

(1970) 03 CAL CK 0031
In the Calcutta High Court
Case No : A.F.A.D. No. 1059 of 1963

Rajendra Nath Sarkar

APPELLANT

Vs

Gour Gopal Ghosh and Another
 Gour Gopal Ghosh
and Another Vs Rajendra Nath Sarkar

RESPONDENT

Date of Decision : 20-03-1970

Acts Referred:

Bengal Tenancy Act, 1885 — Section 26C
Civil Procedure Code, 1908 (CPC) — Section 100, 101
Registration Act, 1908 — Section 49
Transfer of Property Act, 1882 — Section 53A

Citation : AIR 1971 Cal 163 : 75 CWN 106

Hon'ble Judges : M.M. Dutt, J;D. Basu, J

Bench : Division Bench

Advocate : A.K. Sengupta and R.K. De, Prasant Kumar Bandopadhyaya, for the Appellant; Prasant Kumar Bandopadhyaya, for the Respondent

Final Decision : Allowed

Judgement

D. Basu, J.—This appeal arises out of a suit for declaration of title, recovery of possession and for realisation of mesne profits brought by the plaintiffs-respondents. The plaintiffs' case in the plaint, in short, was that on the 28th March, 1950 he acquired the disputed property by an unregistered deed of exchange from the previous owners who had gone over to Pakistan and got possession on the strength of that exchange and that subsequently on the 13th July, 1955 the plaintiffs have obtained registered kobala from those owners. The plaintiffs further averred in the plaint that in 1362 B. S. taking advantage of their temporary absence from India the defendant dispossessed him and that in 1362 B.S. on their return from Pakistan the plaintiffs found the defendant to be in possession of the disputed plot. The plaintiffs also challenged the entry in the revisional settlement record-of-rights which had been obtained by the defendant on the basis of his possession as aforesaid. The defendant is a refugee from Pakistan just like the plaintiffs and he also sets up a case of exchange by an

unregistered deed dated the 26th February, 1950, that is to say, roughly one month earlier than that of the deed of exchange relied upon by the plaintiffs and he also alleges that he entered into possession of the disputed land by virtue of that deed of exchange and had since been in possession of the disputed property and that the plaintiffs' allegation of their being dispossessed in 1362 B.S, was false. Unfortunately, the unregistered deed of exchange of either party was excluded from the evidence on the ground that it required registration and the result was an over-simplification of the controversies between the two parties because once the earlier unregistered deed of exchange asserted by the defendant was out of the field the only document at law was the registered kobala relied upon by the plaintiffs and there was no other way to the court left than to declare the plaintiffs' title, unless the suit was barred by limitation or the plaintiffs' title was barred by adverse possession by the defendant. Since the defendant asserted possession only from 1350 B.S. which was within nine years of the institution of the suit neither limitation nor adverse possession could defeat the plaintiffs' title on the basis of the registered kobala. The trial court, accordingly, decreed the suit on these findings and when the case came on appeal before the court of appeal below the appellant made grievance that the learned Munsif had wrongly rejected the deed of exchange executed in his favour by the original owners and that it was admissible under the provisions of Section 53-A of the Transfer of Property Act and once that provision was applied the defendant could not be ejected from the disputed property. The Court of appeal below discussed the provision of Section 53-A of the said Act but relied upon the ruling reported in (1945) 49 Cal WN 649, Birendra Kishore Roy v. Naruzzaman to hold that since the disputed property constituted an occupancy holding which could be registered only u/s 26-C of the Bengal Tenancy Act it could not be admitted in evidence even to prove part-performance because the proviso to Section 49 of the Registration Act, 1908, was confined only to documents which were compulsorily registrable under the Registration Act and the Transfer of Property Act and not under any other enactment such as the Bengal Tenancy Act. Upon this view he rejected the contention of the defendant that he could resist the plaintiffs' suit on the basis of Section 53-A of the said Act.

