the Collector is forbidden u/s 47 of the Hyderabad Tenancy and Agricultural Lands Act, 1959 and that any alienation in contravention of it is not valid, and that the contract is unenforceable by reason of Section 23 of the Indian Contract Act. It is not necessary to refer to the reasons given in their written statement as to why Section 47 was alleged to apply to the facts of this case.

7. In view of this state of pleadings, issue No. 3 was framed and it is as follows :

"Whether the suit contract is valid and is enforceable by law?"

8. It is also pertinent to point out that while the result of O. S. No. 1 of 1960 mainly depended upon the determination of issue No. 3, such is not the case

with reference to O. S. No. 33 of 1959. Also there is the other main contention which has been put in issue and which, if determined as a fact, would certainly have obviated the necessity of any discussion on these two issues except it be to meet the alternative plea. That concerns the issue whether the agreement itself is a forgery. But that has not been taken up by the Court below and it is said that such a course is followed at the instance of the parties. It has to be observed that the lower Court went on to decide these two issues only; but the course adopted thereafter by it in merely giving a finding and not deciding the suit in accordance with the finding so given, has rendered it, in my view, difficult to have to clearly discern the mind of the Court in doing so. What I mean to point out is that if the lower Court had been deciding the issue in each of the suits as a preliminary one, it must have adopted the course of applying its finding and disposing of the suit in each case. But such a procedure has not been adopted in respect of O. S. No. 33 of 1959. Therefore, the lower Court seems to have merely thought it as a pastime to pronounce something in regard to these issues and leave the matters at that. Such a procedure is indeed open to objection and necessarily has to be dealt with, in my view by this Court when specially a revision application has been filed in regard to it. Thus viewed, the matter raises the question whether the lower Court has not acted with material irregularity even if it had jurisdiction; and in my view this has to be answered in the affirmative. In this view, I am unable to uphold the contention of the learned counsel for the respondent that this revision petition does not lie.

9. It also transpires that O. S. No. 1 of 1960 was subsequently taken up by the lower Court and dismissed. As against it, A. S. No. 3 of 1961 is pending in the District Court of Warangal.

10. In view of this, the finding of the lower Court on issue No. 3 in O. S. No. 1 of 1960 will have to be gone into in that appeal and so much of the matter as pertains to that issue has necessarily to be kept out of the purview of this revision petition. From the brief narration of the contentions and pleadings set out above, it is more than clear that for want of previous sanction of the Collector as provided u/s 47 of the Hyderabad Tenancy and Agricultural Lands Act, 1950, the suit for specific performance is not maintainable is made with special reference to the particular facts of that case only. But the same has not been urged in the other suit. Also that the contract is unenforceable by reason of Section 23 of the Indian Contract Act is a contention special to O. S. No. 1 of 1960 only. Therefore, if this was kept in mind by the lower Court, it would have been no longer necessary for that Court to have mixed up matters and contentions and considered the questions in issue in both the suits together as if they relate to the same thing and raise the same points. It is necessary to recall in this context that O. S. No. 1 of 1960 is a suit for specific performance based upon the contract in pursuance of which, it is also alleged, possession has been given to the defendant. Questions such as whether such a contract is enforceable by the petitioner herein as the plaintiff in O. S. No. 1 of 1960, or the contract itself is hit for want of sanction u/s 47, or is unlawful and therefore affected by

Section 23 of the Indian Contract Act, in my view, are special only to O. S. No. 1 of 1960 and cannot now be considered in this revision petition, but may be gone into the appeal against O. S. No. 1 of 1960.

11. Therefore, remembering that it was not open to the lower Court to have mixed up both the issues and considered them in an omnibus manner without reference to the relevant points raised by them or the specific contentions of each of the parties, it is now to be seen what exactly is the scope of O. S. No. 33 of 1959. That suit is by the respondents herein for recovery of possession and mesne profits against the petitioner herein alleging that there was illegal occupation by the defendant of the suit lands. In other words, this suit is for recovery of possession of the lands and also mesne profits on the ground that the defendant is a trespasser. In respect of this claim so put forward by the plaintiffs, the defendant put up the plea that the unregistered contract in his favour coupled with the possession of the lands which the plaintiffs in that suit gave to the defendant, would not render the possession of the defendant in any case illegal, and as the defendant is in lawful possession of the suit lands and did not occupy them illegally, the defendant cannot be dispossessed. Ordinarily, to a suit of the nature of O. S. No. 33 of 1959, the defence so set up would be a matter to be taken into consideration when the suit is tried. Such a plea cannot be shut out because the provisions of Section 53A of the Transfer of Property Act avail a defendant of such a defence. Therefore, viewed from this angle and in the proper perspective, issue No. 1 in O. S. No. 33 of 1959 cannot be answered in the negative; and it is also not necessary for the purposes of this suit to determine that issue which unnecessarily rakes up the question whether there was a valid purchase binding on the plaintiffs therein. I should, therefore, consider that the finding of the lower Court in regard to issue No. 1 in O. S. No. 33 of 1959 could not be considered as necessary as if it is a preliminary issue which is calculated to determine the suit itself.

