
(1959) 07 MP CK 0018
In the Madhya Pradesh High Court
Case No : S.A. No. 992 of 1956

Tantooram Meghwa

APPELLANT

Vs

Chandrika Sukhiram and another

RESPONDENT

Date of Decision : 16-07-1959

Acts Referred:

Transfer of Property Act, 1882 — Section 53A, 59

Citation : (1960) JLJ 706 : (1959) MPLJ 673

Hon'ble Judges : P.K. Tare, J

Bench : Single Bench

Advocate : R.K. Pandey, for the Appellant; V.S. Pandit, for the Respondent

Final Decision : Allowed

Judgement

P.K. Tare, J.

This appeal is by the Plaintiff against the decree dated 17-8-1956, passed by Shri R. L. Gupta, Additional District Judge, Durg, in Civil Appeal No. 29-A of 1956, confirming the decree passed by Shri A. R. Khan, Civil Judge Class II, Bemetara, in Civil Suit No. 65-A of 1954, dated 30-12-1955.

One Meghwa owned considerable property, including the suit house. He effected a partition of the family property between his sons, when the suit house was allotted to the share of Sukhiram. The genealogy of the parties is as under:

On 13-12-1938, Sukhiram purported to mortgage his house to one Sul-tanchand for an amount of Rs. 11, by an unregistered deed (Exh, P-3). On 11-6-1939 Mst. Fulkunwar repaid the debt, as Sukhiram was unable to do it. Therefore, Sukhiram executed an unregistered sale deed dated 11-6-1939 (Exh. P-4) in favour of his mother, who executed a registered gift deed dated 6-1-1954 (Exh. P-2) in favour of the present Appellant.

The Appellant filed the present suit for possession on the allegation that Mst. Fulkunwar, his mother had been in possession of the house after repaying the

debt of Sultanchand. It was alleged that Mst. Fulkunwar placed the Appellant in possession of the suit property in pursuance of the registered gift deed, and that the Respondents dispossessed the Appellant on or about 24-3-1954.

The Respondents' defence was that they and their predecessor had been in continuous possession of the suit house after the partition in the year 1933. They raised other pleas, which it is not necessary to advert to.

So far as the alleged mortgage deed dated 13-12-1938 (Exh. P-3) is concerned, it could not operate as a mortgage deed, as it was required to be registered. Section 59 of the Transfer of Property Act requires a mortgage deed to be registered and in writing. For want of registration, the document could operate, at the most, as a bond. However, that is not material in the present case.

As Mst. Fulkunwar had repaid the amount of the debt, Sukhram executed the unregistered sale deed dated 11-6-1939 (Exh. P-4) in favour of his mother. The deed was inadmissible in evidence except to show the nature of the possession, as permitted by the proviso to Section 49 of the Indian Registration Act. On account of the unregistered sale deed, the Appellant, being a Plaintiff, could not advance the plea of part performance u/s 53-A of the Transfer of Property Act, but could succeed only if he could prove an oral sale accompanied by delivery of possession, as required by Section 54 of the Transfer of Property Act. If it be held that he failed to prove delivery of possession, he would not succeed in the present appeal. On the other hand, if it be held that he established delivery of possession in pursuance of the oral sale, he would be entitled to contend that Mst. Fulkunwar acquired prescriptive title by adverse possession for more than the statutory period of 12 years. In that event Mst. Fulkunwar would be competent to execute a gift deed in favour of the Appellant.

The trial Judge was of opinion, that as the sale deed dated 11-6-1939 was unregistered, the same was inadmissible in evidence and, therefore, there could be no question of Mst. Fulkunwar's acquiring any title even on the strength of an oral sale accompanied by delivery of possession. However, the trial Judge held that a sale took place in fact, but the same was invalid. The learned appellate Judge also upheld this finding of the trial Judge, but negated the Appellant's claim, mainly on the question, that the Appellant had failed to prove delivery of possession.

