

(1941) 01 CAL CK 0003

In the Calcutta High Court

Case No : Appeal from Appellate Decree No.285 of 1939

Rai Sahrb Bharat Chandra Das Purkayastha

APPELLANT

Vs

Md. Ramjan Choudhury and Another

RESPONDENT

Date of Decision : 17-01-1941

Acts Referred:

Citation : (1941) 01 CAL CK 0003

Final Decision : Dismissed

Judgement

Sen, J.—The only point which now calls for decision in this Court is whether the Defendant Appellant is entitled to resist the Plaintiff's suit for rent by claiming the benefit of sec. 53A of the Transfer of Property Act. The Plaintiffs are two in number. They are Mamad Ramjan Choudhury and his minor son Abdul Faiz. They are the owners of certain property. One Sk. Abru was their tenant with respect to that property paying a rental of Rs. 12-6 per annum. The Defendant purchased the rights of Sk. Abru. The Plaintiffs claim rent including damages from the Defendant for the period 1341 to 1343 B.S. The amount claimed is Rs. 46-6-6.

2. Various defences were taken, but as I have stated at the beginning of this judgment only one defence is now persisted in. The Defendant alleged that there was a contract for sale entered into between the Plaintiff Mamad Ramjan Choudhury in his personal capacity and as guardian of his minor son Abdul Faiz on one side and the Defendant on the other whereby it was agreed that the Plaintiffs would sell this property to the Defendant for the sum of Rs. 630. Pursuant to that agreement the Defendant paid Rs. 51 as earnest money. It was agreed that the Defendant would pay the balance of the purchase money within six months and that within that time Mamad Ramjan would file a petition in the District Judge's Court under the Guardian and Wards Act for being appointed a guardian and for permission to sell his minor son's share in the property. It was stipulated further in the contract that if the District Judge refused such application Ramjan would be bound to return a portion of the earnest money proportionate to the share of the minor. The Defendant contended that the

Plaintiffs having entered into this contract they could not now claim rent from the Defendant who is in possession of the land and who has paid the earnest money in furtherance of the contract. The learned Munsif accepted this view. The Plaintiffs appealed and the learned Subordinate Judge has reversed the findings of the Munsif. He says that the Defendant cannot avail himself of the provisions of sec. 53A of the Transfer of Property Act because the contract so far as the minor Plaintiff is concerned cannot be specifically enforced. The Defendant now appeals to this Court and he contends that whether the contract can be specifically enforced or not the Defendant is entitled to the benefit of sec. 53A of the Transfer of Property Act inasmuch as that section does not say that a party cannot get the benefit of the provisions of that section if the contract on which he relies cannot be specifically enforced. I think that the learned Judge has stated the proposition too broadly when he says that sec. 53A will not apply unless the contract upon which the person relies in seeking to avail himself of the provisions of that section can be specifically enforced. As a matter of fact, the section is intended to be called in aid by a party in cases where he cannot specifically enforce the contract. The object of this section is to protect persons in cases where there is a contract which cannot be proved in evidence or the specific performance of which is barred. In this connection I would quote the words of Sir Dinshah Mulla in his treatise on the Transfer of Property Act, 1933 Edition, page 233:

If the contract is admissible in evidence and a suit for specific performance is not barred, the party in possession under the contract has rights which he can actively enforce by a suit for specific performance and he has no reason to invoke this section. But if the claim for specific performance is barred, or if there is no contract admissible in evidence, the party in possession will invoke this section to protect his possession.

3. Therefore, it is not correct to say that if a contract cannot be specifically enforced sec. 53A will have no application. There is, however, a formidable difficulty in the way of the Defendant seeking the aid of sec. 53A. The section is in the following terms:

Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract &c.

4. Now, in this case it is admitted that the Defendant was already in possession of the land as tenant. So in this case it cannot be said that he took possession of the property in part performance of the contract. The latter portion of that part of the section reproduced by me above will apply. The Defendant is a person who

was already in possession at the time of the contract. What has to be decided is whether he continued in possession in part performance of the contract. There can be no doubt that he did continue in possession; the question is whether he continued in possession in part performance of the contract. The words of the section are perfectly clear. Mere continuance of possession will not do. The transferee must show that the continuance in possession was unequivocally in part performance of the contract. The learned Munsif has said in his judgment that there is no evidence that the Plaintiffs ever realised rent from the Defendant and that:

the Defendant continued in possession on the strength of the bainapatra without payment of rent.