12. It is, however, necessary to notice some of the arguments advanced in this Court on behalf of both the parties and deal with them. It is strenuously contended by Mr. Triambak Rao Deshmukh that it is not possible for the defendant in O. S. No. 33 of 1959 to make use of the agreement to sell and his possession in pursuance thereof and to set up a plea of defence and retain possession of the suit properties as thereby the prohibition in regard to an alienation contained in Section 47 of the Hyderabad Tenancy and Agricultural Lands Act. is sought to be circumvented. In support of this contention, it is urged that any such contract to sell cannot be lawful. Also reliance is placed on Sections 10 and 23 of the Indian Contract Act. A point is taken that inasmuch as the object of the agreement is to defeat the provisions of the Hyderabad Tenancy and Agricultural Lands Act, the agreement cannot be lawful and therefore that contract, if it is not with lawful object, is void. The learned counsel has cited a Full Bench decision of the erstwhile Hyderabad High Court in *Fakir Chand v. Bansilal* ILR 1954 AP 428 : AIR 1955 AP 28 (FB) where the object of the legislature in enacting the prohibitory provisions of the Hyderabad Abkari Act was

considered. It is, no doubt, held that the contracts made in contravention of those prohibitory provisions are rendered invalid u/s 23 of the Contract Act as they would be opposed to public policy. But it is necessary to remember that that statute prescribed certain conditions for the conduct of particular business or profession and contracts in contravention of such conditions were the subject-matter of decision by the Full Bench. As such, in my view, it has no direct bearing on the question which arises in the instant case. A decision of the Division Bench of the Madras High Court in *Jankirama v. Nilakanta* ILR 1954 Mad 537 is also relied upon. There the question that arose was whether the sales effected by only two among the three trustees were valid and binding on the creditors. It was ruled that these sales could not be upheld by resorting to the doctrine of part performance u/s 53A of the Transfer of Property Act as that doctrine presupposes the existence of a valid contract to transfer immovable property, and that if the initial requirement that all the trustees must join in the execution of the conveyance has not been complied with, the contract must be considered to be in contravention of law. This again cannot be said to be apt or throwing any light on the question under discussion. In *Akram Mea v. Secunderabad Municipal Corporation* 1957 Andh LT 211 : AIR 1957 AP 859, it has been held by Subba Rao, C. J. (as he then was) that the necessary condition which enables a transferee to invoke the provisions of Section 53A is that the contract relied upon should be a valid contract, and that if the contract is invalid under any other law, it cannot be made use of. That would only stress the importance where a contract for the sale of immovable property as such has been totally prohibited or rendered absolutely invalid by the Hyderabad Tenancy and Agricultural Lands Act. In another decision of this Court reported in *Appana Radha Sri Krishna Rao Vs. V.K.M. Kodandarama Chetti*, the effect of the enforcement of obligations arising under a trade concerning purchase and sale of chillies which was prohibited by law was considered. The plaintiff's claim therein to enforce a right arising out of the contract of agency pertaining to that trade was negated on the basis that the agent whom the plaintiff knew at the time he made the purchase was instructed to buy what was prohibited by law. These decisions deal with contracts entered into for the purpose of carrying out the prohibited act and thereby defeating the purpose of imposing conditions by the State in pursuance of public policy. In *Narasappa v. Shaik Hazrat* AIR 1960 Mys 59, which has been referred to in its order by the lower Court, it was held that Section 4 of the Hyderabad Prevention of Agricultural Land Alienation Act (III of 1940 Fasli) laid down the obtaining of permission of the Collector as a condition precedent to the alienation under the Act, and therefore, it is held specific performance of an agreement to sell, if enforced, would defeat the provisions of that Act. The question whether contracts for sale have been altogether prohibited has not been gone into in this case; and also the question whether, when contracts were entered into, any permission of the Collector obtained subsequently also will enable enforcement of that contract, has not been specifically adverted to.

