
(1955) 07 CAL CK 0030
In the Calcutta High Court
Case No : A.F.A.D. No. 334 of 1949

Manjural Haque	Vs	APPELLANT
Sm. Mewajan Bibi and Others		RESPONDENT

Date of Decision : 21-07-1955

Acts Referred:

Bengal Tenancy Act, 1885 — Section 12
Evidence Act, 1872 — Section 91
Limitation Act, 1908 — Article 113, 142, 144, 15(1)
Transfer of Property Act, 1882 — Section 53A

Citation : AIR 1956 Cal 350 : 60 CWN 714

Hon'ble Judges : P.N. Mookerjee, J;Guha, J

Bench : Division Bench

Advocate : Lala Hemanta Kumar, for the Appellant; Bon Behari Mukherjee, for the Respondent

Final Decision : Dismissed

Judgement

P.N. Mookerjee, J.—This second appeal arises out of a suit for specific performance, or, in the alternative for what in substance appears to be permanent injunction, restraining the defendants from interfering with the plaintiffs' possession. The claim for specific performance was clearly barred by limitation and it was not pressed by the plaintiffs after its dismissal by the trial Court on that ground.

The plaintiffs' alternative claim, however, was decreed by the learned Munsif u/s 53A, Act, and the defendants were held debarred and they were actually restrained from interfering with the plaintiffs' possession of the suit properties and/or from exercising any rights in respect thereof which might affect such possession. That decision, however, was eventually set aside by the lower appellate Court which refused to apply Section 53A to the facts of this case and, the plaintiffs' suit having been dismissed, they have now come up to this Court in Second Appeal.

2. The learned Munsif described the suit as rather of an unusual type. It followed as a sequel to another suit and, indeed, the litigation between the parties started sometime in 1938 and had a long and chequered career having once come up to this Court in a previous second appeal (S. A. 1311 of 1939).

The present point of dispute was eventually left open by this Court on that previous occasion and the present plaintiffs who also filled the same capacity in the earlier suit (T. S. 38 of 1938) are now seeking a final decision on that point in their favour. The plaintiffs' claim is being resisted by the defendants-respondents.

3. From the admitted owners of the disputed properties, the plaintiffs purchased the same on 14th Magh 1341 B. S. That purchase was made by an unregistered Kobala (Ex. 1) for a sum of Rs. 49/-.

This valuation, however, though less than the minimum of Rs. 100/- for compulsory registration of sale deeds u/s 17(1), Registration Act, could not cure the defect of non-registration and confer validity on the unregistered Kobala as the properties in question were permanent tenures under the Bengal Tenancy Act which could be transferred only by registered documents, irrespective of valuation, u/s 12, Bengal Tenancy Act.

This has been expressly held to be so in the previous second appeal (S. A. No. 1311 of 1939) and the parties are bound by that decision. The plaintiffs, therefore, cannot claim title to the suit properties on the strength of their unregistered Kobala (Ex. 1), referred to above.

4. The defendants are subsequent purchasers of the suit properties from the same admitted owners but by three registered Kobalas which are dated 14th Chaitra 1342 B. S., 6th Bhadra 1343 B. S., and 20th Chaitra 1343 B. S. On the strength of these purchases they (the defendants) dispossessed the plaintiffs in or about Baisakh 1344 B. S. whereupon the plaintiffs filed the earlier suit, T. S. No. 38 of 1938.

In that suit, which succeeded in the two Courts below, the plaintiffs' claim of title was eventually negated by this Court which found title in the defendants' favour subject to the plaintiffs' rights, if any, available to them in law (including Section 53A T. P. Act) under the contract contained in their unregistered Kobala (Ex. 1). Such rights, if any, were left open for consideration in future proceedings between the parties and, for that consideration, this instant suit was brought by the plaintiffs in 1947.

5. For appraisalment of the true legal position, some other facts are necessary. There is no dispute that, on the strength of their Kobala (Ex. 1) of 1341 B. S., the plaintiffs obtained possession of the suit properties on or about 14th Magh 1341 B. S.

