
(1938) 02 CAL CK 0035
In the Calcutta High Court

Nakul Chandra Polley

APPELLANT

Vs

Kalipada Ghosal and Another

RESPONDENT

Date of Decision : 23-02-1938

Acts Referred:

Transfer of Property Act, 1882 — Section 107, 117, 53A

Citation : AIR 1939 Cal 163

Hon'ble Judges : S.K. Ghose, J;Nasim Ali, J

Bench : Full Bench

Judgement

S.K. Ghose, J.—This is a Letters Patent appeal from the judgment of our learned brother McNair J. The plaintiffs brought a suit for declaration of their occupancy right in char lands. The matter in controversy now relates to a 1/3rd share of the holding which was originally owned by one Sahadeb. He executed an unregistered kobala in favour of the defendant-respondent on 25th April 1931 and a registered kobala in favour of plaintiff 1, the appellant before us, on 15th September 1933. The question now is whether the appellant shall have priority over the respondent whose claim is based on the previous unregistered kobala. The Munsif held in favour of the plaintiff and decreed the suit. On appeal, the Subordinate Judge held against the plaintiff and dismissed the suit with regard to that portion of the property which is covered by the previous kobala in favour of the defendant. In second appeal, McNair J. upheld the decision of the Subordinate Judge but allowed further appeal.

2. The question turns upon the applicability of Section 53-A, T.P. Act. The first point taken before us is that Section 53-A, T.P. Act, does not apply because the transfer must be covered by the provisions of Section 26(c), Bengal Tenancy Act. It is pointed out that according to the latter Section a transfer must be by a registered instrument with notice to the landlord and on payment of landlord's fee. These conditions were not complied with in the case of the defendants. So it is contended that the defence u/s 53-A, T.P. Act, is not available to the defendant. The answer to this contention is that the terms of Section 53-A do not

exclude the case of a transfer which in order to be completed must be governed by the special provisions of the Bengal Tenancy Act. It is contended that the Transfer of Property Act and the Bengal Tenancy Act are mutually exclusive. But the converse proposition cannot be accepted that where they are not mutually exclusive even then the Transfer of Property Act should not apply. The Transfer of Property Act enacts the general law on the subject of transfer. There is nothing in this Act or in the local Act to indicate that the general provisions of the Transfer of Property Act shall not apply to agricultural leases. Where it is intended that agricultural leases should be excluded it is specially provided for, as in Section 117, T.P. Act, which itself indicates that but for such special and express provision the Transfer of : Property Act would apply to agricultural holdings and there is no warrant for the proposition that the Bengal Tenancy Act excludes a defence such as is provided for by Section 53-A, T.P. Act. It is contended that Section 26(c), Bengal Tenancy Act, not only provides for the registration but also for bringing in a third party, namely the landlord to whom notice has to be issued and certain fees are to be paid. But where these conditions are not complied with it only means that the transfer has not been completed in the manner prescribed therefor by law, which again satisfies one of the conditions for the applicability of Section 53-A, Transfer of Property Act.

3. It is next contended for the appellant that the respondent is not entitled to rely on Section 53-A because such a defence was not expressly taken in the first Court and no issues were framed upon it. The question however was mooted in the first Court and raised again in the lower Appellate Court which considered it and came to the necessary finding of fact. It is expressly found that all the requirements of Section 53-A, T.P. Act, are there, namely that the contract was in writing, that the defendant obtained possession in pursuance of the contract and that the plaintiff had notice of the transfer in favour of the defendant. I must therefore agree with McNair J. in holding that there is no substance in this point. It is contended that the findings of the Subordinate Judge are not adequate because the question as to whether consideration was paid to the defendant was not considered. This argument is not correct. The learned Judge has expressly found that the defendant redeemed two mortgage bonds which had been executed by Sahadeb in favour of the plaintiff. The learned Judge has gone on to find that the defendant was in possession by virtue of a kobala and that the plaintiff after being acquitted in a murder case took advantage of the defendant's kobala not being registered and got Sahadeb to execute a registered kobala in his favour. This is another test of the mala fide nature of the transfer in favour of the plaintiff.

