

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.04.2015

CORAM

THE HON'BLE MS. JUSTICE R. MALA

S.A.No.750 of 1999

Date of Reserving the Judgment 24.04.2015	Date of Pronouncing the Judgment 29.04.2015
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Balakrishnan
S/o.Marimuthu

... Plaintiff/Respondent/Appellant

Vs

Venkataraman
S/o.Narayanan

... Defendant/Appellant/Respondent

Prayer:

Second appeal filed under Section 100 of CPC against the judgment and decree dated 27.04.1998 made in A.S.No.92 of 1997 on the file of the Additional Sub-Court, Mayiladuthurai, reversing the judgment and decree dated 30.01.1996 in O.S.No.531 of 1993 on the file of the Additional District Munsif Court, Mayiladuthurai.

For Appellant : Mr.S.Sounthar

For Respondent : Mr.V.Raghavachari

JUDGMENT

The second appeal arises out of the judgment and decree dated 27.04.1998 made in A.S.No.92 of 1997 on the file of the Additional Sub-Court, Mayiladuthurai, reversing the judgment and decree dated 30.01.1996 made in O.S.No.531 of 1993 on the file of the Additional District Munsif Court, Mayiladuthurai.

2.The averments made in the plaint are as follows:-

The appellant herein as plaintiff has filed the suit for recovery of possession and also for mesne profits stating that the respondent herein entered into a sale agreement as per Ex.A1 and in pursuance of the sale agreement he was put into possession. He filed the suit in O.S.No.355 of 1988 for injunction wherein the appellant herein has raised the plea that there is no sale agreement and he

only borrowed the money under usufructory mortgage. But the Trial Court has decreed the suit and granted injunction. However, the respondent herein was not ready and willing to perform his part of the contract and hence, he issued a notice under Ex.A.1 to rescind the contract. A reply has been received under Ex.A.2. However, he was neither ready to execute the sale deed nor filed the suit for specific performance, hence he was constrained to file the suit for recovery of possession and mesne profits.

3. The gist and essence of the written statement filed by the defendant is as follows:

The respondent filed the written statement stating that out of the sale consideration of Rs.3,000/-, only Rs.600/- is due. But it is also barred by limitation. He also prescribed title by adverse possession and also he is entitled to invoke Section 53-A of the Transfer of Property Act. Hence, his right has to be protected. Thus, the respondent prayed for dismissal of the suit.

4. The Learned Trial Judge after considering the averments both in the plaint and written statement and arguments on either side counsel, has framed necessary issues and on perusing the oral and documentary evidence viz., P.W.1, D.W.1 and Exs.A1 and A2 and Exs.B1 to B14, decreed the suit. Aggrieved against the judgment and decree passed by the trial court, the defendant preferred an appeal in A.S.No.92 of 1997 on the file of the Additional Sub-Court, Mayiladuthurai.

5. The learned First Appellate Court has considered the arguments advanced on either side and framed necessary point for consideration and reversed the Judgment and Decree passed by the Trial Court and allowed the appeal. Against the Decree and Judgment passed by the first Appellate Court, the present second appeal has been preferred by the plaintiff/appellant.

6. At the time of the admission, the following question of law has been framed.

a. Whether the respondent who failed to assert his hostile possession in an earlier suit between same parties in O.S.No.355/88 is entitled to claim adverse possession from 1977?

b. Whether the Lower Appellate Court erred in finding that the respondent perfected title to suit property overlooking the earlier suit between the parties in O.S.355/88 where there was a dispute between the parties regarding the nature and character of the document Ex.A1? Whether the adverse possession of the respondent will start only from the date of Judgment in that suit namely 15.7.1992.?

Substantial Question of Law (a) & (b):

7. The admitted facts are that the properties were purchased by the appellant under the registered sale deed dated 24.05.1974 under EX.B.7. He entered into a sale agreement under Ex.B.1 and in pursuance of that possession has been given. Thereafter, on 12.12.1977, an unregistered sale deed has been executed under Ex.B.8. The respondent paid the portion of sale consideration under Ex.B.4 to Ex.B.6 viz., letter of the appellant requesting for sale consideration. So, the balance sale consideration is only Rs.600/- which is an admitted fact. It is also an admitted fact that the appellant herein has filed the suit in O.S.No.355 of 1988 for injunction claiming that he is in possession of the suit property on the basis of the sale agreement, as the respondent has attempted to interfere his possession, the appellant herein was forced to file the suit. The written statement filed by the respondent is marked as Ex.B.2 and the judgment is marked as Ex.B.3, wherein it was held that the Ex.B.1 is the sale agreement. Thus, since the respondent herein has put in possession in pursuant of the sale agreement, he is entitled to invoke Section 53-A of the Transfer of property Act. So, his possession cannot be disturbed and hence, injunction has been granted.