There is also no dispute now that they were dispossessed from the said properties in or about Baisakh :1344 B. S. and that the plaintiffs recovered possession from the defendants on 21-8-33 in execution of the decree, made in

their favour by the trial Court in the earlier suit (T. S. 38/38), which was eventually set aside or reversed by this Court in Second Appeal, and that they have merged to continue in possession in spite of such reversal by filing the present suit immediately after this Court's decision in the previous second appeal and by obtaining therein an appropriate temporary injunction which has virtually remained in force at all material times up till this date.

6. Before coming to the major issue between the parties, arising u/s 53A, T. P. Act, we shall dispose of two minor points which were found against the plaintiffs by the learned Munsif and were not repeated before the lower Appellate Court. The first relates to the plaintiffs' claim of specific performance, the other to their claim of title by adverse possession.

7. As to specific performance, the plaintiffs' claim is clearly barred by limitation. They had ample knowledge and notice of the defendant's Kobalas at or about the time of their dispossession in Baisakh 1344 B. S. and, accordingly the relevant refusal of their vendors, the admitted original owners of the disputed properties, to perform the contract, contained in the plaintiffs' Kobala (Ex. 1) of 1341 B. S., which is the only contract on which they can rely, must be deemed to have taken place before Jaistha 1344 B. S. corresponding to about the middle May 1937.

The present suit was filed on 12-9-1945, that is long beyond three years from the above date of refusal. The plaintiffs' claim for specific performance was, therefore, clearly time-barred and it has been rightly disallowed. We need only add that nothing to the contrary was argued or placed before us to justify a different conclusion.

8. Clearly also, the plaintiffs cannot claim acquisition of title by adverse possession. Their possession was admittedly disturbed in Baisakh 1344 B. S. and they have succeeded in maintaining their possession practically since the institution of this suit by temporary injunction.

In view of Section 15(1) Limitation Act, and/or the principle underlying the same, this effective injunction period cannot certainly be taken into account in calculating the period of adverse possession and, if that is left out, the plaintiffs' possession would be for very much less than twelve years. No question of acquisition of title by adverse possession can, therefore, arise in the present case.

9. We come now to the crucial point in the case, namely, the question u/s 53A, T. P. Act. We are inclined to hold, notwithstanding some observations to the contrary in -- Birendra Kishore Roy Vs. Naruzzaman Peada and Others (A), that the requisite contract in writing can be proved by the unregistered Kobala or deed of sale (Ex. 1), obtained by the plaintiffs on 14th Magh 1341 B. S.

Paragraph 4 of the section (Section 53A) clearly shows that the "contract to transfer", referred to in para 1, thereof, may be found from the defective "instrument of transfer" and, for purposes of this section, no distinction is to be

made between "contract of transfer" and "contract for transfer" as was done in the case cited. Nor do we think that the unregistered Kobala (Ex. 1) would be inadmissible in evidence to prove this or the requisite contract.

It is true that the Kobala (Ex. 1), in order to be a valid document of transfer, should have been registered u/s 12, Bengal Tenancy Act. It is true, also, that the said document being compulsorily registrable, not under the Indian Registration Act or the Transfer of Property Act but under another enactment, namely, the Bengal Tenancy Act, would not come within Section 49, Registration Act, and would not thus become admissible in evidence under the proviso to that section.

But, at the same time it is clear also that, the said document not being within the terms of the said section (Section 49, Registration Act), it would not be hit either by that section. Its admissibility or otherwise would, therefore, depend upon other provisions of law. In this connection, reference may be made to -- Sohan Lal and Others Vs. Mohan Lal and Others, ; Dawal Piranshah Vs. Dharma Rajaram Manggarudi, (C): Rama Sahu (dead) and Others Vs. Gouro Ratho, , and " Abdul Alim Vs. Abdul Sattar, .

10. There can be no doubt that the Kobala (Ex. 1) is invalid as a document of title. Being un- registered, it cannot pass title or be regarded as a valid deed of transfer in view of Section 12, Bengal Tenancy Act, and, to the extent that it purports to effect transfer and confer title, it must be held to be invalid and of no effect whatsoever.

