

(1987) 05 GAU CK 0002

In the Gauhati High Court

Case No : Second Appeal No. 99 of 1979

Sunil Kr. Sarkar (deceased by L.R's.) and Others	APPELLANT
Vs	
Aghor Kr. Basu (deceased by L.R's.) and Others	RESPONDENT

Date of Decision : 09-05-1987

Acts Referred:

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

Citation : AIR 1989 Guw 39

Hon'ble Judges : Manisana, J

Bench : Single Bench

Advocate : B.K. Goswami and P.K. Kalita, for the Appellant; A.R. Banerjee, A.K. Bhattacharyya and K. Agarwal, for the Respondent

Final Decision : Dismissed

Judgement

Manisana, J.—This appeal arises from the judgment and decree passed by the learned Assistant District Judge Goalpara in Title Appeal No. 99 of 1978 affirming the judgment and decree passed by the learned Munsiff (I), Dhubri in Title Suit No. 120 of 1975 decreeing the suit for ejectment or eviction of the defendant from the suit premises.

2. The plaintiff brought the suit stating that the defendant, on 8-12-1964, took lease of the suit premises at a monthly rent of Rs. 200/-. But the defendant defaulted in payment of rents for the suit premises from the month of February 1967. The defendant has also sublet a portion of the suit premises. The plaintiff demanded rents and possession of the suit premises, but the defendant failed to pay rent and to vacate the suit premises. The defendant contested the suit. The case of the defendant was that he took a loan of Rs. 4,100/- from the plaintiff by mortgaging the suit premises. The defendant was allowed to possess the suit premises as before on his own right. But a deed of sale, dated 5-12-64, registered on 8-12-64 was obtained by the plaintiff from the defendant for Rs. 8,200/-. A deed of re-conveyance dated 7-12-64 (Ext.- 4) registered on 8-12-64 was executed by the plaintiff for the re-sale of the suit premises at Rs. 8,200/-

stating that if the defendant pays the sum of Rs. 8,200/- on or before 7-12-75, the suit premises would be re-conveyed. There was also another agreement dated 7-12-65(64) (Ext.-5) for re-payment of loan of Rs. 4,100/- at a monthly instalment of Rs. 200/-. The further case of the defendant was that the sale deed (Ext.-3) was fraudulent and collusive; and the plaintiff had acquired no right, title and interest in the suit premises. The defendant has already paid the money and therefore is not entitled to be evicted.

3. The Courts below have held that the sale deed (Ext.-3) was out and out sale; and that the defendant was the tenant of the plaintiff on the basis of the lease deed (Ext.-5); and that the defendant did not pay the sum mentioned in the deed of re-conveyance (Ext.-4).

4. Mr. B. K. Goswami, the learned Counsel for the appellant, has submitted that the three documents, namely, the sale deed (Ext.-3), the re-conveyance deed (Ext.-4) and the lease deed (Ext.-5) if read together, the transaction was a mortgage and not a sale. Mr. Goswami has referred me to the decisions of the Supreme Court as reported in Bhaskar Waman Joshi (deceased) and Others Vs. Shrinarayan Rambilas Agarwal (deceased) and Others, and P.L. Bapuswami Vs. N. Pattay Gounder, to support his contention.

5. Mr. Banerjee, the learned counsel for the respondents, has submitted that u/s 58 of the T.P. Act, the defendant is debarred from taking the plea that the transaction was a mortgage.

6. The question which arises for consideration is whether the transaction was a mortgage by conditional sale. Sale deed, Ext. 3, was executed on 5-12-64. But it was registered on 8-12-64. On 7-12-64 a deed of re-conveyance (Ext.-4) was executed by the plaintiff in favour of the defendant. The deed of re-conveyance was also registered on 8-12-64. Under the deed of re-conveyance, the right of re-purchase was to be exercised within one year from the date of the agreement. On 7-12-64 another lease deed was also executed by the defendant in favour of the plaintiff agreeing to pay rent @ Rs. 200/- p.m. for occupation of the suit premises.

7. By Section 58(c) of the T.P. Act, a mortgage by a conditional sale is defined as follows :

" Mortgage by conditional sale : Where the mortgagor ostensibly sells the mortgaged property-

On condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

On condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale ;

Provided that no such transaction shall be deemed to be a mortgage, unless the

condition is embodied in the document which effects or purports to effect the sale."