8. The appellant herein has issued notice under Ex.A.1 to rescind/revoke the sale agreement and also claiming recovery of possession and mesne profits. Ex.A.2/reply has been issued stating that he is entitled to protection under part performance as per Section 53-A of Transfer of Property Act and also he prescribe title by adverse possession.

9. The learned counsel for the appellant would submit that on one hand the respondent has raised the plea of adverse possession and on the other hand the respondent is trying to protect his possession by invoking Section 53-A of Transfer of Property Act. Both the pleas are inconsistent with each other and so, the respondent is not entitled to plead the same. To substantiate the said argument, the learned counsel relied upon the following decisions:

1. (1996) 1 Supreme Court Cases 639, Mohan Lal (Deceased) Through his Lrs. Kachiru and Others v. Mirza Abdul Gaffar and Another.
2. (2002) 2 Supreme Court Cases 612, Mool Chand Bakhru and Another v. Rohan and Others.

and prayed for setting aside the judgment of the first appellate Court.

10. Resisting the same, the learned counsel for the respondent would submit that the appellant herein is entitled to invoke Section 53-A of the Transfer of Property Act. Merely because the suit for specific performance is barred by time, it will not be a reason for dispossession. Hence, the learned counsel prayed for dismissal of this appeal. To substantiate his argument, the learned counsel for the respondent relied upon the decision reported in 2004 (3) CTC 278, Mahadeva and Others v. Tanabai.

11. Considered the rival submissions made by both sides. Now this Court has to decide whether the appellant is entitled to protection under Section 53-A of the Transfer of Property Act? Or whether the respondent has prescribed title by adverse possession?

12. At this juncture, it is appropriate to consider the decisions relied on by both the parties.

13.1. The learned counsel for the appellant relied upon the decision reported in (1996) 1 Supreme Court Cases 639, Mohan Lal (Deceased) Through his Lrs. Kachiru and Others v. Mirza Abdul Gaffar and Another, it was held that the plea of adverse possession is inconsistent with the plea for retention of possession by operation of Section 53-A of the Transfer of Property Act. It is appropriate to incorporate paragraphs 3 and 6 of the said decision:

"3. The only question is whether the appellant is entitled to retain possession of the suit property. Two pleas have been raised by the appellant in defence. One is that having remained in possession from March 8, 1956, he has perfected his title by prescription. Secondly, he pleaded that he is entitled to retain his possession by operation of Section 53-A of the Transfer of Property Act, 1882.

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6. Even otherwise, in a suit for possession filed by the respondent, successor-in-interest of the transferor as a subsequent purchaser, the earlier transferee must plead and prove that he is ready and willing to perform his part of the contract so as to enable him to retain his possession of the immovable property held under the agreement. The High Court has pointed out that he has not expressly pleaded this in the written statement. We have gone through the written statement. The High Court is right in its conclusion. Except vaguely denying that he is not ready and willing to perform his part, he did not specifically plead it. Under Section 16(c) of Specific Relief Act, 1963, the plaintiff must plead in the plaint, his readiness and willingness from the date of the contract till date of the decree. The plaintiff who seeks

enforcement of the agreement is enjoined to establish the same. Equally, when transferee seeks to avail of Section 53-A to retain possession of the property which he had under the contract, it would also be incumbent upon the transferee to plead and prove his readiness and willingness to perform his part of the contract. He who comes to equity must do equity. The doctrine of readiness and willingness is an emphatic way of expression to establish that the transferee always abides by the terms of the agreement and is willing to perform his part of the contract. Part performance, as statutory right is conditioned upon the transferee's continuous willingness to perform his part of the contract in terms covenanted thereunder."

13.2. In the decision relied on by the learned counsel for the appellant reported in (2002) 2 Supreme Court Cases 612, Mool Chand Bakhru and Another v. Rohan and Others, in paragraph 9, it was held as follows:

"9. The High Court relying upon a judgment of this Court in Mohan Lal (deceased) through his LRs. Kachru & Ors. Vs. Mirza Abdul Gaffar & Anr., 1996 (1) SCC 639, came to the conclusion that since the respondents were claiming to be in possession of the property in part performance of the agreement to sell, the plea of acquisition of title by adverse possession was not available to them. Learned counsel appearing for the respondents did not assail this finding of the High Court. The view expressed in Mohan Lal (deceased) through his LRs. Kachru & Ors. case (supra) has been reiterated by this Court in Roop Singh Vs. Ram Singh, 2000 (3) SCC 708. It has been held in the latter judgment that the pleas of adverse possession and retaining the possession by operation of Section 53-A of the Act are inconsistent with each other. Such a plea is not available to a proposed vendee."