4. The next point which has been strenuously argued is that Section 53-A, T.P. Act, is not available to the defendant because he has no present right to enforce the contract which was made in his favour by Sahadeb. It is pointed out that a suit was brought on 1st February 1935 which is more than three years after the defendant's kobala, though within three years after the plaintiff's kobala. Now as to whether the defendant's right to sue for specific performance has really

been lost under Article 113, Limitation Act, I have some doubt. The unregistered kobala in favour of the defendant does not give any date fixed for the performance unless the date of the kobala itself be taken for such, and, if no such date is fixed, then the only tangible fact that we get to indicate that performance was refused is the fact of the kobala in favour of the plaintiff, which was within three years of the suit. But, conceding that the defendant has no present right to enforce his contract by requiring Sahadeb to register the kobala in his favour, the question is whether he has therefore lost his right of defence under Section 53-A, T.P. Act. It is unnecessary to refer to the principles laid down in English cases which have become classical on the subject of equities to be administered by the Courts in England and in India. In *G.H.C. Ariff Vs. Jadu Nath Majumdar*, the Privy Council held that a permanent lease can only be made by a registered instrument as required by Section 107, T.P. Act, and the doctrine of part performance cannot be applied so as to override the express provision of a statute, as for instance the Transfer of Property Act. But the decision in this case was based upon the old law before Section 53-A, T.P. Act, was enacted although, in point of time, the Section itself was enacted before Ariff's case *G.H.C. Ariff Vs. Jadu Nath Majumdar*, was decided. In AIR 1934 235 (Privy Council) the decision was also based on the old law. The Privy Council referred also to Section 53-A, T.P. Act, with reference to "the partial importation into India of the English equitable doctrine of part performance." As a result of this Section the defendant has now got a statutory right which is limited by two conditions, viz. that the contract must be in writing and further that it is available only as a defence or to use a convenient expression as a passive equity and not as an active equity. The defendant can protect his position not against the whole world but against a transferor or any person claiming under him, the latter being debarred from enforcing any right other than that expressly provided by the contract. If the transferee is entitled to the specific performance of contract of a lease it is provided for by Section 27-A, Specific Relief Act. In such a case it is not necessary for him to resort to Section 53-A, T.P. Act, and since the provision of that Section confers a right which is only available to a defendant to protect his possession no question of limitation arises thereunder, since there is no bar of limitation to a defence. This is consistent with what was said in AIR 1934 235 (Privy Council) and we ourselves said in *Danthmara Tea Co. Ltd. v. Probodh Kumar Das* 41 C.W.N. 54. I entirely agree with McNair J. in holding that the doctrine of part performance being now a substantive provision of the Act must be construed as it is enacted. The argument for the appellant must therefore fail.

5. The result is that the judgment of McNair J., must be affirmed and the appeal must be dismissed with costs.

Nasim Ali, J.

6. I agree. The only substantial point raised on behalf of the appellant is that Section 53-A, T.P. Act, does not apply to a contract to transfer occupancy holdings. There are two branches of this contention: First that Section 53-A does

not apply to a contract to transfer an agricultural lease and secondly that even if it is applicable the defence on the basis of Section 53-A is not available where the right to claim specific performance of the contract has been barred by limitation. Section 53-A is in very general terms. It speaks of a contract to transfer any immovable property. Occupancy holding is immovable property within the meaning of this Section. The Transfer of Property Act of 1882 into which this Section was incorporated by the Transfer of Property Amendment Act of 1929 was passed in the year 1882 to define and amend certain parts of the law relating to transfer of property by acts of parties. The Succession Act and the Contract Act had already been passed. The main project of the Act was to bring the rules which regulate the transmission of property between living persons into harmony with the rules affecting its devolution on death, to furnish the complement of the work commenced in framing the law of testamentary and intestate succession and also to complete the Code of contract law so far as it relates to immovable property. This Act applies to the whole of British India, excepting the territories administered by the Governor of Bombay, the Lieutenant; Governor of the Punjab and the Chief Commissioner of British Burma. The Act applies to transfer of all immovable properties in Bengal. Ch. 2 of this Act lays down the general principles which govern the transfer of all immovable properties which are transferable. After the Bengal Tenancy Amending Act of 1928 came into force, the occupancy holdings in this province became transferable like any other immovable property. The general principles laid down in Ch. 2, T.P. Act, therefore are now attracted to the transfer of these holdings. By Section 117, T.P. Act, only Ch. 5 of the Act is inapplicable to leases for agricultural purposes. This exception was necessary, other, wise there would be Codes of Statutory law relating to landlord and tenant one embodied in the general Act and another in a special or local Act. The implication of the exemption of agricultural leases from the operation of only Ch. 5, T.P. Act, is that the other provisions of the Act would apply also to agricultural tenancies.

