
(1938) 04 BOM CK 0001
In the Bombay High Court
Case No : Second Appeal No. 758 of 1934

Tukaram Ganpatrao Surve

APPELLANT

Vs

Atmaram Vinayak Gondhalekar

RESPONDENT

Date of Decision : 05-04-1938

Acts Referred:

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

Citation : AIR 1939 Bom 31 : (1938) 40 BOMLR 1192

Hon'ble Judges : Macklin, J;Broomfield, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Broomfield J.

1. The two principal points in this second appeal are : (1) whether the equity of redemption in the case of a usufructuary mortgage is tangible property so that it can be transferred by an unregistered deed where the value of the property does not exceed Rs. 100, and (2) whether Section 53A of the Transfer of Property Act, which came into force on April 1, 1930, is to be regarded as retrospective.

2. The facts so far as it is necessary to mention them are as follows :-The property in suit is a paddy field. In 1879 the owner Babaji Surve mortgaged it by a possessory mortgage to Gondhalekar, the ancestor of respondents Nos. 1 and 2. In 1890 the property, that is to say the equity of redemption, was sold in execution of a money decree against the mortgagor and it was purchased by Mahadev Khare, the father of respondents Nos. 10 and 11. In 1902 Khare sold it to Laxmanrao More, the father of respondent No. 3, by an unregistered sale-deed, exhibit 84. The consideration for the sale was Rs. 75. Laxmanrao redeemed the mortgage and got possession of the property from the mortgagee, and he and his son respondent No. 3 have been in possession ever since. In 1930 respondents Nos. 10 and 11, the sons of Mahadev Khare, purported to sell their rights to the present appellant, who sued to redeem the mortgage.

3. The suit was dismissed on the ground that the purchase of the equity of redemption in 1902 was proved and valid and that therefore the appellant acquired nothing by his purchase from respondents Nos. 10 and 11, The trial Judge only considered the question whether the sale-deed required registration u/s 17 of the Indian Registration Act and did not consider Section 54 of the Transfer of Property Act. The latter section provides as follows :-

"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Such transfer, in the case of tangible Immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible Immovable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

4. The District Judge in first appeal held that the sale by Khare to the father of respondent No. 3 in 1902 was a sale of tangible Immovable property and that as the value was less than Rs. 100 a registered deed was not required. He based his decision on the judgment of the majority of the full bench in *Sohan Lal v. Mohan Lal* ILR (1928) All. 986. It was there held by Mukerji and Kendall JJ. that the sale by a mortgagor of his interest in the property of which he has made a usufructuary mortgage is a sale of "tangible Immovable property". The basis of this decision, to put it very briefly, is that the mortgagor, in spite of executing a mortgage, whether it be a simple mortgage or a usufructuary mortgage, is still the owner of the property so mortgaged, and if he makes a transfer of his interest he makes a transfer of the property itself and not merely of an abstract right or of "certain rights out of his total bundle of rights" originally owned by him. Sulaiman Ag. C.J. differed from the other Judges on this particular point, and his reasons for doing so may be said to be summed up in what he says at p. 1003 of the report :-

The interest which the mortgagor possesses is not itself capable of being touched, nor is it such that an actual delivery of its possession can be effected by the mortgagor to the mortgagee. It seems difficult to conceive of a thing as being tangible when it is not capable of actual delivery of possession. Although, therefore, the mortgagor is the legal owner of the usufructuarily mortgaged property, whatever rights he possesses, so long as the mortgage subsists, cannot be treated as "tangible." The subject-matter of ownership is "tangible," but the interest which the mortgagor can, transfer is "intangible."

5. Prior to this full bench case the view taken by the Allahabad High Court and also by the Madras High Court in *Ramasami Pattar v. Chinnan Asari* ILR (1901) Mad. 449, was that the equity of redemption in a simple mortgage is tangible because; the mortgagor is in possession, but in a usufructuary mortgage it is intangible because he is not in physical possession. Conversely, as to the

