

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

SA. No.234 of 2017

JUDGMENT:

This Second Appeal is filed challenging the judgment and decree dt.16.11.2016 in A.S.No.225 of 2010 of the VI Additional District Judge, (Fast Track Court), Narsapur reversing the judgment and decree dt.14.10.2008 in O.S.No.94 of 2002 of the Senior Civil Judge, Narsapur.

2. The appellant is 2nd defendant in the suit.

3. The 1st respondent is the adopted son of one Venkateswarlu and Seetharatnam under a registered Adoption Deed executed on 02.06.1969. Venkateswarlu died in 1971 leaving 1st respondent and his adopted mother Seetharatnam as his legal heirs.

4. The appellant's father, Subba Rao, is the brother of Seetharatnam; the 2nd respondent is wife of said Subba Rao; and respondents 3 & 4 are other children of Subba Rao.

Pleadings in Plaint of 1st respondent/Plaintiff:

5. 1st respondent/plaintiff contended that his adoptive father, Venkateswarlu, was the owner of the property and

since the 1st respondent was a minor and his adoptive mother Seetharatnam is widow, and could not look after the cultivation personally and since the property is situated in Ravipadu of Poduru Mandal, where the defendants are residing, Subba Rao, her brother, came forward to assist the 1st respondent and his mother to take care of the property and in fact the property was leased out to Subba Rao under an oral lease.

6. Subsequently, Subba Rao died and mother of 1st respondent/plaintiff also died on 05.01.2001.

7. The 1st respondent contended that after the death of Subba Rao, since the defendants were in grief, the 1st respondent and his mother did not insist for payment of rent.

8. Subsequently, the 1st respondent became major and became capable of cultivating the land, and he issued legal notice on 09.11.1999(Ex.A1) to the appellant and other respondents calling upon them to pay arrears of rent and sought delivery of property.

9. On receiving the same, under Ex.A2 dt.27.11.1999, appellant and 2nd respondent gave a reply enclosing Ex.B2 agreement of sale dt.26.01.1972.

10. The 1st respondent and his mother denied the execution of the said document as well as another promissory note dt.19.06.1969 relied upon by the appellant and respondents 2 to 4.

11. The 1st respondent contended that the appellant and respondents 2 to 4 were in possession and enjoyment of the property only as tenants but not as owners and that Subba Rao, through whom the appellant and respondents 2 to 4 are claiming, during his life time never informed about the said promissory note or Ex.B2. They also denied their signatures on the said document(Ex.B2).

12. Therefore, the 1st respondent sought relief of declaration of title and also recovery of possession in O.S.No.94 of 2002 on the file of Senior Civil Judge's Court, Narsapur.

The Written Statement of appellant/2nd defendant:

13. Written statement was filed by the appellant and respondents 2 to 4. They denied the tenancy and placed reliance on Ex.B2. While admitting the title of Venkateshwarlu and the fact that on his death title to property devolved on 1st respondent and his adopted

mother Seetharatnam, they contended that promissory note for a sum of Rs.10,000/- was executed by late Venkateswarlu in 1969 for (i) family expenses, (ii) purchase of some land at Kowthalam village and (iii) for effecting repairs and to bring the land into cultivation, agreeing to pay interest @ 12 % per annum; that after he died, the 2nd respondent/1st defendant demanded the 1st respondent and his mother to discharge the promissory note debt; and since the appellant and respondents 2 to 4 offered higher amount, they agreed to sell the property to them and executed Ex.B2. They contended that Subba Rao was in exclusive possession of the property and on his death, the property devolved on the appellant and respondents 2 to 4.

14. On the basis of rival contentions, the Court below framed the following issues:

- “1. Whether the case of the plaintiff that late Subbarao and defendant put in possession of suit land as tenants of plaintiff and Seetharatnam in May, 1972 is true?
2. Whether the possessing sale agreement dt.26.01.1972 for suit land alleged to have executed by plaintiff and executed by plaintiff and Seetharatnam in favour of late T.Subbarao is true, valid and binding on plaintiff and Seetharatnam?
3. Whether the defendants have perfected their title to suit land by adverse possession?
4. Whether the plaintiff is entitled to the relief of declaration of title to the suit property and

possession of the same after ejecting the defendants there from?"

15. Before the trial Court, 1st respondent examined PWs.1 to 3 and marked Exs.A1 to A14. The appellant and respondents 2 to 4 examined DWs.1 to 5 and marked Exs.B1 to B11. Exs.X1 to X8 were also marked.

16. By judgment and decree dt.14.10.2008, the trial Court dismissed the suit. It held that the 1st respondent could not prove tenancy between himself and the appellant and respondents 2 to 4, that the 1st respondent could not explain how the original title deed of the year 1955 (Ex.B4), under which the property was purchased by late Venkateswarlu, went into the custody of Subba Rao, that there were no receipts relating to the Maktha allegedly paid by Subba Rao to 1st respondent and his adoptive mother. It held that when Exs.B2 and B3 were denied by the 1st respondent, he should establish that the signature purporting to belong to him and his mother Seetharatnam in Ex.B2 and B3 do not belong to them; and that, if really the 1st respondent was absolute owner of the property, the 1st respondent should have taken steps within reasonable time to file the suit after demise of his adoptive parent, but he kept quiet.

17. Assailing the same, 1st respondent preferred A.S.No.225 of 2010 to the Court of VI Additional District Judge (Fast Track Court), Narsapur.

