
(1960) 02 PAT CK 0014
In the Patna High Court
Case No : A.F.A.D. No. 429 of 1958

Mahadei Haluai

APPELLANT

Vs

Ram Krishna Singh and Another

RESPONDENT

Date of Decision : 22-02-1960

Acts Referred:

Transfer of Property Act, 1882 — Section 107, 53A

Citation : AIR 1960 Patna 354

Hon'ble Judges : U.N. Sinha, J

Bench : Single Bench

Advocate : G.C. Mukherji and N.N. Roy, for the Appellant; A.G., Dinesh Chandra and Karuna Nidhan Keshava, for the Respondent

Final Decision : Allowed

Judgement

U.N. Sinha, J.—This is an appeal by defendant No. 1. It arises out of a suit instituted by the plaintiff for eviction of defendant No. 1 from the property mentioned in Schedule A of the plaint. There was a prayer for the removal of the structures raised by defendant No. 1 on the land in dispute. The plaintiff had claimed damages and compensation also.

2. The plaintiff's case, in short, was as follows: The land in dispute measuring 2 kathas 10 dhurs originally belonged to pro forma defendant No. 2. The land had been let out to defendant No. 1 as a monthly tenant for temporary residential purposes. Defendant No. 2 had sold the land to the plaintiff by a registered sale deed dated the 10th October 1953. According to the plaintiff defendant No. 1 was, therefore, in possession of the land in dispute as a monthly tenant under the plaintiff. The plaintiff having required the land for his own use, had served a notice upon defendant No. 1 to deliver possession to the plaintiff after removing the structures standing on the land in dispute. Defendant No. 1 not having complied with the notice, the plaintiff was compelled to institute the suit for the reliefs mentioned above.

3. The suit was contested by defendant No. 1 alone. The defence, in substance, was as follows. According to this defendant, the land in suit had been permanently settled with her by defendant No. 2 by virtue of a Patta dated the 8th June 1936, on receipt of a premium of Rs. 500/- and at an annual rent of Rs. 2/2/-. Under the document of settlement, the defendant was given the right to use the land for residential purposes, and the defendant had, in part performance of the contract, taken possession of the land in dispute and was continuing in possession by payment of rent. The defendant, therefore, contended that she was not liable to eviction.

The defendant's further case was that after taking the settlement mentioned above, she had got her name mutated in the Jugselai Notified Area Committee in place of defendant No. 2, and she was paying municipal tax since the settlement. The defendant had applied to the Notified Area Committee for sanctioning the plan of certain structures, but she had not been able to construct the entire structure on account of paucity of funds. She had, however, constructed a building which was being used by her. The plaintiff's case that he was entitled to evict the defendant by service of notice was denied. Substantially upon these allegations, defendant No. 1 contended that the plaintiff's suit was liable to be dismissed.

4. The learned Munsif, who tried the suit decreed the same and directed defendant No. 1 to remove the structures from the land in suit within fifteen days from the date of the decree, and deliver possession of the land to the plaintiff. It was ordered that the amount of damages which the plaintiff could recover, would have to be ascertained in a separate proceeding on the plaintiff taking proper steps in that connection.

5. Defendant No. 1 thereafter carried an appeal to the court of appeal below. The learned Additional Subordinate judge, who heard the appeal, dismissed the appeal affirming the decree passed by the learned Munsif. Defendant No. 1 has come up to this court,

6. The substantial point that has been urged in this court was covered by the first issue framed in the suit which runs thus:--

"Is the defendant a permanent tenant of the suit land or is she a monthly tenant of the same and is she liable to be evicted therefrom?"

It was urged on behalf of defendant No. 1 in the court of the learned Munsif that she was protected from eviction by virtue of the provisions of Section 53A of the Transfer of Property Act. The learned Munsif stated as one of the points for decision thus:

Whether the plaintiff was estopped from evicting defendant No. 1 by virtue of the provisions of Section 53A of the Transfer of Property Act.