2. This finding of the lower appellate court has been challenged in this second appeal. When it came up before the learned single Judge (Laik, J.) the learned Judge observed that there was a conflict of opinion between the two decisions just referred to and an earlier decision of this Court in Nakul Chandra Polley v. Kalipada Ghosal, reported in 42 CWN 630 = (AIR 1939 Cal 163) and that, accordingly, the present appeal should be dealt with by a Division Bench. It is true that the decision in (1945) 49 Cal WN 649 is not a Division Bench decision but that of a single Judge. Chakravarti. J. (as he then was), but there are certain observations therein which might lead one to think that Section 49-A of the Registration Act debarred from evidence any unregistered document of transfer of an occupancy holding which was required to be registered u/s 26-C (1) of the Bengal Tenancy Act. Before entering into this question it should also be

noted at once that there has been another Division Bench decision of this Court which has dealt with the specific question which is before us.--namely, Manjural Haque Vs. Sm. Mewajan Bibi and Others, .

3. Having given our anxious consideration to the question involved we are of the opinion that the decision in (1945) 49 Cal WN 649 does not really deal with the question which we are to decide and is not in conflict with the decision in 42 Cal WN 630 = (AIR 1939 Cal 163). It is curious that the decision in 42 Cal WN 630= (AIR 1939 Cal 163) was not referred to in (1945) 49 Cal WN 649. Be that as it may, it should be observed at the very beginning that though the Bengal Tenancy Act is a self-contained enactment relating to the law of landlord and tenant, it is not a complete Code as to the law relating to land held by a tenant or the law relating to such tenancy. The relevant provision of the Transfer of Property Act, which is a general enactment relating to the law of transfer of immovable property in India, is Section 117 of the Transfer of Property Act which only excludes the applications to agricultural leases of the provisions of Chapter V of the Transfer of Property Act which deals with leases of immovable property. There is no provision in the Transfer of Property Act which excludes its general provisions in their application to agricultural holdings. So far as the Bengal Tenancy Act is concerned, it does neither inasmuch as its preamble says that it is an Act to amend and consolidate the law relating to the landlord and tenants. It never professes to be an exhaustive Code as to the immovable property when that is used for agricultural purposes and held by a tenant. If that be so, there is no reason why the general provisions of the Transfer of Property Act such as Section 53-A of the said Act, cannot be extended to agricultural properties or agricultural holdings, as has been held in 42 Cal WN 630 = (AIR 1939 Cal 163) as well as Manjural Haque Vs. Sm. Mewajan Bibi and Others, . If that be so, then the provision in Section 53-A of the Act which is meant to protect a defendant from eviction when he has entered into possession in part-performance of an unregistered deed of transfer should not be available to the transferee of an occupancy holding who has obtained a deed of transfer but has not got it registered, as required by Section 26-C of the Bengal Tenancy Act.

4. The trouble indeed has been created by Section 49 of the Registration Act. It says as follows:

"No document required by Section 17 or by provision of the Transfer of Property Act, 1882 to be registered shall-

- (a) affect any Immovable property comprised therein,
 - (b) confer any power to adopt, or
 - (c) be received as evidence of any transaction affecting such property or
- conferring such power, unless it has been registered:

Provided that an unregistered document affecting Immovable property and required by this Act, or the Transfer of Property Act, 1882, to be registered may

be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of part-performance of a contract for the purposes of Section 53-A of the Transfer of Property Act, 1882. or as evidence of any collateral transaction not required to be effected by registered instrument."