Proviso to Section 58(c) envisages that the condition effecting or purporting to effect the sale a mortgage transaction must be incorporated in one and the same deed. In the present case, there were three separate deeds as already stated. The condition effecting or purporting to effect the sale as a mortgage has not been embodied in the sale deed (Ext-3). Therefore, u/s 58(c) the defendant is debarred from saying that the transaction was in the nature of mortgage or a mortgage by conditional sale. In a similar case, the Supreme Court, in *K. Simrathmull Vs. S. Nanjalingiah Gowder*, has held :

"It is unfortunate, having regard to the provision of Section 58(c) of the Transfer of Property Act, that the plaintiff is debarred from proving that the transaction was in the nature of a mortgage."

In the case before the Supreme Court, there were three deeds executed on the same day as parts of same transaction. They were : (i) a sale deed conveying to the defendant the suit land and house, (ii) a deed of re-conveyance in favour of the plaintiff providing that if the plaintiff could pay Rs. 1,500/- within 2 years, the defendant would execute a sale deed of transferring the land and house, and (iii) a rent-note by the plaintiff in favour of the defendant agreeing to pay rent at the rate of Rs. 26.25 per month for the occupation of the house and the land. Therefore, the decision of the Supreme Court is squarely applicable to the present case. In view of the above discussion, the transaction was not a mortgage.

The decisions of the Supreme Court in *Bhaskar Waman Joshi (deceased) and Others Vs. Shrinarayan Rambilas Agarwal (deceased) and Others*, and *P.L. Bapuswami Vs. N. Pattay Gounder*, referred to me by Mr. Goswami are not applicable to the present case for the reason that in those cases before the Supreme Court, condition effecting or purporting to effect the sale as a mortgage was stipulated in the sale deed itself, but in the present case there were three separate deeds. In this view of the matter, the contention of Mr. Goswami must fail.

8; Mr. Goswami, the learned counsel for the appellant, has submitted that the defendant is protected by or u/s 53A of the T. P. Act. Mr. Banerjee, the learned counsel for the respondents, has submitted that this plea was not taken before the Courts below, therefore, the plea of protection u/s 53A cannot be raised in the Second Appeal. In any event, the defendant is not protected by or u/s 53A. Be that as it may, the Courts below have concurrently given findings that the defendant was a tenant of the plaintiff.

9. The question then is,-- Whether a tenant continuing in possession after a contract to transfer written and signed by the landlord is protected by or u/s 53A? The pre-requisites for invoking the equitable doctrine of part performance are : (a) that there must be a contract to transfer for consideration immovable

property in writing signed by the person sought to be bound by it and from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty; (b) that it must be shown that the transferee has, in part-performance of the contract, either taken possession of the property or any part thereof, or the transferee being, already in possession, continues in possession and has done some act in furtherance of the contract; and (c) that the transferee has performed or is willing to perform his part of the contract.

10. If the tenant was already in possession of the property at the time of contract, what has to be decided is whether he continues in possession in part-performance of the contract. Therefore, mere continuance in possession does not satisfy the requirements u/s 53A. Where the tenant is already in possession of the property as a tenant and continues in possession in his capacity as a tenant after the contract it does not necessarily follow that he continues dispossession in part-performance of the contract. It is for the reason that a tenant is estopped from questioning the title of the landlord u/s 116 of the Evidence Act. Therefore, the tenant must show either from the contract or some other material or evidence that he continued to possess the property not in the capacity as a tenant, for example, he does not pay the rents under one of the terms of contract to sale in order to show that his possession is not in the capacity as a tenant, but in part-performance of the contract. In addition to it, the tenant has to show that he has done some act in furtherance of the contract, such as payment of necessary taxes to show that he was liable to pay the taxes as his possession was no longer as that of a tenant. Therefore, if a tenant has been in possession in his capacity as a tenant and not in part-performance of the contract, he cannot take the plea of protection u/s 53A.

11. In the present case, although there is a registered written contract (Ext.-4), there is no material to show that the defendant-tenant was possessing the suit premises in part-performance of the contract. The Courts below have also held that he had been possessing the suit premises in the capacity as tenant under the deed of lease (Ext-5) and not in part-performance of the contract. Therefore, the defendant is not qualified for the protection u/s 53A.

12. For the foregoing reasons, the appeal is dismissed No costs.