

(2011) 11 KL CK 0056

In the High Court Of Kerala

Case No : Regular First Appeal No. 207 of 2007

K.P. Mohammed Sheriff

APPELLANT

Vs

M. Hassan Kani Rawther (Died) and Others

RESPONDENT

Date of Decision : 17-11-2011

Acts Referred:

Transfer of Property Act, 1882 — Section 53A, 54

Citation : (2012) 1 KLJ 538

Hon'ble Judges : P. Bhavadasan, J

Bench : Single Bench

Advocate : K.P. Sreekumar and Prakash Puthiadam, K.S. Hariharaputhran ; P.P. Thajudeen and Mansoor B.H., for the Respondent

Judgement

P. Bhavadasan, J.—The plaintiff, who was non-suited by the court below, is the appellant. Certain facts are admitted. The plaintiff was a tenant under the defendant in respect of a shop room. There was an agreement for sale dated 17.9.1985 evidenced by Ext. A20(a) by which the shop room and a portion of the land behind the shop room was agreed to be sold to the plaintiff for a sum of Rs. 70,000/- and Rs. 10,000/- was received in pursuance thereof. The period fixed was three months. Admittedly, due to certain reasons, the sale deed was not executed and that resulted in execution of a fresh agreement evidenced by Ext. A1 dated 17.12.1985. That in fact, though referred to the shop room and its rear portion, it is claimed by the plaintiff that pursuant to Ext. A1, another sum of Rs. 25,000/- was paid and he was put in possession of the rear portion of the shop room which was agreed to be conveyed to him. Eversince then, he has been in possession and enjoyment of the suit property, it is pointed out that the property is in his exclusive possession and he is entitled to protect his possession and he cannot be forcibly evicted from the property. The suit was laid for a declaration to the said effect.

2. The first defendant resisted the suit. The agreements were admitted. But the claim of the plaintiff that he was put in possession of the vacant land on the rear

portion of the shop room was denied. It was also pointed out that the plaintiff had defaulted in performing his part of the agreement and he is not entitled to get specific performance of the agreement thereafter. The rear portion of the shop room which was occupied by the plaintiff is still in the possession of the defendants and it lies contiguous to the rest of the portion of land possessed by the defendants. It is also pointed out that the terms of Ext. A1 are very clear regarding the period within which the document had to be executed and the plaintiff had not taken any steps for having the document executed in his favour. Apart from the fact that the suit is barred by limitation, it is also contended that the plaintiff is not entitled to a declaration as prayed for. On the basis of these contentions, the first defendant prayed for dismissal of the suit.

3. On the above pleadings, issues were raised. The evidence consists of the testimony of PWs 1 to 4 and documents marked as Exts. A1 to A5 from the side of the plaintiff. The defendants had DWs 1 to 3 examined and Exts. B1 to B41 (c) marked. Ext. C1 is the commissioner's report and plan.

4. On an evaluation of the evidence, the lower court came to the conclusion that evidence is found wanting to show that the plaintiff had been put in possession of the rear portion of the shop room and there was nothing to show that he was put in possession at the relevant time. Holding so, the suit was dismissed.

5. This appeal is directed against the said judgment and decree. The question which arises for consideration is whether the finding of the court below that the plaintiff had no possession of the property is justified or not.

6. The Learned Counsel for the appellant pointed out that even if the prayer for declaration was misconceived, still, the court below ought to have considered the prayer for injunction. The lower court, according to the Learned Counsel, was not justified in coming to the conclusion that possession has not been given of the rear portion of the shop room and that the property remained with the defendants. A reading of Ext. A1 will clearly show that in fact, possession of 2.5 cents on the rear portion of the shop room was given to the plaintiff and he continued to be in possession thereof. If that be so, according to the Learned Counsel, he is entitled to protect his possession and he cannot be forcibly evicted. The finding of the lower court that no possession has been given to the plaintiff is incorrect and therefore, the decree needs to be interfered with.

7. The Learned Counsel for the respondents on the other hand pointed out that the agreement was in respect of the shop room as well as the land on the rear portion of the shop room having an extent of 2.5 cents. The Learned Counsel also pointed out that when the first agreement for sale was entered into between the parties, the relationship of landlord and tenant changed into that of a vendor and vendee. The Learned Counsel pointed out that the plaintiff was evicted by taking recourse to rent control proceedings from the shop room and therefore, he cannot be heard to say that he continues to be in possession of the rear portion of the shop room. The Learned Counsel also drew attention of this Court

to the reliefs prayed for and pointed out that in the nature of the reliefs prayed for, possession cannot be independently considered since it is for declaration of title also. As far as the claim based on S.53A of the Transfer of Property Act is concerned, the Learned Counsel raised two-fold contentions. The first one was that an amendment was sought for in that regard which was negatived. That was challenged before this Court and that was confirmed by this Court in OP No. 24141/06. The other ground is that there is nothing to show that the plaintiff was ready and willing to perform his part of the agreement and if that be so, Section 53 A cannot be attracted. In a suit of the present nature, the question of possession cannot be independently considered, so says the Learned Counsel and for that proposition, he relied on the decision in *Pankajashy v. Devaki Ramakrishnan*, 2010 (4) ILR Kerala 207. In short, the contention is that no grounds are made out for interfering with the judgment and decree of the court below.