It is absolutely clear that the proviso which is an exception to the enacting portion of Section 49 does not deal with documents which are required to be registered by an enactment other than the Registration Act or the Transfer of Property Act. The reason is that the enacting portion does not relate to documents registrable under any enactment other than Registration Act or Transfer of Property Act. From this merely it is not possible to contend that because other enactments are not specified in Section 49 or its proviso the documents which are required to be registered under those enactments but not so registered cannot be admitted into evidence for any purpose whatsoever. The bar in the enacting portion of Section 49 primarily refers to the substantive provision in Section 17 of the Registration Act which requires that certain documents which purport to create, declare, assign, limit or extinguish any right, title or interest in immovable property cannot be effected except by a registered instrument. Section 19 is merely a provision to supplement the provision of Section 17 and lays down that, because of the substantive proviso in Section 17 of the Registration Act, if that is not complied with, no such document which is not registered, shall be received in evidence for the purpose of creating or extinguishing etc., any right, title or interest in immovable property. If Section 49 remained without the proviso, which was inserted in 1929, the question might arise whether because of the bar in Section 49. the equitable doctrines of specific performance, or part-performance could be relied upon by a person who had not got registered the deed of transfer which might be otherwise valid and, in fact, numerous cases arose between 1908 and 1929 as to whether those equitable doctrines could be made available to such a person, which went up to the Privy Council on several occasions. It is to obviate such controversies that the Proviso to Section 49 was engrafted in 1929, namely, that though for the purposes of affecting right, title or interest in the property the unregistered deed of transfer would not be admissible, nevertheless, it would be admissible in a suit for specific performance or to defend the transferee's possession under the provisions of Section 53-A of the Transfer of Property Act, and for other purposes which might be called "collateral" (with which latter question we are not concerned in this appeal).

5. It is, therefore, absolutely clear that the proviso to Section 49 could have no possible application to cases where the enacting portion of Section 49 was not called for. In other words, if any enactment like the Bengal Tenancy Act required registration of any document and that document was not registered, there was no bar in the law of evidence to receive the unregistered document for purposes other than for establishing title. In fact, in an early case reported in AIR 1942 Cal 337, *Fazal Ahmed Choudhury v. Etim Ali Choudhury*, the question was raised

whether Section 49 barred the admission into evidence of an award which was not registered as required by Section 47 of Bengal Agricultural Debtors Act and the answer given by a single Bench of this Court, Roxburgh, J., was that there was no law to debar it from evidence inasmuch as Section 48 was not attracted to a document required to be registered under the Bengal Agricultural Debtors Act. This is also the rationale upon which the Division Bench in *Manjural Haque Vs. Sm. Mewajan Bibi and Others*, (Guha and P. N. Mookerjee, JJ.) expressed the view that the document which was required to be registered u/s 52 of the Bengal Tenancy Act would not be hit by Section 49 of the Registration Act. It was also laid down by the Division Bench that Section 53-A of the Transfer of Property Act itself implied that such a document could be admitted in evidence for the purposes of establishing part-performance u/s 53-A of the said Act.

6. The reason why we had at the outset said that the case in (1945) 49 Cal WN 649 did not deal with the question before us was that that was a suit by a plaintiff who wanted to establish his title by virtue of an unregistered deed of sale which was required to be registered u/s 26-C of the Bengal Tenancy Act. It is clearly laid down in Section 53-A that the advantage of that provision could be taken only by a transferee in possession as a defendant to resist the suit for recovery of possession by the transferor or anybody else claiming under him (vide paragraph 4 of Section 53-A of the Act). This has been made clearer by the Privy Council in the case reported in 44 Cal WN 145 = (AIR 1940 PC 1), *Probodh v. Dantamara Tea Company*, namely, that the doctrine of part-performance, as it has been statutorily imported in Section 53-A of the Act, is narrower than the English Rule of Equity where it can be availed of both as an active as well as a passive equity, while u/s 53-A of the Act it cannot be used as an active equity to establish title by a plaintiff, which the law provided, could be acquired only by a registered deed. It was only to prevent fraud and to protect the rights of a person who had already obtained possession under an unregistered deed that Section 53-A was enacted. But though the statutory provision of Section 53-A of the said Act is narrower, the principle upon which it was engrafted was the same as that in England as explained in leading cases since the case of *Maddison v. Alderson*, (1883) 8 AC 467.

7. In England, the equitable doctrine of part-performance was evolved because of the provision of the Statute of Frauds under which no action could be brought upon any contract or sale of land unless the agreement was in writing.

