

(1951) 07 OHC CK 0003
In the Orissa High Court
Case No : Second Appeal No. 115 of 1948

Udayanarayan Ananga Bhima Deo	Vs	APPELLANT
Badia Dasu and Others		RESPONDENT

Date of Decision : 25-07-1951

Acts Referred:

General Clauses Act, 1897 — Section 3(25)
Specific Relief Act, 1877 — Section 27A
Transfer of Property Act, 1882 — Section 107, 3, 4

Citation : AIR 1952 Ori 116 : (1955) 21 CLT 501

Hon'ble Judges : Ray, C.J.;Narasimham, J

Bench : Division Bench

Advocate : B.N. Das, for the Appellant; G.B. Mohanti and H. Mohapatra, for the Respondent

Final Decision : Allowed

Judgement

Ray, C.J.—This is a plaintiff's Second Appeal in a suit for recovery of Mustajari rent. According to the plaintiff, the defendants took a Mustajari lease for collecting rents from the tenants for the Fasli 1353 and agreed to pay a certain sum, namely, Rs. 14/3/12/11. They have not respected the contract. Hence the suit.

2. The defence is that there was no such lease nor did they make any collections. On the contrary, they state that the estate-holder himself made khas collections for certain period of the suit land. Both the Courts below have come to a finding that, in fact, there was a lease though in law there was not. The learned Munsif came to a very clear finding that after the execution of the lease, there was given delivery of possession to the defendants who, in pursuance thereof, entered upon the tenure and made collections. The plaintiff, however, adduced no evidence to show what, was the amount collected by them.

3. The following questions of law arose out of the issues joined between the parties:

- "1. whether the lease Ex. 1 is a lease, or is only a bid-sheet;
2. Whether the lease is one which is compulsorily registrable; and
3. Whether the plaintiff is entitled to get any relief under the lease if it is held that the same is invalid for want of registration."
4. It may be true that there was an auction and the defendants were the highest bidders for the lease. But we are convinced on reading Ex. 1 that it is a lease and also it purports to be so. It embodies all the terms of the lease and is executed both by the lessor and lessee. The real contention, on this head, is that if this document is not a lease-deed, can the lease, alleged in this case, be said to have been created by an oral agreement and can such a lease be made orally as it is for one year only. On reference to Rule 107, T.P. Act, it is clear that all leases of immovable properties other than those from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made either by a registered instrument or by oral agreement accompanied by delivery of possession. According to Mr. B. N. Das, the learned counsel for the appellant, it was in course of the auction that the terms of the lease were settled and the relation between the parties was created and that the so-called lease-deed was a mere memorandum of events and facts that had taken place and that the delivery of possession, subsequent to the written document (Ex. 1), should be taken to be a delivery accompanying oral agreement within the meaning of the section. None of the Courts below have accepted this contention nor are we going to accept it. As I have already indicated, it was a regular lease-deed and is, therefore, a document compulsorily registrable. It cannot, therefore, be taken into evidence in proof of creating any relationship of lessor and lessee as between the parties. But for what I am going to say presently, on this ground alone, the plaintiff could not have been non-suited.
5. It is necessary to mention here the contention raised in the very able argument of Mr. H. Mohapatra, the learned counsel for the respondents, to the effect that lease of a right to collect rents is not a lease of immovable property within the meaning of Section 107, T.P. Act. What he means to say is this that the immovable property must be such which must be capable of being given possession of and which must be capable of being occupied. It is next urged that what was demised not being premises, the plaintiff cannot recover damages for use and occupation either. This contention, however, is completely negatived by the definition of "immovable property" in the General Clauses Act. According to this definition, "immovable property" includes "benefits to arise out of land". So, the right to collect rent from the tenants who pay it for use and occupation of lands is a right to the benefits arising out of those lands. That this definition of the General Clauses Act governs the provisions of the T.P. Act and Specific Relief Act can hardly be contested, Section 4 of the General Clauses Act lays down that this definition of immovable property given in the Act will apply to an acts passed subsequent to the year 1868. It is, therefore, a lease of immovable property within the meaning of T.P. Act as well as S.R. Act. It has been the settled law that

