

(1961) 07 AP CK 0019

In the Andhra Pradesh High Court

Case No : Second Appeal No. 252/1 of 1956

Salla Venkata Reddy

APPELLANT

Vs

Bheemreddy Jadikonti Ramreddy and Others

RESPONDENT

Date of Decision : 07-07-1961

Acts Referred:

Transfer of Property Act, 1882 — Section 105, 53A, 54, 58

Citation : AIR 1963 AP 239

Hon'ble Judges : Srinivasachari, J

Bench : Single Bench

Advocate : Sadashiva Rao, for the Appellant; A. Raghuvir, for the Respondent

Judgement

Srinivasachari, J.—An interesting question of law arises in this case. Two persons, Avanchi Abbaiah and Jagannadham, executed a registered sale deed on 2nd February, 1951. A suit was filed in the Court of the District Munsif, Warangal, for possession, against defendants 1 and 2 of the northern portion of the property and as against defendant 3 for the southern portion. The suit was contested by defendant No. 3 relying on two documents, one executed by Jagannadham, an unregistered sale deed dated 29th December, 1950 and another executed by Abbaiah, a mortgage deed dated 9th January, 1951. The plea of the third defendant was that he was in possession of the property under an unregistered sale deed and a mortgage not registered and he was entitled to retain possession and resist the suit for eviction under the doctrine of part performance u/s 53A of the Transfer of Property Act. The first Court decreed the suit because these two documents were not on stamp paper and also not registered. The Court however, held that the execution of the documents had been proved. It also held that these documents were brought into existence by the fraud of the vendor and under those circumstances, Section 53A could not be applied and it could not be regarded as possession having been taken in part performance. It held that because there was an out-right sale Section 53A of the Act would not apply to the case. As regards the possession under the mortgage, it likewise held that

Section 53A could have no application whatsoever.

2. The third defendant appealed to the lower Appellate Court and the lower Appellate Court differed from the Trial Court and held that it made no difference between a complete transfer and an agreement to transfer, for the purposes of Section 53A. It, therefore, held that Section 53A applied and that the plaintiff could not dispossess the third Defendant. It allowed the appeal and set aside the decree of the Trial Court. Hence this appeal.

3. It was argued by the learned counsel for the appellant that Section 53A contemplated the taking of possession of property in part performance of the contract, that is to say, where the sale had not been completed but in part performance of the contract between the parties if the vendee took possession of the property, Section 53A would apply, and not otherwise as in this case where there was an out-right sale. So far as that question is concerned, I do not think that the law makes any difference as between an out-right sale and an agreement to sell. What is necessary for the application of Section 53A is that there should be a contract to transfer immovable property for consideration and the transferee must have, in part performance of the contract, taken possession of the same or, being in possession, continues to be in possession under this contract and that would be regarded as having come to be in possession in furtherance of the contract. This doctrine of part performance, which is equitable doctrine, is available to a person who gets into possession of the property in pursuance of a contract of sale. It is not necessary that the sale should have been completed by a duly registered document of sale. I might in this connection refer to a decision of this Court in *Achayya v. Venkata Subba Rao* 1956 Andh LT 725 : AIR 1957 AP 854. It enables the transferee to defend his possession if the transferor seeks to enforce his right. Although it confers no title in the transferee, it nevertheless invests in him a right to resist dispossession where he is sought to be evicted. Therefore, the application of this principle to a case of out-right sale is well accepted and, therefore, the objection of the plaintiff on this ground cannot be accepted.

4. As stated above, the third defendant claims to be in possession of a portion of the property under an unregistered mortgage deed also and the suit is resisted on the basis of possession under an unregistered deed of mortgage being a mortgagee with possession. With regard to the right of a mortgagee, who is in possession of the property, but whose mortgage deed is unregistered, *Shri Sadashiv Rao* contends that under no circumstance could this doctrine apply to the case of a mortgagee under an unregistered deed of mortgage. No doubt the Supreme Court had occasion to consider this aspect in an action to eject the lessee on the ground that he had no registered deed of lease. The lessee pleaded that he in part performance of the agreement to lease came to be in possession and that there was a written and signed contract of lease in his favour; that he took possession in accordance with the signed contract to lease. Their Lordships observed that the lessee under such circumstances was entitled to retain

possession in spite of the fact that the lease deed which was compulsorily registrable had not been registered.

In effect they applied the equitable doctrine of part performance u/s 53A to the case of a lease also. Their Lordships found that in the case before them, in pursuance of the agreement to lease, the lessee paid the rent; he effected a mortgage in favour of third parties. Therefore they found that what could be done by a lessee under a registered lease deed had been done by the lessee in possession and only a formal document of lease had to be got and registered. Their Lordships observed that a formal lease was not necessary to attract the provisions of Section 53A of the Act. See *Ganeshi Lal Vs. Joti Pershad*, Therefore, as the law stands today, a vendee under an unregistered sale is entitled to be in possession and resist a suit for eviction on the basis of Section 53A; likewise, a lessee put in possession in part performance of the contract to lease.