13. It is contended by Sri Madhav Reddy, on behalf of the petitioner (defendant) herein that no transfer of property is effected either by a contract of sale and no interest in immovable property is created by any contract of sale and that since what is prohibited by Section 47 and is rendered unlawful is only a permanent alienation or transfer of property of agricultural land, contracts to sell as such or delivery of possession in pursuance thereof are not rendered unlawful. The learned counsel relied upon the language of Section 47 of the Hyderabad Tenancy and Agricultural Lands Act which is as follows :-

"47. Notwithstanding anything contained in any other law for the time being in force or in any decree or order of a Court, no permanent alienation and no other transfer of agricultural land shall be valid unless it has been made with the previous sanction of the Collector."

In support of this contention the learned counsel cited AIR 1941 128 (Privy Council) . The scope of Section 53A is stated in that decision as hereunder:

"It creates no real right: it merely creates rights of estoppel between the proposed transferee and transferor"

There is also an observation of Shah, J., in *Gurappa Ningappa Patne Vs. Basawanappa Apparao Kilje*, which is to the effect that before the prohibition contained in Section 24 of the Bombay Agricultural Debtors' Relief Act is enforced, it must be established that there was a transfer of land and that the same could not be said to have been effected by a mere agreement to sell even if it is accompanied by delivery of possession or the property agreed to be sold. On the basis that in pursuance of such a contract to sell, the alienee did not acquire any title to the property, it was held that any liability to refund the price did not arise.

14. Basing upon these decisions, it is urged on behalf of the petitioner herein that the contract of sale or putting the defendant in possession in pursuance of the contract cannot be altogether eschewed from evidence as permitting such a thing would be on the unsustainable basis that Section 47 of the Hyderabad Tenancy and Agricultural Lands Act prohibited even the contracts or use thereof as evidence to resist claims by pleading estoppel based upon such a contract, or the conduct of the plaintiff himself in pursuance of Section 47. The limited purpose for which Section 53A can be put to is indeed brought out in the decision in *Achayya v. Venkata Subba Rao* 1956 Andh WR 830 : AIR 1957 AP 854. There, Subba Rao, C. J., (as he then was) laid down that Section 53A enables a transferee to defend his possession if the transferor seeks to enforce his rights against the property. Later on also the learned Chief Justice posits as follows:

"Or to put in other words, he cannot seek to enforce his title but he can resist the attack made by a transferor."

15. From these authorities it may be safely drawn as a conclusion that though the defendant may not set up title by virtue of a contract for sale, or by reason

of obtaining possession of the property in pursuance thereof, he may effectively defend the possession he has by pointing out that he was never a trespasser and resist the claim to mesne profits in respect of such possession. In such a case, the use of the contract of sale or the possession he has is not to establish title by reason of any permanent alienation or transfer, but only in support of the plea of estoppel which cannot be said to have been denied to the defendant by reason of the provisions of Section 47 of the Hyderabad Tenancy and Agricultural Lands Act.

16. A consideration of the arguments advanced on both sides and the authorities cited on each side makes me accept the contention advanced on behalf of the petitioner (defendant) herein and hold that the use of contracts for sale or the fact that the defendant was put in lawful possession in pursuance of that contract cannot be shut out as a piece of evidence which the lower Court ought to have taken into account in considering the defence set up by the defendant in O. S. No. 33 of 1959.

17. The further points raised on behalf of the respondents herein that they cannot be said to have been complaining about any trespass by the defendant, but have been only setting up the plea that they cannot create any rights of occupancy in the defendant need be stated only to be rejected as they are opposed to the statements in the plaint itself.

18. For the aforesaid reasons, it is ordered that the determination of issue No. 3 in O. S. No. 1 of 1960 should depend upon the result of the appeal filed against it and the finding on issue No. 1 in O. S. No. 33 of 1959 should be set aside; and the trial of O. S. No. 33 of 1959 proceeded with and determined in the light of the observations contained in this order. This Revision Petition is, therefore, allowed. In view of the intricate nature of the questions involved about which a state of uncertainty existed, there will be no order as to costs.