18. By judgment and decree dt.16.11.2016 the said appeal was allowed. The lower appellate Court held that Ex.B4 filed by the appellant is the sale deed dt.05.07.1955 in favour of the 1st respondent's adoptive father Venkateswarlu and Ex.B5 is its link document and these documents establish the title of Venkateswarlu. It held that in view of Ex.A6 Adoption Deed dt.02.06.1969, the adoption of the 1st respondent by Vankateswarlu and his wife Seetharatnam also cannot be disputed. After considering the recitals in Ex.B2, it held that in the recitals, it is clear that it is a sale deed and not an agreement of sale and since it is unregistered, on that basis, the appellant and respondents 2 to 4 cannot become owners of the property. It noted that a bunch of tax receipts filed by the appellant and respondents 2 to 4 marked as Ex.B11 itself showed that they are in the name of Venkateswarlu, but the tax was paid by Subba Rao and that this establishes the tenancy between the parties and he would not have paid the tax, if he had nothing to do with Venkateswarlu. It also rejected the plea of part performance raised by appellant under

Section 53A of the Transfer of Property of Act, 1882. It observed that the appellant and respondents 2 to 4 even after the death of Subba Rao did not attempt to get a registered sale deed. It held that under the provisions of Registration Act, 1908 and also under the Transfer of Property Act, 1882, a sale deed is required to be registered and since Ex.B2 is not registered, no title passes to the appellant and respondents 2 to 5. It therefore held that the 1st respondent is the owner of the property having inherited the same from his adoptive father, Venkateswarlu, that the appellant and respondents 2 to 4 are tenants and they cannot be allowed to continue in possession without paying rent and they are liable to be evicted from the property.

19. Assailing the same, this Second Appeal is filed.

20. Sri C.C.S.Sastry, counsel for appellant raised two contentions; firstly that the finding of the lower appellate Court about the tenancy is erroneous; and secondly that the appellant is entitled to protect his possession invoking Section 53A of Transport of Property Act, 1882.

21. From the facts narrated above it is clear that the 1st respondent is the adopted son of Seetharatnam and Venkateswarlu through Adoption Deed dt.02.06.1969,

that Seetharatnam had a brother by name Subba Rao, that appellant and respondents 2 to 4 are his wife and children, that both Seetharatnam and Subba Rao died. Admittedly Venkateswarlu died in 1971.

22. According to 1st respondent, Subba Rao, being the brother of his adoptive mother, Seetharatnam, offered to help them by managing the property which is situated in Ravipadu of Poduru Mandal, where Subba Rao was residing. Admittedly, at that time, the 1st respondent was minor and his mother Seetharatnam being a widow, were dependent on Subba Rao to manage the property.

23. While the 1st respondent contended that Subba Rao and his family were tenants, the appellant and respondents 2 to 4 denied the said allegation in the suit, but the title of the 1st respondent to the property was rightly held to be established by the 1st respondent in view of Ex.B4 sale deed dt.05.07.1955 executed in favour of Venkateswarlu by the lower appellate Court.

24. Since there is no registered sale deed in favour of Subba Rao or the appellant or respondents 2 to 4, title cannot be said to have passed to them.

25. Recitals of Ex.B2 were considered by the lower appellate Court and it held that it is a sale deed, which is unregistered and since it is not registered as required by the Transfer of Property Act, 1882 and the Registration Act, 1908, title could not have passed in favour of Subba Rao.

26. It may be that there is no direct evidence about the tenancy in the form of a tenancy agreement or filing of Maktha receipts, but that factor is not relevant, once the title of the 1st respondent is established, to entitle him to seek recovery of possession on the basis of said title.

27. Section 53A of the Transfer of Property Act is an equitable doctrine of part performance. In ***Mashadik and Another v. Devi Sahai and Others***¹ the Supreme Court observed that:

“10. In order to qualify for the protection conferred by the equitable doctrine of part performance as enacted in section 53A, the following facts will have to be established:

(1) That the transferor has contracted 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;

¹ AIR 1982 SC 989

- (2) *That 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:*
- (3) *That the transferee has done some act in furtherance of the contract: and*
- (4) *That the transferee has already or is willing to perform his part of the contract." (see Nathulal v. Phool Chand. (1970 (2) SCR 854 at p. 858 = AIR 1970 SC 546 at p.548))*

There was no dispute that the aforementioned conditions have to be satisfied to make good the defence of part performance. The controversy is on their application to the facts of the case."

28. Thus Section 53A is an equitable doctrine and for it to be applied, equity must be in favour of the transferee.

29. In the present case, the 1st respondent and his mother Seetharatnam relied upon her brother Subba Rao, through whom the appellant and respondents 2 to 4 are claiming the property.

30. After the death of Venkateswarlu as a brother of Seetharatnam, it was his duty to act in a manner not prejudicial to the interest of the 1st respondent and his mother Seetharatnam, who trusted him. But instead he created Ex.B2 to defeat their title. He also did nothing to rely upon Ex.B2 during his lifetime. No attempt was made by him to get it registered during his life time.

31. I am therefore of the opinion that this equitable doctrine of part performance indicated in Section 53A of the Transfer of Property Act, 1882 cannot be invoked by the appellant and respondents 2 to 4 to claim through Subba Rao, who took advantage of his widowed sister, Seetharatnam, and the 1st respondent, who was a minor at the time when Ex.B2 was executed.

32. Therefore, in the facts and circumstances of the case, I am of the opinion that the appellant cannot be allowed to invoke Section 53A of the Transfer of Property Act, 1882 and therefore I do not find any merit in this Second Appeal, and it is accordingly dismissed. There shall be no order as to costs.

33. Consequently, miscellaneous petitions pending, if any, shall stand dismissed.

M.S.RAMACHANDRA RAO, J

13th April, 2017.

gra