5. So far as a usufructuary mortgagee is concerned, there are not clear authorities. Learned counsel for the respondent invited my attention to a decision of the Punjab High Court in *Chhotu Ram v. Kharaitiram* AIR 1950 P & H 604. That appeal arose out of an order passed u/s 33 of the Provincial Insolvency Act. One Pratap Singh was adjudicated an insolvent and the creditors sought to prove their debts. The Insolvency Court held that the debts of two persons were proved and that finding was upheld on appeal. In so far as one of the creditors, Chottu Ram was concerned, the Insolvency Court held that no doubt the debt was proved but the same was not a secured debt as the deals of the other two creditors were. Chottu Ram preferred an appeal. Before the High Court it was argued that they were in possession of the property and as such could use the mortgage in their favour as a shield to protect their possession when the mortgagor or the lessee in whom the interest of the mortgagor vested tried to dispossess them. So, the question was as to whether Section 53A of the Act applied to the case.

The view taken by the learned Judge was that the Insolvency Court did not put an end to the mortgagee under an unregistered document of mortgage. Therefore, if the mortgagee could protect his possession then, a Receiver obviously cannot take possession of the property from the mortgagee. While taking this view, the teamed Judge referred to a Full Bench decision of the Lahore High Court in *Milka Singh v. Shankari* AIR 1947 Lah 1, wherein it was held that an unregistered document can be used as a shield to protect possession, which possession had been got under the unregistered document. What the learned Judges purported to lay down in the Full Bench case was that Section 53A was based on equitable principles which were applicable to the whole of India including the Punjab and, therefore, though Section 53A did not in terms apply to the Punjab, the principle embodied therein applied. Therefore, the position in the Punjab was the same as that in any other province that the defence of part performance was available u/s 53A.

I do not think that that decision could be regarded as applying the principle of

the doctrine of part performance to the case of a mortgage. Learned counsel for the respondent relied upon a decision of Mack, J. in the Madras High Court in *Kanakaraj v. Sundara Raj Iyer* AIR 1955 (Mad) 3923. No doubt the learned Judge has stated as a general proposition of law that although a contract, which has to be registered, such as a sale deed or a mortgage deed, has not been registered, but where possession had passed to the transferee, this transfer should protect him under the equitable doctrine of part performance recognised u/s 53A of the Act. Although the Full report is not available, it would appear that was a case arising under Act IV of 1938 and in considering whether a mortgagor in such a case was entitled to scale down a decree, the learned Judge held that he was entitled to scale down. He also observed that the mortgagee was entitled u/s 53A to protect his possession and resist dispossession. The facts in that case are not clear in this regard as to whether the possession of a mortgagee in possession of the property under an unregistered document would be the same as that of a vendee.

6. Another decision of the Allahabad High Court by Sulaiman, J. In *Kesri Singh Vs. Channo*, cited By the learned counsel for the respondent, is only an authority for the proposition that an unregistered mortgage deed or a deed of sale, although does not pass title, is nevertheless admissible for other purposes to show the nature of the possession of the person In whose favour the document has been. I do not think that the equitable doctrine of part performance u/s 53A could be applied to the case of a mortgagee in possession.

7. Yet another decision of the Lahore High Court was cited by the learned counsel for the respondent viz., *Munshiram v. Baisakhi Ram* AIR 1947 Lah 335. In this case the learned Judge was considering the legal position of a purchaser who has been let into possession by a vendor under an unregistered sale deed, which did not pass title but where the consideration had been paid and where the parties bona fide thought that the transaction was complete. Adverting to another decision of the same High Court, the learned Judge said that such a vendee was lawfully in possession of the property and had a lien over it for the amount of consideration paid by him. But, with regard to a mortgagee in possession, his possession, according to the learned Judge differed from that of a vendee in that mortgagee might be ousted from possession by the mortgagor upon the satisfaction of the agreed conditions while the vendee could not be ousted and was entitled to be in possession where he had been let into possession after the payment of consideration.

Here also, a distinction was drawn between the possession of a vendee in part performance of the contract of sale and the mortgagee in possession under an unregistered mortgage deed. It would be difficult to apply the principles of Section 53A to cases of mortgage where the mortgagee happens to be in possession. Under the circumstances, I am of the opinion that while the respondent Is entitled to the relief viz., that he could resist the eviction by the plaintiff in so far as the northern portion is concerned, over which he is in

possession as a vendee, no relief could be granted to him in regard to the southern portion over which he is in possession only as a mortgagee.

8. The result is that the decree of the lower Appellate Court will be modified as under:

The plaintiff will be entitled to a decree for eviction as against the third defendant in so far as the southern portion of the suit property is concerned. The decree of the lower Appellate Court in regard to the northern portion will stand and is confirmed. The respondent will be entitled to recover proportionate costs from the appellant. Leave granted.