The Statute of Frauds was enacted to lay down a rule of evidence in order to prevent fraud, by requiring written proof of transactions of an important nature; but a court of equity would not allow the Statute of Frauds to be used as an engine of fraud. Where one party has executed his part of the agreement in the confidence that the other party would do the same, it would be a fraud on the part of the other not to perform his part of contract, and in such a case, to allow the latter to plead the Statute in defence would be to defeat the very object for which the Statute was passed. Equity, therefore, would regard part-performance

as a cogent evidence of the existence of some agreement relating to the land between the parties, and consequently, in an action of specific performance, allow such agreement to be proved by oral evidence, notwithstanding the Statute of Frauds. This Equity was thus available also to a plaintiff in suit for specific performance. While enacting Section 53-A of the Transfer of Property Act in 1929 it was evident that while the English Statute required writing, in India it was the Registration Act which required registration, for the avoidance of fraudulent transactions relating to immovable property. Therefore, to meet cases where it would be fraudulent on the part of one party to take the plea that the other party had not obtained registration of a contract, which was otherwise valid. Section 53-A was enacted, but, instead of the absence of writing the absence of registration was substituted as the condition for application of the doctrine. It was, accordingly, held that merely oral contracts could not come within the protection of Section 53-A of the Act and it was further held, as stated earlier, that the equitable plea created by Section 53-A could not be availed of by a plaintiff to establish his title but could be availed of only by a defendant to protect his possession.

8. The safeguards which have been engrafted in Section 53-A to prevent fraud on the part of the defendant himself are,--(1) that the defendant must have, in part-performance, that is to say, in pursuance of the unregistered contract, taken possession of the property; (2) that he must continue in possession in such part-performance of the contract at the time of the dispute, and (3) if these conditions are satisfied, he can resist a suit for recovery of possession from him either by the transferor or by any person claiming under him, provided only that such latter person would not be affected by the defence of part-performance if he was a person who had acquired the property for consideration without notice of the contract to the defendant or of the part-performance thereof.

9. In the case before us the plaintiffs-respondents are no doubt persons claiming under the transferor of the defendant because they had come upon the land, according to their pleading, by another unregistered deed of exchange which was later in point of time,--by a month or so. It was contended on behalf of the plaintiffs-respondents before us that there was no specific plea of part-performance taken in the written statement out of which the question of protection u/s 53-A of the Act could be raised under the law; but upon a fair reading of paragraph 12 of written statement it would be clear that the defendant had alleged that in pursuance of the registered deed of exchange dated the 26th February, 1950 the defendant had obtained possession and had since been occupying the disputed land and the structures thereon and had also been in possession at the time of the suit in pursuance of the contract embodied in the deed of exchange. Prima facie, therefore, the materials necessary to plead part-performance were there in the written statement and we must say that the court of appeal below was right in entertaining the plea of part-performance.

10. The only reason why the court of appeal below refused to give effect to that

plea in defence was that the unregistered deed of exchange set up by the defendant could not be put into evidence because of Section 49 of the Registration Act. We have already made it clear that Section 49 would not be a bar to the admission of that document for the purposes of applying Section 53-A of the Transfer of Property Act. No doubt the trial court did not believe the defence case that the defendant had been in possession since 1950 and the appellate court has also affirmed that finding but we must say that the discussion on the question has not been elaborate; and, particularly because both the courts have misdirected themselves on the question of law, that finding cannot be binding upon us in this appeal. In view of the rejection of the evidence of the unregistered deed of exchange set up by the defendant, the trial court had to rely solely upon oral evidence and both the courts were much more anxious to find whether the plaintiffs' title by registered kowala could be defeated by limitation or by adverse possession.

11. In our opinion, there should be a specific issue based on part performance u/s 53-A of the said Act and the court of appeal below should dispose of the appeal afresh upon the evidence on the record after taking formal evidence for proof of the unregistered deed of exchange relied upon by either party, if formal proof was not dispensed with. While deciding the issue of part performance the court of appeal below should also consider whether the plaintiffs could get the benefit of the proviso to Section 53-A of the Transfer of Property Act, as to which we do not express any opinion.

12. The appeal is, accordingly, allowed. The judgment and decree of the court of appeal below are set aside and the case is remitted to that court for disposal according to law, as indicated herein.

13. In the circumstances of the case, we make no order as to costs.

M.M. Dutt, J.

14. I agree.