The Learned Counsel for the Appellant urged that the finding of the lower Courts on the point of want of delivery of possession was not warranted by the pleadings as they stood. He urged that as there was no specific denial of the contract of sale and its unenforceability, as required by Order 6, Rule 8 and Order 8, Rule 2 of the CPC Code, the Appellant had not led extensive evidence on the point. All the same, the Learned Counsel pointed out that Tantooram (P. W. 1) and Ratan (P. W. 5) had testified to the fact relating to the delivery of possession in pursuance of the oral sale. It was pointed out by the Learned Counsel that the lower Courts ignored the pleadings, while arriving at this

conclusion, particularly when the contract of sale and its unenforceability had not been specifically traversed by the Respondents in their written statement. It is, therefore, necessary to examine the pleadings of the parties.

The Appellant, in para. 7 of his plaint, made the following allegations:

Soon after Sukhiram sold the said house to his mother Smt. Fulkunwar in lieu of the amount of Rs. 15 advanced by her to Sukhiram to pay of Seth Sultanchand's debts under a deed dated 11-6-1939 and put her in possession of the said house. Ever since Mst. Fulkunwar had been in possession of the house until the date hereinafter mentioned.

In answer to this, the Respondents made the following allegations in para. 7 of their written statement:

Para. 7 is denied. The Defendants have been in continuous possession of the suit house without any obstruction from the year 1933. Smt. Fulkunwar was never in possession of the suit house. Smt. Fulkunwar always stayed with her daughter-in-law Janwati, widow of Sukhnandan and is staying with the Plaintiff for the last one year.

From the above pleadings, it will be seen that there was no specific denial of the contract of sale or the delivery of possession in pursuance of the oral sale. What the Respondents alleged was that they were in possession of the suit property continuously from the year 1933, and, as such, they claimed prescriptive title by adverse possession. It was necessary for the Respondents to further plead facts either in admission or in denial of the contract of sale and the consequential delivery of possession. That not having been done, the Respondents would have no further defence, in case, the Appellant is able to establish the contract of sale and delivery of possession. Their Lordships of the Supreme Court in *Kalyanpur Lime Workers Ltd. Vs. State of Bihar and Another*, (sic), laid down as follows:

Rule 8 of Order VI of the CPC lays down that where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract. Rule 2 of Order VIII requires that the Defendant must raise by his pleadings all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality. These provisions leave no doubt that the party denying merely the factum of the contract and not alleging its unenforceability in law must be held bound by the pleadings and be precluded from raising the legality or validity of the contract.

Further on their Lordships made the following observations:

In view of these facts it seems to us clear that the High Court was not justified in allowing this question to be raised at the time of the arguments when the Plaintiff had had no opportunity to adduce evidence upon the question of fact whether the leases(sic) were signed on behalf of the Government. It is also clear that despite the best efforts of the Plaintiff, the Government withheld the production of the other leases. Without going further into the matter, we shall rest our decision on the ground that the question ought not to have been allowed to be raised and we accordingly reject the plea found on Section 30 on this ground.

In view of the law laid down by their Lordships of the Supreme Court, it is clear that in the present case, if the lower Courts found it as a fact that there was a contract of sale, the question about its enforceability not having been raised by the Respondents, the Courts below were precluded from examining the question of delivery of possession. Even according to the written statement of the Respondents, they admitted the recent possession of the Appellant along with Mst. Fulkunwar, although, according to them, it might have been for a year past.

Even assuming that the Appellant was required to prove delivery of possession in pursuance of the contract of sale, there was unrebutted evidence on behalf of the Appellant, inasmuch as Tantooram (P. W. 1) and Ratan (P. W. 5) had specifically testified to the delivery of possession in pursuance of the contract of sale. In spite of this evidence, the learned appellate Judge was influenced by the fact that Kanhaiyalal (P. W. 2), Kanhaiyalal (P. W. 3) and Bhagirathi (P. W. 4) did not depose anything about the delivery of possession. In fact the question about delivery of possession did not and could not arise in the present case, and even if it arose, there was evidence enough to warrant the inference that delivery of possession had in fact taken place.