mortgagee's interest, it is intangible if the mortgage is a simple mortgage, but tangible if the mortgage is a usufructuary mortgage. But " sale " is defined in Section 54 of the Transfer of Property Act as a transfer of ownership and " mortgage " is defined by contrast in Section 58 as a transfer of an interest, and having regard to these definitions the basis of the distinction sought to be made is not: very obvious. There is no difficulty about the interest of a simple mortgagee. That is clearly intangible property ; but the real reason is, I should say, not that the mortgagee is not in possession of tangible property" but that he is not the owner. The interest which he owns is a right to recover his money out of the property. But can it be said that the usufructuary mortgagee is in any better position in this respect ? It is true that he is in possession of tangible property but he is not the owner of it and cannot transfer the ownership of it. What he owns and can transfer is an interest in the property entitling him to remain in possession and enjoy the profits until the debt is paid, and that is intangible. On the other hand, the mortgagor is the owner of the property itself, and can transfer the property itself subject to the mortgage, and whether the mortgage is with or without possession, ii the mortgagor transfers his rights that may well be regarded in my opinion as a sale of tangible property. The definition of sale says nothing about possession, and though the purchaser is normally entitled to get possession of the property sold at once it is not always or necessarily so. No doubt it is correct to say, as Sulaiman Ag. C.J. says in *Sohan Lal v. Mohan Lal*, that a tangible thing must be capable of being possessed, but to say that in the case of a sale it must be capable of being immediately possessed by the transferee seems to me to be adding something to the definition of sale for which there is no warrant. As at present advised, therefore, I am of opinion that the decision of the majority of the Court in *Sohan Lal v. Mohan Lal* is correct.

6. The next point taken by the appellant was that even if the property be regarded as tangible property, since there is no registered deed, delivery is necessary to complete the transfer and there could be no delivery by the vendor because the mortgagee was in possession. " Delivery " is defined in Section 54 where it is provided : " Delivery of tangible irnmoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the. property." In the present case it was provided in the contract of sale that the vendee was to pay off the mortgagee and enjoy the property. That shows that it was in the contemplation of the parties that he should get possession of the land. He did in fact pay off the mortgage, as the endorsement on the mortgage deed shows, on the very same day and he got possession, and it has remained with him ever since. It may fairly be held therefore that he got possession with the assent of the vendor, and according to the decision in *Sibendrapada Banerjee v. Secretary of State jor India in Council* ILR (1907) Cal. 207 that is enough. It was held there that if on the date of the sale the vendee gets possession of the property with the assent expressed or implied of the vendor, that amounts to delivery of property within the meaning of the section.

7. Even if I am wrong as to the question whether it can be regarded as a sale of tangible property, there remains the point taken by the respondents based on Section 53A of the Transfer of Property Act. This section, which was added by the Amending Act XX of 1929 which came into force on April 1, 1930, provides :-

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,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract :

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

There is considerable conflict of authority as to whether this section can be regarded as retrospective. But on the whole, I think the better view is that it should be so regarded. It was held to be retrospective by Mr. Justice B. J. Wadia in *Suleman Haji Ahmed Umar Vs. P.N. Patell*, . In *Cooverjee H. Plumber Vs. Vasant Theosophical Co-Operative Housing Society, Ltd.*, , Mr. Justice Murphy expressed the opinion that the section has no retrospective effect. It does not appear however that the authorities on the point were cited, nor was there any discussion of the provisions of Section 63 of the Amending Act, on which the decision of the question must mainly depend. In a recent case of the Calcutta High Court, *Sk. Mohammed v. Janiini Nath* (1937) 42 C. W. N. 38, it has been held that Section 53A applies in the case of a suit brought after April 1, 1930. The same view has been taken in *Wakefield v. Kumar Rani Sayeeda Khatun* ILR (1936) Pat. 786. The only case to which our attention has been drawn in which a different view has been taken after argument is *Kanjeer and Mooljee Bros. v. Shanmugam Pillai* ILR (1932) Mad. 169, where it was held that Section 53A has no application to an agreement made prior to April 1, 1930.

8. There are a number of cases on Section 92 of the Act which has been held to be retrospective for reasons which apply equally to the case of Section 53A. Tota

Ram v. Ram Lal ILR (1932) All. 897. is a full bench case in which that view has been taken, mainly as the result of the construction of Section 63 of the Amending Act XX of 1929. This section begins by saying that certain provisions of the Amending Act (which do not include Section 92 or Section 53A) shall not be deemed in any way to affect the terms or incidents of any transfer of property made or effected before April 1, 1930, or to affect the validity or invalidity, effect or consequences of anything done or suffered before the aforesaid date. The second portion of the section says this :-

... and nothing in any other provision of this Act shall render invalid or in. any way affect anything already done before the 1st day of April, 1930, in any proceeding pending in a Court on that date : and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may; be, as if this Act had not been passed.

The most reasonable interpretation of the provisions of this section certainly seems to be that the sections of the Transfer of Property Act not specifically mentioned in Section 63 of the Amending Act were intended to be retrospective except in the case of proceedings pending in a Court on April 1, 1930.