Mustajir leases are leases of immovable properties. Reference ,in this connexion, can be made to a decision of the Madras High Court in the case of " Udaya Pratapa Singh and Others Vs. Gourachendra Dyano Sumanto and Others, The principles laid down there get full support from the decisions reported in "Mangalswami v. Subbia Pillai", 34 Mad 64 and AIR 1933 230 (Privy Council) . Their Lordships of the Privy Council have quoted with approval the statement of law pronounced by the learned Judges who decided the case reported in "Mangalasamy v. Subbiah Pillay" 34 Mad 64. On that very decision AIR 1937 Mad 856 Mr. Justice Pandrang Row has held after a very lucid and forceful discussion that the right to collect rent from the tenants constitutes "premises" which are capable of use and occupation. This meets the second branch of Mr. H. Mohapatra"s contention as set forth above.

6. The next question that pertinently arises is whether after having based his cause of action on that invalid lease, the plaintiff is entitled to any relief. Two answers are admissible: one is that the plaintiff is entitled to be compensated by payment of damages by the defendants for use and occupation of the immovable properties concerned. Now this relief will require a finding as to what is the amount that has been collected from the tenants of the disputed village. As I have said, the plaintiff has adduced no evidence to show that. If this was the only remedy available, the cause might have had to be remanded to the Courts below for giving the plaintiff an opportunity to adduce further evidence in that behalf. The second remedy that is available to the plaintiff is the one contemplated in Section 27A of the Specific Relief Act. Section 27-A reads:

"Subject to the provisions of this chapter where a contract to lease immovable property is made in writing signed by the parties thereto, or on their behalf, either party may, notwithstanding that the contract, though required to be registered, has not been registered, sue the other for specific performance of the contract if,--(a) Where specific performance is claimed by the lessor, he has delivered possession of the property to the lessee in part performance of the contract, and....."

This section was added by Section 3 of the T.P. (Amendment) Supplementary Act, 1929 (XXI of 29) introducing Section 53A into the T.P. Act. Both the sections are replica of the equity jurisdiction exercised in England in cases where justice is repudiated for want of a technical flaw in a transaction to one of the parties who in all good faith has complied with and performed the terms relating to the transaction on his part. Transactions, like deeds of transfer or deeds of lease, sometimes used to be left incomplete for want of necessary registration and either the transferor or the transferee, or either the lessor or the lessee used to be deprived of the rights under the contract owing from other party concerned even though he had performed his part of it. Under varying conditions, equity may have had to be invoked by either the transferor or the transferee according as one or the other has performed his part of the contract and advantage is taken by the opposite party of the unenforceability or invalidity of the concerned

deed for want of registration. According as the reliefs vary, the matters form the subject-matter of two different Acts, namely, T.P. Act and Specific Relief Act. For one party, it was always a contract, and for other, it was something more than that. Hence this division between the two Acts; but they are considered to be supplementing each other. According to Section 53A, where any person contracts to transfer for consideration by writing which is not registered and the transferee after performance of his part of the contract has come into possession, the transferor is prevented from taking advantage of the incompleteness in the document and being allowed to take back possession of the property on ejecting the transferee. It was, however, one of the conditions precedent for application of the provision u/s 53A that the transferee must have paid the consideration. The case of a lessor and a lessee is a case which very appropriately is taken into S.R.Ac. It more or less involves specific performance of the contract, Section 53A affords protection to one who can invoke part performance to his aid, that is, the transferee-in-possession, while Section 27A deals with enforcement of contract by specific performance. It is not disputed at the Bar that the present suit for recovery of the amount, agreed to be paid under the lease, is for enforcement of contract. Mr. Mohapatra, in disputing the application of Section 27A, S. R. Act, also raises the plea that this is a contract of lease of immovable property but not a contract to lease immovable property which is dealt with in Section 27A. He says that it is a lease of immovable property though incomplete for lack of formality of registration. It is not a mere contract to lease which is intended to be dealt with within the purview of Section 27A. If this is acceded to, this section as well as Section 53A of the T.P. Act will be reduced to nullity. It has to be noted that behind every transfer of immovable property, there is a contract which when carried out terminated in a completed transfer. So long as it is inchoate in that respect it is an enforceable contract, that is, nothing deters from exercising right of specific performance of contract. In pursuance of the ban on receipt of unregistered but compulsorily registrable document provided in Section 49 of the Indian Registration Act, the judicial pronouncements were in favour of excluding the said documents and also of oral evidence by way of secondary proof of the terms. Hence the amendment. It has to be noted that another supplementary legislation was also effected at the same time by adding a proviso to Section 49 of the Indian Registration Act. The proviso reads:

"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 53A of the T.P. Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument."

The answer to this contention, in the aforesaid context, is that what was intended to create a lease but failed to do so on account of technical defect, namely, non-registration of the document, is to be treated as a contract to lease. Section 27A comes into application where one of the parties has performed his

part of the contract and the other has taken shelter under the invalidity of the document and repudiates it. The section has been enacted to supply defects of justice and help either party to have the transaction completed and the right accruing under it enforced. In this case, it has been found, as a fact, that the lessor delivered possession to the lessee in part performance of the contract. A controversy was raised at the Bar that the delivery of possession was not by way of part performance of the contract contained in the alleged lease-deed (Ex. 1). Though not in this connexion but in another connexion, this question also was agitated in the Court of Appeal below. It has to be noted that the judgment of the learned Subordinate Judge in this respect is unsatisfactory and we have, therefore, to fall back upon the finding of the learned Munsif which has not been displaced by the learned Subordinate Judge. The point urged was that whether there was delivery of possession in pursuance of the agreement, that being the contention of the plaintiff in order to make out a case of completed lease u/s 107, T.P. Act. The learned Munsif rejected the case of oral agreement accompanied with delivery of possession but held that the delivery of possession was in pursuance of the written agreement. It would be profitable to quote a passage from his judgment which relates to this aspect of the case:

"Admittedly in this case there is no registered instrument of lease..... On the other hand it is clear from the evidence let in on the plaintiff's side that the delivery of possession granted to the Mustajars was in pursuance of the document Ex. 1."

7. The learned counsel for the respondents (Mr. H. Mohapatra) argues that this finding will not conclude the point particularly as the question of applicability of Section 27A of the S. R. Act never raised and the point was never broached from the appropriate angle of vision. No doubt, there is some force in this contention, but however, the question whether the delivery of possession was made in pursuance of the oral agreement was pointedly raised and negatived. The necessary conclusion that the delivery of possession was in part performance of the lease must inevitably follow. In the circumstances, there will be no use in sending the case back asking the trial Court to come to a finding on that very point. We are, therefore, unhesitatingly of opinion that the plaintiff will be entitled to a decree for the sum agreed to be paid in Ex. 1 by way of specific performance of the contract which was, in fact, entered into between the parties and the lessor did fulfil his part as contemplated in Section 27A of the S. R. Act. The applicability of this section had been raised in the first appellate Court. That Court was in error in saying that the suit had not been found framed as one for specific performance of contract. This view is totally misconceived. The only part of the contract that was necessary to be enforced was payment of the consideration by the lessee. They had already got the benefit from the lessor's performance of his part of the contract. They could not keep the benefit to themselves and repudiate the contract. Besides, this question had been raised before the first appellate Court and so it could be raised in Second Appeal provided, as is the case here, all the necessary findings of facts are there. In the

circumstances, we direct that the plaintiff's suit be decreed for the claim.

8. As the plaintiff's approach to the subject-matter of the suit was wrong and he was vacillating from one point to another, he shall be deprived of the costs which should have otherwise followed his success.

9. In the result, the suit is decreed but each party should bear his own costs throughout.

Narasimham, J.

10. I agree.