The facts upon which the provisions of Section 53A were invoked are these. The document dated the 8th of June 1936, exhibited as Ext. A in this case, had been

executed only by defendant No. 2 and the document was not registered. The document was described as a Korfa Patta. The patta purported to settle the land in dispute with defendant No. 1 permanently after taking a salami of Rs. 500/- and fixing a rent of Rs. 2/2/- per year. The learned Munsif held that as the patta had not been executed by both the lessor and the lessee, it contravened the provisions of Section 107 of the Transfer of Property Act,

Thereafter, the learned Munsif, after a consideration of certain decisions, came to the conclusion that as the patta (Ext. A) was not only unregistered but was also not in accordance with Section 107 of the Transfer of Property Act, defendant No. 1 could not invoke the doctrine of part performance provided u/s 53A of the Transfer of Property Act. As defendant No. 1 was held not to be able to invoke the provisions of Section 53A, she failed in the court of the learned Munsif in her contentions, and the plaintiffs suit was decreed.

7. The learned Additional Subordinate Judge framed four points for consideration, the fourth one of which was framed thus:

""Will the provisions of Section 53A of the Transfer of Property Act apply to the facts and circumstances of this suit?"

The learned Judge decided the point against the contentions of defendant No. 1, substantially on the grounds that defendant No. 1 had not so conducted herself as to seek protection u/s 53A of the Transfer of Property Act, and that the onus was on defendant No. 1 to establish that the plaintiff had notice of the settlement in favour of defendant No. 1 and of the constructions raised by her by way of part performance of the contract, and that she had failed to discharge the onus. In the result, defendant No. 1 failed also in her contentions before the learned Additional Subordinate Judge based upon the provisions of Section 53A of the Transfer of Property Act.

8. Learned counsel for the appellant has contended that the learned Additional Subordinate Judge has put an erroneous construction upon Section 53A of the Transfer of Property Act. It is urged that even on the facts found by the learned Judge, the provisions of Section 53A are attracted, and the plaintiff is precluded from evicting the appellant. It is further urged that on the facts of this case, it has been erroneously held by the learned Additional Subordinate Judge that the onus was upon defendant No. 1 to establish that the plaintiff had notice of the settlement in favour of defendant No. 1 and of the constructions made by her. It is contended that under the law the plaintiff will be imputed with notice of the title of defendant No. 1, and the onus was on the plaintiff to establish that he had in fact no notice of the contract in favour of defendant No. 1 or of the part performance thereof.

9. Learned Advocate General appearing for the plaintiff-respondent has on the other hand, submitted that inasmuch as the patta in favour of defendant No. 1 was not in accordance with the provisions of Section 107 of the Transfer of Property Act, Section 53A of the Act was not attracted. Secondly, it has been

urged that under the proviso to Section 53A of the Transfer of Property Act, it was the duty of defendant No. 1 to prove that the plaintiff had notice of any contract in her favour or the part performance thereof.

10. In order to come to a decision upon the contentions raised by learned counsel for the parties, it is necessary to state the findings to which the learned Additional Subordinate" Judge has arrived. The learned Judge has come to the following conclusion. He has held that defendant No, 1 Had erected a compound wall and one room on the land in dispute. He has held that the name of defendant No. 1 had been mutated in the office of the Jugselai Notified Area Committee as an assessee. He has held that defendant No. 1 has proved that she has paid rent to the Area Committee for atleast some years.

In spite of these findings, the learned Judge has held that defendant No. 1 cannot derive benefit of the provisions of Section 53A of the Transfer of Property Act for the following reasons. The learned Judge has held that defendant No. 1 should have placed some evidence in Court which would have proved that her eviction would cause serious dislocation and inconvenience to her. He has held that defendant No. 1 does not appear to have raised any substantial building on the land in suit. He has also held that

"defendant No. 1 has not so conducted herself as she claims to have done by virtue of which she can now seek protection u/s 53A of the Transfer of Property Act".

Therefore, apart from the question of the proviso u/s 53A of the Transfer of Property Act, the learned Judge has held that defendant No. 1 is not entitled to invoke the provisions of Section 53A of the Act. In my opinion, the conclusions of the learned Judge upon this aspect of the case are erroneous and are not supported by the provisions of Section 53A of the Transfer of Property Act. To my mind, all that is necessary to invoke Section 53A of the Act is to consider whether the transferee, who was not in possession prior to the transfer in question, was inducted upon the land in pursuance of the transfer in question or not. The learned Judge has himself found that defendant No. 1 was, in fact, inducted upon the land in question and she was in possession in pursuance of the transfer in question.