7. Mr. Boy appearing on behalf of the appellant however contended that as the special provisions contained in Section 26(C), Ben. Ten. Act, dealt specifically with the transfer of occupancy holdings, we must look for the whole law relating to the transfer of occupancy holdings as also the contract to transfer such holdings in the provisions of that Act alone and nothing else. Ch. 2, T.P. Act, deals with general principles relating to transfer viz. sale, mortgage, lease gift, exchange. The subsequent chapters lay down the rules relating to the modes of these transfers and the rights and liabilities arising out of such transfer. So far as sale is concerned, the Transfer of Property Act lays down that the transfer is to be effected by a registered document where the value is one hundred rupees and upwards but where the value is below Rs. 100 it may be effected either by a registered document or by delivery of the property. The Bengal Tenancy Act however has placed the sale of occupancy holdings the value of which is below Rs. 100 on the same footing as the sale of holdings the value of which is Rs. 100 or upwards so far as the mode of transfer is concerned. The effect of Section

26(e) is that the only mode of transferring an occupancy holding whatever may be its value is by a registered document. It lays down only one mode for transfer of all occupancy holdings. Bengal Tenancy Act does not lay down and its object was not to lay down the general principles which would govern the transfer of occupancy holdings. When Sections 26(B) and 26(C) were introduced in Bengal Tenancy Act it was assumed that the general law already contained in the Transfer of Property Act would apply to these transfers if it is not in any way inconsistent with the provisions of the Bengal Tenancy Act. Further, Section 53-A, T.P. Act, deals with contracts to transfer property. Its provisions are attracted where transfer has not been completed in accordance with the modes laid down by statute for effecting the transfer. The Bengal Tenancy Act does not deal with the rights and liabilities of the vendor and the purchaser on the basis of a contract for sale. It simply amends and consolidates certain enactments relating to the law of landlord and the tenant within the Province of Bengal, and is not concerned at all with the rights, liabilities and incidents arising out of other kinds of transfer or agreements relating thereto. It cannot be said therefore that there is any provision in the Bengal Tenancy Act which in any way takes away the right conferred by Section 53-A, upon a purchaser to retain possession as against his vendor in the circumstance mentioned in that Section.

8. As regards the second branch of contention that the defendant in the present suit cannot avail himself of the statutory right to retain possession of the land u/s 53-A, T.P. Act, in view of the bar of limitation it may be pointed out that limitation does not generally apply to a plea in defence : see *Sri Kishan Lal v. Mt. Kashmiro* A.I.R.(1916) P.C. 172. Section 53-A has imported in a modified form the English doctrine of part performance into this country. It confers only a passive right and is available to a defendant to protect his possession. Article 113, Limitation Act, certainly cannot apply to such a right. Mr. Eoy however contended that this right was in substance the right to get specific performance of the contract in pursuance of which the purchaser was put into possession. Lord Selbourne however pointed out in *Maddison v. Alderson* (1883) A.C. 467 that the basis of the doctrine of part performance was not the contract but the acts subsequent to the contract. This right is not an equitable right in this country as in England. It is a right conferred by the Statute law of this country whatever might have been its source in England and the reason for its importation into this country. There is nothing in Section 53-A to indicate that the assertion of this right in defence is dependent on the original contract or is subject to any law of limitation. Limitation bars the remedy but not the right in possession. Section 28, Limitation Act, does not apply to this right. The contention of Mr. Roy that the defence based on the statutory right u/s 53-A is not available on account of the bar of limitation cannot therefore be accepted.