

(1987) 11 MAD CK 0018
In the Madras High Court
Case No : S.A. NO.1092 of 1983

Mohamed Ali and others

APPELLANT

Vs

K.G. Nagaraja Mannair and others

RESPONDENT

Date of Decision : 20-11-1987

Acts Referred:

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

Citation : (1987) 11 MAD CK 0018

Hon'ble Judges : Srinivasan, J

Bench : Single Bench

Advocate : S. Gopalrathnam, for the Appellant; S.V. Jayaraman, for the Respondent

Judgement

Srinivasan, J.—An interesting question of law is raised by learned counsel for the appellants in this second appeal, which arises out of a suit

for bare injunction. Necessary facts are: The plaintiffs entered into an agreement for purchase of the suit properties with the owner thereof by name

Malangusa Rowther on 2-1-1973 under Ex. A1. The consideration was fixed at Rs. 9675. Out of it a sum of Rs. 100 was paid by the plaintiff.

Under the agreement, the plaintiff was put in possession of the suit property, Melangusa Rowther died soon after the agreement and his legal

representatives are defendants 1 to 9. The 10th defendant is the son-in-law of Malangusa Rowther. The 11th defendant is the subsequent

purchaser of item 2 of the suit properties and the 12th defendant is said to be a cultivating tenant The 13th defendant is the brother of the 12th

defendant. When the defendants sought to interfere with the possession of the plaintiff he came forward with the present suit for an injunction

restraining the defendants from interfering with his possession. Though the

defendants admitted the truth of the agreement, their contention was that the plaintiff was not put in possession under the agreement and that possession was always with the 12th defendant, the cultivating tenant, who was paying rent to the 10th defendant, the son-in-law of the family. It was also the contention of the defendants that the plaintiff was not ready and willing to perform his part of the contract.

2. Both the courts below have found against the defendants on the facts and held that the plaintiff got possession under the agreement and that he was ready and willing to perform his part of the contract. Consequently, the courts below granted an injunction against the defendants.

3. In this second appeal, it is vehemently contended by the learned counsel for the appellants that the findings of the courts below on the facts are vitiated by failure of the courts below to consider the relevant evidence on record and that such findings are not binding on this court even though it is a second appeal. I am convinced on a perusal of the records that the conclusions arrived at by the courts below on the facts is unassailable.

4. The question of law, as raised by learned counsel for the appellants, is that the plaintiff is not entitled to maintain the suit for injunction. His contention is that the plaintiff, even assuming that he was put in possession under the agreement and that he was ready and willing to perform his part of the contract, would only be entitled to the benefits of S. 53A of the Transfer of Property Act, which he could utilise only as a defendant. He relied upon the observations of the Privy Council as well as the Supreme Court in *Probodh Kumar Das v. Dantmara Tea Co., Ltd.* 51 L.W. 1

(P.C.) = 1940-1-M.L.J. 75 P.C., and *Delhi Motor Company and Others Vs. U.A. Basrurkar and Others*, , respectively. It is laid down in those

cases that the right under S. 53A of the Transfer of Property Act, is available only to the defendants to protect his possession. It has also been

observed that the right conferred under this section could be used only as a shield and not as a sword. Learned counsel also relied upon an

observation of a Division Bench of this Court in *Krishnamurthi Kounder v. Paramasiva Kounder*³. The Division Bench has taken the view that a

person in possession under an agreement of sale is not entitled to file a suit for injunction as his right is only to defend any suit that could be filed

against him by the transferor for enforcement of his rights. The ratio is that an

agreement of sale does not create any interest in the property, which is the subject matter of the agreement and that all that the transferee could claim under S. 53 of the Transfer of Property Act is only an equity conferred on him by S. 53A of the Transfer of Property Act.