For purposes of proving, however, the requisite contract in writing u/s 53A, T. P. Act, or the terms thereof, there appears to be no valid objection in law to its reception in evidence. The section (Section 53A) itself clearly contemplates proof of these matters by the defective "instrument of transfer" and we find nothing in Section 91, Evidence Act, which would exclude such proof.

A "contract to transfer" is not per se registrable under the law and, accordingly, mere non-registration would not affect the admissibility of the Kobala (Ex. 1) to prove the requisite "contract to transfer" or the terms thereof for purposes of Section 53A T. P. Act.

-- AIR 1929 269 (Privy Council) , which was decided on the terms of old Section 49, Registration Act, does not apply as the Kobala (Ex. 1) does not admittedly, come under that section and, even apart from tile special proviso which was engrafted to the said Section 49 by the amending Act 21 of 1929 to supersede inter alia the said decision, upon the enactment of Section 53A, T. P. Act, & which is not relevant -- and, indeed, no resort to it is necessary -- for our present purpose, the Kobala (Ex. 1) would be admissible to the above limited extent. We would, therefore, hold that there was, in the present case, the requisite contract in writing as required by Section 53A, T. P. Act.

11. There is also no dispute that the plaintiffs obtained possession of the disputed properties in pursuance of the Kobala (Ex. 1) of 1341 B. S. and their

initial possession was certainly referable to that purported transfer or the contract, underlying the same and deducible from it.

Even then, however, the plaintiffs cannot succeed in the present suit. Their possession was admittedly disturbed in 1344 B. S. when they were dispossessed by the defendants from the present suit properties. They succeeded, no doubt, in regaining possession in execution of the decree of the trial Court, passed in the earlier Title Suit No. 38 of 1938, but, that decree having been set aside in second appeal by this Court, they have been maintaining their possession on the strength of restraint orders, obtained from the Court, whereby they have successfully prevented the defendants-respondents from getting restitution in terms and on the basis of this Court's decision on the earlier occasion.

In these circumstances, we are unable to treat the plaintiffs' present possession as strictly legal or at all relevant or sufficient for purposes of Section 53A, T. P. Act. That possession is plainly that of trespassers as it is truly referable only to the previous decree of the trial Court in the earlier Title Suit No. 38 of 1938, since set aside or superseded, & it would not be quite proper to refer it back -- and, indeed, it would be a violent inference to treat it as refer-able -- to the contract in the Kobala (Ex. 1) so as to suffice for purposes of Section 53A.

The position would have been quite different if the plaintiffs had succeeded in regaining possession under any valid order or decree of Court, restoring their original possession, say, for example, u/s 9, Specific Relief Act. In such event, the plaintiffs' possession would have been legitimately referable to the contract, evidenced by the Kobala (Ex. 1), and the present suit would then have been, quite legitimately, a suit for protecting possession u/s 53A, T. P. Act, in the light of the decisions reported in -- Pandit Ram Chander Vs. Pandit Maharaj Kunwar and Others, ; "Mastram v. Ma Ohn" 1934 Rang 284 (AIR V 21) (H); AIR 1940 1 (Oudh); AIR 1944 212 (Oudh) ; "Kaura Ram v. Chamanlal" AIR 1934 Lah 751 and "Shankri v. Milkha Singh" AIR 1941 Lah 407

In the one case the plaintiffs' possession would have been under a lawful restoration of the initial or original contractual possession and thus in law a lawful continuance of that rightful possession; in the other, it would be maintenance or retention of present unauthorised possession under a superseded decree and thus wrongful continuance of possession which law would not, -- at any rate, should not, -- ordinarily permit to be tacked on for the rightful initial possession so as to form one complete whole for the purpose of supporting or sustaining a claim of right, be it passive or active, under a limited statutory equity like the one, recognised and embodied in Section 53A, T. P. Act.