Whether defendant No. 1 has raised substantial constructions on the land or has not been able to raise substantial constructions on the land, is not a question which is within the purview of section 53A of the Transfer of Property Act. When it has been proved that defendant No. 1 came in possession of the land in dispute by virtue of the purported lease, one part of the requirement of Section 53A has been established. The relevant portion of Section 53A only requires that the transferee not being already in possession has to take possession of the property in part performance of the contract. The statute does not require that over and above taking possession of the property, it must further be established that the transferee has built constructions or substantial constructions upon the

property transferred.

In my opinion, the conclusion of the learned Additional Subordinate Judge that defendant No. 1 cannot invoke Section 53A of the Transfer of Property Act because she has not so conducted herself as to invoke its aid is an erroneous conclusion. The contention of learned Advocate General appearing for the plaintiff-respondent that Section 53A of the Transfer of Property Act cannot be invoked by defendant No. 1 Because the patta was not executed also by the lessee, is not an acceptable contention. It is submitted that if a document is hit by the provisions of Section 107 of the Transfer of Property Act to the extent that it fails as a lease of Immovable property because of not being executed both by the lessor and the lessee, the document cannot be relied upon for the purposes of Section 53A of the Act. In my opinion, this contention is not valid. The relevant words in Section 53A of the Transfer of Property Act may be noticed. These are:--

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

It appears to my mind that the words "the transfer has not been completed in the manner prescribed therefore by the law for the time being in force" are sufficient to cover a lease which has not been executed both by the lessor and the lessee. If a lease is executed by the lessor alone after amendment of Section 107 of the Transfer of Property Act, then in my opinion, it ought to be held that it is an instrument of transfer not having been completed in the manner prescribed therefore within the meaning of Section 53A of the Transfer of Property Act. The contention of the learned Advocate General that the meaning of the expression "instrument of transfer which has not been completed in the manner prescribed therefor" in connection with a lease required to be registered, is that the lease must have been executed both by the lessor and the lessee but not registered, cannot be accepted as sound.

The decision in Sheth Maneklal Mansukhbhai Vs. Hormusji Jamshedji Ginwalla and Sons, was cited before the learned Additional Subordinate Judge, and he distinguished the decision by stating that the facts and circumstances of that case were very much different from the facts of the instant case. It appears, however, that the principle upon which Sheth Maneklal Mansukhbhai Vs. Hormusji Jamshedji Ginwalla and Sons, , was decided cannot be ignored altogether. The defence u/s 53A of the Transfer of Property Act succeeded in Sheth Maneklal Mansukhbhai Vs. Hormusji Jamshedji Ginwalla and Sons, , upon the ground that the evidence had disclosed that there was an agreement in

writing which had been signed by the transferor in that case. Their Lordships of the Supreme Court stated thus:

"A formal lease is not necessary to attract the application of Section 53A, T. P. Act. All that is required is that an agreement in writing signed by the transferor can be gathered from the evidence."

If an agreement in writing signed by the transferor can be gathered even from secondary evidence adduced in court, as was the case in the decision re-reported in *Sheth Maneklal Mansukhbhai Vs. Hormusji Jamshedji Ginwalla and Sons*, , I cannot see how a patta executed by the lessor alone can have less force. The original patta is on the record signed by defendant No. 2. By virtue of that patta, it has been proved that defendant No. X came in possession. It is quite clear to my mind that defendant No. 1 is entitled to invoke the provisions of Section 53A of the Transfer of Property Act. In this connection the decision in AIR 1942 231 (Oudh) may be noticed.