5. I am unable to agree with the contention put forward by learned counsel for the appellants, for the following reasons. The observations relied on

by him, which are made by the Division Bench in Krishnamurthi Kounder v. Paramasiva Kounder A.A.O. 757 of 1977 Judgment dated 2-4-1981

T.N.L.J. 189., were made in a case which came to this Court at an interlocutory stage of a suit. In a suit for specific performance, the plaintiff

prayed for an interim injunction, during the pendency of the suit, restraining the defendants from interfering with his possession. The trial court

granted injunction and that order was challenged in appeal before this Court. On the facts of the case, the Division Bench found that it was not

proved prima facie that the plaintiff was put in possession under the agreement. It was also found that the genuineness of the agreement was itself

questioned by the defendants and in the face of such a challenge and in the absence of prima facie evidence to prove the possession of the plaintiff

under the agreement, the court held that the trial court was in error in granting injunction till the disposal of the suit. After giving such a finding on the

facts, the Division Bench proceeded to observe that, even assuming that the plaintiff was put in possession under the agreement and that he was

entitled to the benefits of S. 53A of the Transfer of Property Act, he was not entitled to maintain a suit as plaintiff, and seek an injunction, as that

would amount to his using the provisions of the section as a sword and not as a shield.

6. Apart from the fact that the observations made by the Division Bench were only obiter, I am bound by the decision of another Division Bench of

this Court, which had occasion to deal with the matter in a case of final disposal. It has to be noted that the decision of the said Division Bench was

rendered much earlier to the Division Bench decision in Krishnamurthi Kounder v. Paramasiva Kounder 1981 T.L.N.J. 189. In fact, the attention

of the later Bench was not drawn to the ruling of the earlier Division Bench, which was given in S.F. Munuswami Gounder and Others Vs. Erusa

Gounder, After referring to the decision of a Division of Andhra Pradesh High

Court in Yenugu Achayya and Another Vs. Ernaki Venkata Subba

Rao and Others ., the Bench observed as follows-

As pointed out in Achayya v. Venkatasubba Rao³, which is representative of a large volume of judicial opinion, S. 53A of the Transfer of

Property Act does confer some right on the transferee, if the conditions of that section are fully satisfied and what is that right is also clear from the

provisions of S. 53A. The right is to have the transferor or any person claiming under him 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. This right can be

enforced by the transferee always as a shield and not as an independent claim either in the capacity of plaintiff or defendants, that is to say, he

cannot ask for title basing his claim on the fact that he has fulfilled the conditions of S. 53A. But he can, as a shield, ask for protection of the right

envisaged by S. 53A, by debarring, in other words, by getting an injunction against the transferor and those claiming under him from interfering with

his possession.

7. The same view was taken by Ramanujam, J., in Mahalingam v. Ayyathurai 85 L.W. 869 = 1972-1-M.L.J. 9. In that case, the learned Judge

had elaborately discussed the matter and had also referred to the decisions of the Privy Council and the Supreme Court relied on by learned

counsel for the appellants before me. After referring to the earlier decisions, the learned Judge observed in these terms:-

Though S. 53A confers no active title on the transferee, it gives him a right to protect his possession. Though the transferee is the plaintiff in this

case, he is a person who is trying to defend his possession upon the doctrine of part performance against the invasion thereof by the transferor and

his representative. Under S. 53A, a transferee can resist any attempt on the part of the transferor to enforce his right in respect of the property

whether he is a plaintiff or a defendant.

Again, the learned Judge observed-

Hence, the correct view seems to be not to consider whether S. 53A is invoked by the plaintiff or the defendant, but to see as to what are the

rights claimed by the plaintiff in the suit, if the right is claimed to enforce the contract or to assert the right to protect or sustain the possession,

which the transferee got by way of part performance.