14.1. On the other hand, the learned counsel for the respondent has relied upon the decision reported in 2004 (3) CTC 278, Mahadeva and Others v. Tanabai, wherein at paragraphs 5 and 8, it was held as follows:

"5. By a brief reasoning that the defendants who were claiming title by adverse possession also, could not succeed by claiming protection under Section 53-A of the T.P. Act and inasmuch as the plea of acquisition of title by adverse possession was negatived, their possession must be held to be illegal, the High Court has allowed the Second Appeal and directed the suit filed by the plaintiff to be decreed. Aggrieved by the judgment of the High Court, the defendants have filed this appeal by special leave.

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8. The judgment of the High Court is based on a question framed during the course of writing of the judgment which is in departure from the two questions of law on which the appeal was admitted for hearing. The whole emphasis shifted from the core issues. Then, the High Court has not discussed any law and has also not assigned reason, much less a satisfactory one, for taking a view different from the one concurrently taken by the two courts below. The singular reason assigned by the High Court for denying the benefit of Section 53-A of the TP Act is not a sound reason by itself in view of the decision of this Court in *Shrimant Shamrao Suryavanshi and Anr. Vs. Pralhad Bhairoba Suryavanshi (Dead) by Lrs. and Ors.* - (2002) 3 SCC 676. This Court has held that merely because the suit for specific performance at the instance of the vendee has become barred by limitation that by itself is not enough to deny the benefit of the plea of part performance of agreement of sale to the person in possession."

Thus, merely because the suit for specific performance has been barred by limitation, that by itself is not enough to deny the benefit of plea for retention to the person in possession. In the instant case, the respondent herein has filed the suit for bare injunction stating that the appellant had attempted to interfere with his possession even though the sale agreement has been entered into and even after receipt of Ex.A2/notice, he has not filed the suit for specific performance, whereas he has only stated that he is the owner of the property. Hence, I am of the view that the above citation is not applicable to the facts of the present case.

15. Considering the facts of the present case in the light of the above citations, it is pertinent to note that notice has been issued to rescind the contract as per Ex.A.1. But he has not filed any suit for specific performance. Per contra, in his written statement, he has raised a plea stating that the sale deed has been executed. It is true that Ex.B.8/Sale deed dated 12.12.1977 is a nomenclature sale deed and an unregistered one. An unregistered sale deed for a sale consideration of more than Rs.100/- is illegal. But he has not taken any steps to register the document within the stipulated time. It is true that the suit for injunction filed in O.S.No.355 of 1988 is for permanent injunction and not for temporary injunction. Hence, his right has to be protected. It is also true that the permanent injunction was also granted. But till the agreement is in force, he is entitled to invoke Section 53-A of the Transfer of Property Act. However, the sale agreement has been rescind by the appellant under Ex.A.1. Even after the receipt of the notice, the respondent has not stated that he is ready and willing to perform his part of the contract. Whereas he has taken the plea that only a sum Rs.600/- has to be paid and the balance amount had already

been paid. However, the payment of balance amount of Rs.600/- was also barred by limitation and also he prescribed title by adverse possession.

16. At this juncture, it is appropriate to incorporate Section 53-A of the Transfer of Property Act.

"53-A. Part performance - 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 therefor 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. "

17. As per the decision reported in (2002) 3 Supreme Court Cases 676, Shrimant Samrao Suryavanshi and Another v. Pralhad Bhairoba Suryavanshi (Dead) by LRs and Others, there are certain conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under Section 53-A of the Act. The necessary conditions are:

- 1) there must be a contract to transfer for consideration of any immovable property;
- 2) the contract must be in writing, signed by the transferor, or by someone on his behalf;
- 3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;
- 4) the transferee must in part-performance of the contract take possession of the property, or of any part thereof;

5) the transferee must have done some act in furtherance of the contract; and

6) the transferee must have performed or be willing to perform his part of the contract.

18. On considering the facts of the present case, in the light of the above conditions, there exists condition no.1 viz., Ex.B1/Sale agreement. As regards the condition no.6 that "the transferee must have performed or be willing to perform his part of the contract", the respondent herein in his Ex.B.2/Notice has stated that he had paid the entire sale consideration from the year 1997 onwards and he is in possession as true owner and hence, he is the owner of the property. But in paragraph 6 of the written statement, he has stated that the balance amount of Rs.600/- had been agreed to be received in front of the Registrar at the time of registration. But the amount is also barred by limitation. It is appropriate to incorporate the relevant portion of the counter:

"துஅந்த பத்திர தேதியில் ரூ.200./ம் வாதி பெற்றுக்கொண்டுள்ளார். ஆக கூடுதல் ரூ.2,400./ம் பட்டுவாடா ஆகி ரூ.600./மட்டில் பாக்கி இருந்தது. அந்த தொகை பதிவாளர் முன்பாக பெற்றுக்கொள்ள வேண்டியதாக கண்டு எழுதிக் கொடுத்துள்ளார். அந்த கிளையும் காலாவதியால் பாதிக்கப்பட்டுவிட்ட."