In AIR 1942 231 (Oudh) , there was a lease which had been effected by a registered thekanama and a registered qabuliat neither of which had been executed by both the lessor and the lessee. It was held that under the main provisions of Section 53A of the Transfer of Property Act, the defendant, who had taken the lease of a Bazar and was in possession of the property, was protected and that the plaintiff was debarred from enforcing any right in respect of the property "other than a right expressly provided by the terms of the contract". In the case. *Hadu Maharana Vs. Ramdulal Ghosh*, , the plaintiff had instituted a suit for rent at a stipulated rate. The defendant had been inducted on the land under a patta and a qabuliat. The patta had been executed by the landlord and not by the tenant and the qabuliat had been executed by the tenant and not by the landlord. The case was governed by the amended Section 107 of the Transfer of Property Act. Rowland, J. stated thus:

""In the result it must be held that the two documents even read together do not constitute a validly executed lease of immovable property; but admittedly the defendant was put into possession. That being so, although the lease did not operate to transfer to the defendant the right of enjoyment which ordinarily passed by a lease, Section 105, the defendant would obtain in respect of the property the benefit of Section 53A which bars the transferor from enforcing against him any right in respect of immovable property other than a right expressly provided by the terms of the contract, subject to the proviso that the transferee has performed or is willing to perform his part of the contract."

It was held that the claim based on the stipulation in the documents had been rightly decreed. In the case, *Hari Prosad Agarwalla and Another Vs. Abdul Haq and Others*, , the plaintiffs had filed a suit for certain declarations including a declaration that they were in possession as Maiyadi lessees. It was held that Section 53A of the Transfer of Property Act gave no right to a transferee to come to Court as a plaintiff either to maintain his possession or to recover possession,

if dispossessed after having been put in possession in pursuance of the contract. Sinha, J. in dealing with this point, stated thus;

"A transferee who is not clothed with title in the manner recognised by law, cannot be said to be a person having a valid title in law and therefore, Courts of law cannot recognise such a title. If the transferee though not clothed with, a perfect legal title has been put in possession or continued in possession, the Court on grounds of equity alone can refuse to enforce the rights of the transferor except so far as those rights are expressly mentioned in the contract in writing and the equitable right in favour of the transferee has been embodied in Section 53A."

In my opinion, although the three decisions referred to above do not cover the facts of the instant case, the principle is quite clear that if a lease is executed by the lessor alone after amendment of Section 107 of the Transfer of Property Act and the lessee is put in possession, the latter can invoke to his aid the doctrine of part performance u/s 53A of the Transfer of Property Act. This, of course, is subject to the interpretation of the proviso to Section 53A.

11. The proviso to Section 53A of the Transfer of Property Act runs thus:

"Provided that nothing in the Section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

In my opinion, the conclusion of the learned Additional Subordinate Judge that defendant No. 1 had to establish that the plaintiff had notice of the settlement in favour of defendant No. 1 and also of the constructions raised by her by way of part performance of the contract is an erroneous conclusion. It appears that in the instant case neither the plaintiff alleged that he had no notice of the contract in favour of defendant No. 1, nor did defendant No. 1 allege that the plaintiff had notice of the contract. Therefore, no issue on this point was framed and no findings have been given on facts. It will have to be decided as a question of law as to who will fail in the absence of agitating the point that the plaintiff had or did not have notice of the contract in question. It appears to me that it was incumbent upon the plaintiff to allege and prove that defendant No. 1 could not invoke the protection of Section 53A of the Transfer of Property Act because the plaintiff had no notice of the contract in her favour,

I or of the part performance of the contract. Learned counsel for the appellant has submitted that under Section 3 of the Transfer of Property Act, the plaintiff must be deemed to have notice of the title under which defendant No. 1 was claiming to hold the property in question.

It is submitted that the plaintiff must be taken to have notice of the contract or of the part performance thereof, because he would have had actual notice but for his wilful abstention from an enquiry in purchasing a property which was in possession of defendant No. 1 and not in possession of the plaintiff's vendor. My

attention has been drawn to one of the Illustrations u/s 27, Clause (b) of the Specific Relief Act. The Illustration runs thus:

"A contracts" to sell land to B for rs. 5,000/-. B takes possession of the land. Afterwards A sells it to C for Rs. 6,000. C makes no inquiry of B relating to his interest in land. B's possession is sufficient to affect C with notice of his interest, and he may enforce specific performance of the contract against C."