It was also pointed out by the learned Judge that to say that the rights under S. 53A cannot be availed of by a plaintiff is to take away the benefit of

the section to a large number of cases where the transferee may not be able to sustain his possession against his transferor. While concluding his

judgment, the learned Judge stated thus-

I am inclined to interpret the observations of their Lordships of the Privy Council when they said that S. 53A conferred no right of action on a

transferee in possession as meaning that he cannot have a right of action to enforce his title to the properties in his possession or to seek recovery

of possession. The Supreme Court in *Delhi Motor Company and Others Vs. U.A. Basurkar and Others*, ., has specifically left open the question

whether a person, who sues as a plaintiff may still be regarded as defending the rights sought to be conferred upon him by an unregistered deed. It

is true that a suit to enforce the rights on the basis of the agreement of sale by resort to S. 53A of the Transfer of Property Act, cannot be

maintained unless the transferee files a suit for specific performance of the contract of sale. But where he files a suit in defence of his rights under

the agreement on the basis of S. 53A and seeks to protect his possession, there cannot, in my opinion, be any objection.

8. It is to be noted that Ramanujam, J. was party to the Division Bench which decided in *Krishnamurthi Kounder v. Paramasiva Kounder* 1987

T.N.L.J. 189. Obviously, his attention was not drawn to the earlier decision reported in *Mahalingam v. Ayyathurai*2.

9. It has been laid down by a Full Bench of this Court in *Rama Subbarayalu Reddiyar v. Rangammal* 85 L.W. 869 = 1972-1-M.L.J. 9. that the

normal rule to be followed by subordinate courts is that, where there is a conflict between two decisions both pronounced by a Bench of the High

Court consisting of the same number of Judges, and the Subordinate Courts after a careful examination of the decisions comes to the conclusion

that both of them directly apply to the case before it, it will then be at liberty to follow that decision which seems to it more correct, whether such

decision be the later or the earlier one. In this case, the learned District Judge, West Thanjavur, has referred to the decisions of both the Division

Benches and also the decision of the Full Bench in *Rama Subbarayalu Reddiar v.*

Rengammal 75 L.W. 452 (F.B.), and came to the conclusion that the decision of the earlier Division Bench rendered in *Munusami v. Erusa Goundei* 87 L.W. 291 = AIR 1975 Mad. 25, is more correct. I cannot find fault with the reasoning of the learned District Judge.

10. Apart from the authorities referred to above, I am of the opinion that even on a reading of S.53A of the Transfer of Property Act, the plaintiff in this case cannot be nonsuited. The relevant portion of S. 53A is to the effect that 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 there for 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. It is not necessary to refer to the other portions of the section. This part of the section makes it clear that the transferor is debarred from enforcing his rights against the transferee. This in my opinion, will not only prevent the transferor from enforcing his rights through a court of law, but also from enforcing his rights outside the court adopting means which cannot be upheld by a court of law. Otherwise, if the interpretation suggested by learned counsel for the appellants were to be accepted it would only mean that when a person cannot obtain by instituting proceedings in a court of law, he can obtain the same by high-handed means outside the Court. If the transferor seeks to dispossess the transferee high-handedly without approaching the court of law, then to say that the transferee cannot seek the aid of the court as a plaintiff would only mean that the transferor can disregard the law as well as the machinery for enforcing the law. It will be a lamentable state of affairs to hold that a transferee, who obtained possession lawfully under an agreement and who satisfies the condition prescribed by S. 53A of the Transfer of Property Act will not be in a position to protect such possession, where the said possession is sought to be interfered with by unlawful means. I am, therefore, of the opinion that, when the transferee comes to court seeking the aid of the court to protect his possession, it is only a case of using the right conferred on him by S. 53A of the Transfer of Property Act, whether it is an equity or a right, as a

shield and not as a sword. It is only a right of defence that is put forward by him in the garb of a plaintiff. That cannot be considered to be a case, which is prohibited by S. 53A of the Transfer of Property Act, or by the interpretation of S. 53A, given by the Privy Council of the Supreme Court, when they observed that the transferee under S. 53A can only use the right as a shield and not as a sword. In the result, the contentions urged by learned counsel for the appellants cannot be accepted and the second appeal has to fail. Accordingly, the second appeal is dismissed, but there will be no order as to costs, as the appellants were justified in filing the second appeal in view of the conflicting pronouncements of two Division Benches of this Court.