8. Though one may not agree with the contention that after the agreement for sale, the relationship between the parties in respect of the shop room as landlord and tenant changed into that of a vendor and vendee, that cannot have much bearing to the issue to be resolved in this case.

9. Two agreements of sale are admitted and so also the receipt of Rs. 35,000/-. There is considerable dispute regarding the question as to whether the plaintiff had been put in possession of 2, 5 cents of land on the rear side of the shop room pursuant to Ext A1 agreement. It is true that in Ext. A1 agreement, it is mentioned about the handing over of possession of the property.

10. The lower court took the view that the earlier recital in the deed that till the entire sale consideration is paid and the document of sale is executed, the vendee will not have title or possession of the property, militates against the latter recital of giving possession and the rules of construction of deeds warrant that earlier part is to be given effect to. If that be so according to the lower court, the latter recital regarding possession cannot be taken note of.

11. It may not be necessary to construe, it in that, manner. Even assuming that possession has been given, what is intended by the earlier possession is that no right will accrue till the sale deed is executed, it is necessary at this point of time to note the pleadings in the plaint. The reliefs in the plaint reads as follows:

As rightly pointed out by the Learned Counsel for the respondents, the main prayer in the suit is for a declaration that the building in the property belongs to the plaintiff. Realising that there is infirmity in the plaint, he later on sought to amend the plaint incorporating the prayer with reference to S.53A of the TP Act. That was negatived by the trial court. That was challenged before this Court and this Court refused to interfere with the order. As of things now stand, the claim based on S.53A of the TP Act is conspicuously absent in the plaint though a passing reference is made in para 5 of the plaint. A reading of the plaint will not indicate that the reliefs are sought for on the basis of that provision. Apart from

the said fact, there is yet another aspect. Ext. A1 is dated 17.12.1985. The period fixed in the document was two months. The document clearly recites that until the sale deed is executed, no possessory right or title will vest with the vendee and time is the essence. It is only after the execution of the deed that the right to exclusive possession commences. It may be that possession may be handed over but the earlier recital makes it clear that no right will accrue by virtue of that possession. So also, there is nothing to show that after Ext. A1 was executed and before the period had expired, there was any effort from the part of the plaintiff to express that he was ready and willing to perform his part of the agreement. In order to attract S.53A of the TP Act, it is absolutely essential that the party should express his willingness to perform his part of the agreement. That is conspicuously absent in the present case. On that basis also, the plea based on S.53 A has to fail.

12. It is very vehemently contended by the Learned Counsel for the appellant that at any rate, the plaintiff is in possession and he is entitled to protect his possession. The said contention is without any basis.

13. Here, it will be apposite to refer to the decision in Pankajakshy v. Devaki Ramakrishnan's case (supra) wherein it was observed as follows:

A declaration of possession is quite different from applying for an injunction on the basis of settled possession. The law recognizes only two modes of transfer of sale, one by registered instrument and the other by delivery of possession, in respect of immovable properties. Section 54 of the Transfer of Property Act, 1882 lays down the law with respect to sale of immovable properties. That section allows the simpler alternative of delivery of possession only in case of tangible immovable property of a value less than Rs. 100. In all other cases, sale of immovable property can be made only under a registered instrument. In the present suit, the appellant/plaintiff has set forth a claim over item No. 1 property alleging that there was a transfer of that property in her favour by an oral sale for Rs. 3,000/-. She has claimed her possession on the basis of an oral sale which can never be recognised under law.

In the case on hand also, the prayer for injunction is dependent on the main prayer which is one for declaration of title over the property. One fails to understand how such a relief could be granted to the plaintiff when he claims possession only on the basis of an agreement for sale, it has also been found that Section 53A of the TP Act cannot come to his aid. If that be so, his possession has no legal backing as he is seeking injunction against the true owner. The agreement for sale was executed on 17.12.1985 and the suit is laid after 10 years. There is nothing to show that he was always ready and willing to perform his part of the agreement. For the above reasons, no grounds are made out warranting interference with the judgment and decree of the lower court. May be the reasons given by the lower court may not be very convincing, but the conclusion arrived at is fully justified. The appeal is without any merits and it is accordingly dismissed. No order as to costs.