5. The learned Advocate for the Respondents argued that there is absolutely no evidence to show that the Defendant continued in possession in part performance of the contract and he says that in the absence of such evidence the finding of the learned Munsif that the Defendant continued in possession on the strength of the bainapatra is one which cannot be supported in law. I have been through the evidence and I find that there is not an iota of evidence to show that the Defendant continued in possession pursuant to the bainapatra. The Defendant says no such thing anywhere in the evidence. The mere fact that he did not pay rent does not necessarily mean that he continued in possession in part performance of the contract. The decisions on this point are numerous and I need only refer to the decision of Bahadur Singh Singhee v. Rani Jyotirupa Debi. 40 C.W.N. 1176 (1936) It was laid down there that in order to avail oneself of the benefit of the provisions of sec. 53A it must be shown that the possession refers unequivocally to the contract. Where a person is already in possession as lessee and continues in possession after the contract for sale it does not necessarily follow that he continues in possession in part performance of the contract. He must show either from the contract itself or from some other evidence that the continuance of his possession was in reference to or pursuant to the contract for sale. In this case there is nothing said in the bainapatra regarding possession and as stated above the Defendant does not say a word in evidence about his possession being in part performance of the contract. On these grounds, therefore, the Defendant's plea must fail. It becomes unnecessary for me to decide some of the other points of law raised by the learned Advocates regarding the question whether the contract so far as the minor is concerned was a valid one or not and whether if that portion of the contract was invalid sec. 53A can be availed of by any party; but the points having been argued at length I propose to give my opinion on these two matters. Ramjan Choudhury is undoubtedly the legal guardian of his infant son so far as the property is concerned. Under the Mahomedan law a legal guardian may under certain circumstances sell the immovable property of his ward, but unless those circumstances are present the sale would be invalid. The reason given in this bainapatra for selling the property of the minor is that it is difficult for the guardian to manage the property as it is some distance away from his permanent

residence and that they are not getting any profits from the property owing to this difficulty of management. Now, under the Mahommedan law this is not a valid ground for the sale of immovable property belonging to a minor by his legal guardian. The valid grounds for such sale are given in Sir Dinshah Mulla's book on Mahammedan law and they are seven in number (vide The Principles of Mahammedan Law, Eleventh Edition, pages 259-260). It is unnecessary to state the seven conditions under which a minor's property may be sold by his legal guardian. It will be enough to say that difficulty of management and absence of profits are not grounds which would entitle a legal guardian to sell a minor's immovable property. The powers of a guardian appointed under the Guardians and Wards Act to sell are different, but in this case the Plaintiff Ramjan Choudhury had not yet been appointed a guardian by the Court under the Guardians and Wards Act. In these circumstances it cannot be said that there was any valid contract to sell so far as the minor's share of the property is concerned. Again Ramjan Choudhury agreed to sell the property on behalf of the minor if and when he was clothed with authority to do so by the District Judge. Now, there was no certainty whatsoever that the District Judge would consent to the sale of the property. There was, therefore, no complete contract for the sale of the minor's interest. That being so, sec. 53A of the Transfer of Property Act cannot be availed of so far as the minor's share of the property is concerned. The contract contemplated by sec. 53A is a completed contract and a valid contract. A person cannot seek the benefit of sec. 53A on the basis of a contract forbidden by law or on the basis of negotiations which had not matured into a contract. Now, if the Defendant cannot avail himself of the provisions of sec. 53A so far as the minor's share in the property is concerned, can he avail himself of the benefit of that section only with respect to Mamad Ramjan Choudhury's share in the property? In my opinion he cannot. Sec. 53A contemplates reliance upon the entire contract. It does not contemplate the splitting up of a contract into different parts in this manner. I, therefore, hold that the Defendant cannot seek the benefit of this section of the Transfer of Property Act. For these reasons I uphold the decision of the learned Subordinate Judge and dismiss this appeal with costs.