12. In the events, however, which have happened in the present case, none of the above decisions can assist the plaintiffs. In the Pandit Ram Chander Vs. Pandit Maharaj Kunwar and Others, ", the transferee was clearly in possession at the date of the suit under and in pursuance of the relevant contract of transfer, and similar appears to have been the position in the Rangoon Case AIR 1934 Ran

284", as conceived by the learned Judge who decided the same, the mortgagor's possession being in law the possession of the mortgagee.

The AIR 1940 1 (Oudh) (J)", does not lay down any contrary principle as the suit there (which was instituted under Order 21, Rule 103, C. P. C.) was rightly treated as a continuation of the Order 21, Rule 100, C. P. C. proceedings, thus relating back to the date of institution of the said proceedings, on which date, admittedly, the plaintiff was clearly in possession on the strength of the relevant contract u/s 53A, Transfer of Property Act.

In the Lahore cases AIR 1934 Lah 751, and AIR 1941 Lah 407, also, the transferees were in possession under the respective invalid deeds of transfer at the dates of the respective suits. It is thus clear that all these decision, clearly recognised that, for the transferee to succeed u/s 53A, T. P. Act, possession on his part, referable to the relevant contract of transfer, was necessary at the date of the relevant suit or proceeding. This is wanting in the present case, as found above by us, and, accordingly, the plaintiffs' present suit cannot succeed.

Even if this suit be taken as a continuation of the previous suit (T. S. No. 38 of 1938) the same defect would remain -- it would even be more pronounced -- as the plaintiffs were, admittedly, not in possession at all on that date.

13. It is only necessary to add one word of caution with regard to the observations of Allsop J. in Municipal Board Vs. L. Moradhuji. Those observations were clearly obiter, as there the learned Judge was merely concerned and actually dealing with a transferor's claim to assert active rights u/s 53A &, wide though they are, the said observations should not be read as permitting a direct suit for recovery of possession by the transferee u/s 53A, T. P., Act.

Otherwise, the learned Judge's observations would clearly conflict with the interpretation, put upon the section (Section 53A), and the limited scope, assigned to it, by the several Privy Council decisions, reported inter alia in " AIR 1940 1 (Privy Council) and AIR 1941 128 (Privy Council) , and they would practically mean conversion of the "passive equity" (vide -- "Probodh Kumar Das v. Dantmara Tea Co." 45 Cal WN 132 at pp. 133-4 (P), stressed by the Privy Council, into an "active equity" and it would indeed be difficult to reconcile them with the Judicial Committee's oft-quoted expression of opinion that the section (Section 53A) is a "partial importation into India of the English equitable doctrine of part performance" (See AIR 1934 235 (Privy Council)).

As at present advised, we are not prepared to take the extreme view of the section, which may be founded on Allsop J.'s obiter dictum, particularly when it does not seem necessary to do so to effectuate the purpose of the section in the light of the above Privy Council decisions.

The dispossessed transferee is certainly entitled to recover possession u/s 9, Specific Relief Act, provided he acts with vigilance and due diligence and we do not find any sufficient reason or justification for extending the scope of the

section by unduly stretching the language of their Lordships of the Privy Council, and even an equitable construction, having that effect, would not be justified in view of what we have said above, as equity aids the vigilant.

14. Lastly, we have to refer to the decision of this Court, reported in *Ram Protap Kayan Vs. The National Petroleum Co. Ltd.*, , which was cited on behalf of the appellants as an instance of "active equity" u/s 53A, T. P. Act, assisting a plaintiff in a suit for ejectment.

We do not, however, deem it necessary to examine the full implications of the said decision on the present occasion, as it was not the case of a transferee, suing as plaintiff, but was the case of a transferor-plaintiff, where different considerations may well arise u/s 53A. We would, therefore, for the present, leave aside the said decision and reserve it for fuller consideration on an appropriate future occasion.

15. As a result of our foregoing discussion we are bound to hold that the appellants' suit was rightly dismissed by the lower appellate Court. We, accordingly, affirm its decision and dismiss this appeal. We would however, direct the parties to bear their own costs throughout.

Guha, J.

16. I agree.