It is not necessary that the delivery of possession in pursuance of the oral contract should be simultaneous with execution of the unregistered sale deed. The late J. Sen J. in AIR 1949 410 (Nagpur) held that what is necessary is delivery of possession in pursuance of the contract of sale, although such delivery of possession may be after the execution of the unregistered sale deed. I am in respectful agreement with the observations of the learned Judge. From the other facts and the circumstances on record, it is clear, as deposed to even by the second Respondent as D. W. 1, that after the death of Sukhiram, she and her son left the village for Bilaspur. Her explanation was that although she was staying at Bilaspur for a number of years, she continued to be in possession of the suit house. This version was given obviously with a view to get over the fact that the Appellant and Mst. Fulkunwar were in actual possession of the suit house before the filing of the suit till they were dispossessed by the Respondents. There was no explanation on behalf of the Respondents as to how the Appellant along with Mst. Fulkunwar came in possession of the house. If the Respondents' allegation about Tantooram taking forcible possession of the house be believed, Mst. Fulkunwar's joint possession along with the Appellant remained

unexplained. Mst. Fulkunwar's joint possession along with the Appellant was explainable only on the basis of the Appellant's evidence about delivery of possession in pursuance of the oral sale. Moreover, the said fact about delivery of possession is corroborated by the Respondents' absence from the village for such a long period of about 13 or 14 years. The Respondents did not, by their evidence, indicate as to, in what manner they continued possession over the suit house even though they had left the village for a number of years. Under these circumstances the Courts below were in error in holding that the Appellant had failed to prove delivery of possession in pursuance of the contract of sale.

The Learned Counsel for the Respondents urged that, although the Respondents may not have raised the plea regarding contract of sale and its enforceability, all the same, the parties understood the case correctly and fought it on that basis. In this connection attention was invited to the rule laid down by their Lordships of the Supreme Court in *Nagubai Ammal and Others Vs. B. Shama Rao and Others*, In my opinion, the principles laid down by their Lordships of the Supreme Court in the said case are inapplicable to the present case, where there was no specific denial of the contract of sale or its invalidity on any ground. As such, as indicated by their Lordships in *Kalyanpur Lime Workers Ltd. Vs. State of Bihar and Another*, the question about enforceability of the contract of sale did not arise. As such the present case would be governed by the rule laid down by their Lordships in *Messrs. Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar*, according to which, the Courts below could not base(sic) a finding on points or facts not pleaded by the Respondents. Therefore, the said finding of the Courts below, being beyond the questions arising out of the pleadings, the finding is liable to be ignored.

It was urged by the Learned Counsel for the Respondents that the finding about the delivery of possession, being a finding of fact, was binding on this Court, as laid down by their Lordships in the Supreme Court in *Deity Pattabhiramaswamy v. S. Hanvmayya and others* A I R 1959 S C 57 . Had it been a mere finding of fact to be arrived at, upon a consideration of the evidence, this Court would certainly be bound by the same. But, as indicated earlier, this finding was unwarranted by the pleadings on record. Therefore, it has to be ignored altogether. Secondly, even on merits, the finding was based upon a misapprehension of the pleadings, as also the facts on record, inasmuch as Mst. Fulkunwar's long possession for more than 12 years was completely ignored by the Courts below. As laid down by their Lordships of the Supreme Court in *Kakumanu Peda Subbayya and Another Vs. Kakumanu Akkamma and Another*, a finding based on misapprehension, can be reversed by the second appellate Court. Similarly, as laid down by their Lordships in *Arjan Singh v. Kartar Singh*, (1951) 2 SCR 258 a finding which is vitiated by illegalities can also be interfered with by the second appellate Court, Therefore, as laid down by their Lordships of the Supreme Court, the finding about the delivery of possession in the present case is liable to be ignored. At any rate, it is liable to be set aside, as it is vitiated by illegalities and is based on misapprehension. Therefore, differing from both

the Courts below, I am of opinion that the Appellant got a valid title on the basis of a registered gift deed dated 6-1-1954 (Exh, P-2) executed by Mst. Fulkunwar in favour of the Appellant, as she had in fact, been in possession of the suit house in pursuance of a contract of sale dated 11-6-1939, and, moreover, she had acquired a prescriptive title by adverse possession due to her possession for more than the statutory period of 12 years. Therefore, the Courts below were in error in dismissing the Appellant's claim for possession.

For the reasons aforesaid, this appeal succeeds and is allowed with costs throughout. The decrees of the Courts below are set aside and instead the Appellant's suit for possession is decreed. Counsel's fee according to schedule or certificate, whichever be less. Leave for filing Letters Patent Appeal is refused.