9. This Allahabad case was approved of by N. J. Wadia J. in Isap Bapuji Amiji Vs. Umarji Abhram Adam, . I myself was a party to the decision in that case, and at that time I preferred not to express a decided opinion on the question whether Section 92 is to be regarded as retrospective, although I agreed with my learned brother that the reasoning of the Allahabad High Court in Tola Ram v. Ram Lal is preferable to that in Jagdeo Sahu v. Mahabir Prasad ILR (1933) Pat. 111, which was also cited but in which the point had not really been discussed and there was no reference to Section 63 of Act XX of 1929. Still more recently in Subraya Kuppa Joshi Vs. Timmanna Subraya Bhatta, disposed of by Mr. Justice Sen and myself we preferred to follow Tota Ram v. Ram Lal ILR (1932) All. 897. and Sk. Mahammed v. Jamini Nath (1937) 42 C. W. N. 38, rather than Lakshmi Amma v. Sankara JVarayana Menon ILR (1935) Mad. 359, Kanjee and Mooljee Bros. v. Shanmugam Pillai ILR (1932) Mad. 169 and Ko Pu Kun v. C. A. M. A. L. Firm ILR (1932) Ran. 465, where it has been held that Section 92 is not retrospective.

10. It has been argued for the appellant that his rights are not affected by reason of the proviso to Section 53A which says that " nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof." But in view of the admissions made by the appellant in cross-examination there is no substance in this argument. He says :-

Thikans Nos. 1 and 3 are in defendant No. 3's name in the botkhat and he pays the dast. I know of this state of things existing for the last 40/50 years. Defendant No. 3 is in actual possession. I did not personally inquire of Gondhalekar. Before my sale-deed I went to defendant No. 3 and made inquiries. He said I am in possession as owner.

Under the circumstances it must be held in my opinion that the appellant had at any rate constructive notice of the sale of the equity of redemption to defendant No. 3 in 1902.

11. I hold therefore that the appeal should be dismissed with costs.

Macklin J.

12. I agree. Apart from the authorities it seems to me that in a case of a sale of this kind it must be taken that what is sold is the actual physical property and not merely a tangible right with respect to property, and I say this not because in practice such sales are usually expressed to be in terms of land itself but because the consequences of such a sale seem, to me, without exception, to have an effect upon the ownership of the property itself and consequently sooner or later upon the physical possession of the property. Assuming (which is not the case here) that a sale of the equity of redemption were so expressed and that the mortgage on the property were even a usufructuary mortgage, (as to which it has been held that the mortgagor's right is merely intangible), it seems to me inconceivable for the vendee, having exercised the right which he has purchased in redeeming the mortgage, to be then excluded from possession on the ground that his sale, being in terms of the equity of redemption only, gave him no right with respect to the property itself. In such a case there can be no doubt that the redeeming vendee would be able to resist possession even against the vendor upon the strength of his purchase; and if that is so, I do not see how it can be said that what is sold is not property itself, which is a tangible thing. I think, therefore, that even in the case of a sale of property subject to a usufructuary mortgage the sale is of tangible Immovable property and can be effected in the case of a sale less than Rs. 100 by delivery of possession.

13. In the present case upon the facts I have no doubt that the vendee did in the end get possession by virtue of his purchase and the manner in which he obtained it shows, I think, that it was by delivery of possession within the meaning of Section 54 of the Transfer of Property Act as interpreted in that respect by *Sibendrapada Banerjee v. Secretary of State for India* in Council ILR (1907) Cal. 207. The sale in my view is therefore a valid sale and the defendants are entitled to resist the suit upon that ground.

14. But even if the sale were invalid for want of registration, I think that the defendants' reliance on the doctrine of part performance as expressed in Section 53A of the Transfer of Property Act is justified. As my learned brother has stated, there is some conflict of judicial opinion upon the point. But I agree in thinking that the better opinion is that in the case of proceedings instituted after the enactment of Section 53A the section is retrospective in its effect. I do not think that it is necessary to deal further with the authorities beyond saying that the reasoning expressed in *Tota Ram v. Ram Lal* ILR (1932) All. 897., with respect to Section 92 of the Act [a case that was followed in *Isap Bapuji Amiji Vs. Umarji Abhram Adam*, , commends itself to me in preference to the ruling of the Madras

High Court in Kanjee and Mooljee Bros. v. Shanmugam Pillai ILR (1932) Mad. 169, and that I am not able to apply a different form of reasoning to Section 53A from that which has been applied in this case to Section 92. Upon the facts it is clear that the plaintiff is not entitled to plead want of notice, and he is therefore bound by the sale to defendant No. 3 in 1902.

15. The appeal must therefore be dismissed.