19. In paragraph 8, he has claimed protection under Section 53-A of the Transfer of Property Act. Whereas the first appellate Court in paragraph 11 of its judgment has held that the appellant has prescribed title by adverse possession, since the suit has not been filed within 12 years from the date of the sale agreement viz., 12.12.1977. So his right has been extinguished. But the above finding does not hold good.

20. It is a well settled principle of law that a person must specifically plead adverse possession and prove the same by way of oral and documentary evidence. However, in the instant case, the respondent has not pleaded adverse possession and proved the same. Furthermore, it is appropriate to consider that the respondent herein has stated that the amount due is only Rs.600/- but it is barred by time. Whereas in the Ex.A.1/Notice, it was specifically mentioned that he is not ready and willing to perform his part of the contract and hence, he rescind the contract. Further, he has not filed the suit for specific performance.

21. Now this Court has to consider that as per the decision of the Hon'ble Apex Court reported in (1996) 1 Supreme Court Cases 639, Mohan Lal (Deceased) Through his Lrs. Kachiru and Others v. Mirza Abdul Gaffar and Another and 2004 (3) CTC 278, Mahadeva and Others v. Tanabai, both the defence under Section 53-A of the Transfer of

Property Act and pleading of adverse possession cannot be taken by a party. Here the adverse possession has not been proved.

22. At this juncture, it is appropriate to incorporate Section 27 of the Limitation Act.

"27. Extinguishment of right to property.—At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."

23. In the present case, the respondent herein has admitted the title of the appellant and on the basis of the Ex.B.1/Sale agreement he filed the suit for permanent injunction and that has been decreed as per Ex.B.3 only on 15th July 1992. So, once he has admitted that he is in possession in pursuance of the sale agreement, Section 27 of the Limitation Act does not come to his rescue.

24. Admittedly the appellant herein is the owner of the property and the respondent herein has entered into a sale agreement under Ex.B.1. The respondent as plaintiff has also filed the suit for injunction and injunction has been granted in his favour. The sale agreement has been rescind as per Ex.A.1/Notice and the suit for recovery of possession has been filed within one year. Hence, the suit is not barred by time. Further, the respondent herein has not taken any steps to file the suit for specific performance but whereas his defence is that the balance sale consideration is barred by time.

25. Since the respondent herein has failed to accept the title of the appellant/plaintiff adverse to his interest, right with his knowledge he is in possession for more than the statutory period, then only he is entitled to adverse possession by prescription. But here, in the earlier suit, the respondent herein has sought for protection under Section 53-A of the Transfer of Property Act and has also sought for injunction. The said case has been disposed of on 15th July 1992, as per Ex.B.3 and the appellant herein has issued Ex.A.1/Notice on 27.01.1993 and rescind the sale agreement and filed the suit for recovery of possession. So, the finding of the first appellate Court that the right of the appellant has extinguished does not merit acceptance.

26. Thus, the Substantial question of law (a) and (b) is answered as follows:

The respondent has neither prescribed title by adverse possession nor he is entitled to retain possession by invoking Section 53-A of Transfer of Property Act. Only from the date on which sale agreement has been rescind/revoked under Ex.A.1/Notice dated 27.01.1993, the possession adverse to the interest of the true owner has been started. The plaint has been filed on 29.04.1993, which is well within 12 years from the date of issuance of the Ex.A.1/Notice to rescind the sale agreement. The substantial question of law (a) and (b) are answered accordingly.

27. For the foregoing reasons, the judgment of the first appellate Court is unsustainable and it is hereby set aside and the judgment of the Trial Court is restored on file. The second appeal is allowed with costs.

28. In fine,

(a) The Second Appeal is allowed with costs.

(b) The judgment and decree passed by the first appellate Court is hereby set aside.

(c) The judgment and decree passed by the Trial Court is hereby restored.

(d) The time granted for delivery is two months.

-s/d-

Assistant Registrar (CS-II)

True Copy

Sub-Assistant Registrar

To

1. The Additional Subordinate Judge, Mayiladuthurai.

2. The Additional District Munsif, Mayiladuthurai.

3. The Section Officer, V.R. Section, High Court, Chennai.

+ 1 cc to Mr. S. Sounthar, Advocate SR 23660

+ 1 cc to Mr. V. Raghavachari, Advocate SR 23294

jsv(co)

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