

(1973) 07 KAR CK 0026
In the Karnataka High Court
Case No : First Appeal No. 114 of 1971

Mohammad Tahair

APPELLANT

Vs

Syed Khaja Ali and Others

RESPONDENT

Date of Decision : 03-07-1973

Acts Referred:

Hyderabad Tenancy and Agricultural Lands Act, 1950 — Section 47 (1)
Transfer of Property Act, 1882 — Section 53 A

Citation : AIR 1973 Kar 307 : (1973) 2 MysLJ 94

Hon'ble Judges : E.S. Venkataramiah, J;B. Venkataswami, J

Bench : Division Bench

Advocate : N. Santosh Hegde and A.M. Farooq, for the Appellant; Murlidhar Rao, for the Respondent

Final Decision : Allowed

Judgement

Venkataswami, J.—This is a defendant's appeal u/s 96 of the C. P. Code. The suit in question was O. S. No. 72 of 1968 on the file of the Civil Judge at Bidar. The suit was for declaration of title, possession, mesne profits and incidental reliefs and filed by the respondents herein. The suit has been eventually decreed on terms. Hence this appeal by the defendant.

2. The case of plaintiffs is that they succeeded to the suit property as heirs of their father, and that the defendant had no manner of right, title, or interest in the said property after the expiry of the period stipulated under an alleged mortgage the terms of which need not be set out for our present purpose. The defence in the main is that the defendant was put in possession of these suit properties pursuant to an agreement to sell entered into by the father of the plaintiffs in the year 1957, produced and marked in the suit as Exhibit D-5.

3. The court below came to the conclusion that the agreement to sell was one which would clearly give rise to a defence of part performance u/s 53-A of the Transfer of Property Act. But, having regard to the provisions of Section 47 of the Hyderabad Tenancy and Agricultural Lands Act, 1950 the transaction in question

was virtually a permanent alienation falling within the scope and ambit of the said section. It was, therefore, concluded that Section 47 would invalidate such a transfer of possession u/s 53-A of the Transfer of Property Act. In short, it was held that such a defence would be unavailable to the defendant in a suit based on title.

4. On behalf of the appellant, Shri N. Santosh Hegde, the learned counsel, relying on a decision of this Court in *Eramma v. Parvathamma* (1971) 2 Mys LJ 179 : AIR 1972 Mys 121 contended that the view of the court below was clearly erroneous. On behalf of the respondents, Shri Murlidhar Rao, the learned counsel, submitted that the agreement relied on behalf of the defendant was clearly a sale-deed ("Kbaridi Patrak") and, therefore, the defence of part performance u/s 53-A of the Transfer of Property Act would still be unavailable to the defendant.

5. On a careful consideration of the matter, we are in agreement with the contention urged on behalf of the appellant. We are also of opinion that having regard to the terms of Exhibit D-5, the agreement in question it was nothing but an agreement to sell contemplating the execution of a sale-deed at a later date. In *Eramma's* case (1971) 2 Mys LJ 179 : AIR 1972 Mys 121 it was laid down that in a case of part performance u/s 53-A, it was open to a defendant in possession to raise such a plea notwithstanding the provisions of Section 47 (1) of the Hyderabad Tenancy and Agricultural Lands Act. We are, with respect in agreement with the above view. It is seen from the provisions of Section 47 (1) of the aforesaid Act that what it contemplates is a clear case of a permanent alienation or a transfer of a like nature thus divesting the owner of his title to the property and vesting it in a transferee. In an agreement of the nature concerned in the present case, no title as such passes to the vendee. At best the right conferred on a vendee, is to remain in possession of the property and to protect it by using the agreement and such possession as a shield. In this view, we are unable to sustain the conclusion of the court below in this behalf.

6. Once this conclusion is reached it follows that the suit for possession based on title has to be dismissed. But it is contended by Shri Murlidhar Rao that at least in regard to the title of the respondents, a decree of declaration ought to be granted. It is sufficient for us to observe that the grant of a declaratory relief is discretionary. In the facts and circumstances of the case we are not disposed of to grant even that limited relief of declaration of title of the respondents.

7. The result, therefore, is that this appeal succeeds and is allowed. The judgment and decree of the court below are set aside and the suit is dismissed. Having regard to the facts and circumstances of the case, we think it proper to direct the parties to bear their own costs throughout, both here and in the court below.