"Learned counsel for the appellant has advanced the following argument by way of analogy. He has submitted that u/s 27A of the Specific. Relief Act, a plaintiff suing for specific performance of a contract to lease is also governed by a proviso which runs thus:

"Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

It is submitted that the Illustration to Section 27(b) of the Specific Relief Act quoted above makes it clear that the possession of a contractee is notice to a subsequent transfer. It is urged that a duty has been cast upon the subsequent transferee to enquire about the right under which the person in actual possession claims to hold a property of which he is in possession. It is, therefore, submitted that in the instant case which is governed by the proviso to Section 53A of the Transfer of Property Act, which, word per word, is the same as the proviso to Section 27A of the Specific Relief Act.

the possession of defendant No. 1 must be held to affect the plaintiff with notice of the interest of defendant No. 1.

Under these circumstances, it is submitted that unless the plaintiff could prove, as a matter of fact, that he had no notice of the contract in favour of defendant No. 1 or of the part performance by defendant No. 1, the plaintiff cannot take advantage of the proviso to Section 53A of the Transfer of Property Act and throw the burden, as a matter of law, upon defendant No. 1 in order to defeat her defence u/s 53A. My attention has also been drawn to Explanation II inserted in Section 3 of the Transfer of Property Act which runs thus:

"Any person acquiring any Immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any of any person who is for the time being in actual possession thereof."

It is submitted that u/s 3, the plaintiff in this case must be deemed to have constructive notice of the contract in favour of the appellant or of the part performance thereof and under Explanation II of Section 3, the plaintiff shall be deemed to have notice of the "title" of the appellant. Upon the interpretation of Explanation 10 u/s 3 of the Transfer of Property Act, learned counsel has referred to the decision in Noor Zahur Mian v. Islam Mian 1958 B. L. J. R 466. "In Noor Zahur Mian"s case 1958 BLJR 466, the main contention was whether the possession of the plaintiff was tantamount to constructive notice to defendant

No. 2 as regards the plaintiffs right under a contract for sale.

Their Lordships held that the plaintiff in the suit, who was in possession as a mortgagee, could take recourse to Explanation II of Section 3 of the Transfer of Property Act. In my opinion, the submission of learned counsel for the appellant based upon Section 27A of the Specific Relief Act and upon the principle underlying Noor Zahur Mian's case 1958 BLJR 466 is of substance in the instant case. The appellant was in possession by virtue of the patta of the year 1936, and the plaintiff must be deemed to have notice of the appellant's title in this case.

12. Learned Advocate-General has relied upon the case of AIR 1952 244 (Nagpur) . In my opinion. AIR 1952 244 (Nagpur) is not in point. In that decision, the question of actual notice of the contract was agitated in the Courts. The learned Judge held that the case upon this point, as pleaded, was different from the case upon which evidence was adduced in Court. The learned Judge stated that under the circumstances it must be held that the appellants in that case had purchased the property without notice of the previous transaction in the respondent's favour. In the instant case, the issue under the proviso to Section 53A of the Transfer of Property Act has been raised as a question of law and not upon pleadings and the evidence of the parties.

My attention has been drawn to the case of Ko Mar v. Ma May AIR 1935 Rang 12 upon interpretation of the proviso to Section 53A of the Transfer of Property Act. In Ko Mar's case, AIR 1935 Rang 12, however, the learned Judge did not deal with Section 3 of the Transfer of Property Act. With great respect I differ from the decision of the learned Judge in Ko Mar's case. AIR 1935 Rang 12 upon his interpretation of Section 53A of the Transfer of Property Act. In my opinion, in the instant case, the plaintiff cannot defeat the appellant's defence u/s 53A due to proviso to Section 53A of the Act,

13. Learned counsel for the appellant has furthermore relied upon the nineteenth ground taken in this Court to the effect that the title of defendant No. 1 had been perfected by adverse possession. Learned Advocate-General has submitted that the appellant is not entitled to agitate this point for the first time in this Court not having raised the question in any of the Courts below. I do not propose to deal with this last question raised by learned counsel for the appellant as in my opinion, upon the interpretation of Section 53A of the Transfer of property Act, the defence put forward by defendant No. 1 must be held to succeed.

14. For the reasons given above. I am of the opinion, that the plaintiff's, suit in ejectment was erroneously decreed by the Courts below. The appeal is allowed, the judgment & decree passed by the learned Additional Subordinate Judge are set aside and the plaintiff's suit is dismissed. The appellant- defendant No. 1 is entitled to her costs throughout as against the plaintiff-respondent No. 1.