

Eramma Vs. Parwatamma

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Court : Karnataka

Decided On : Mar-05-1971

Reported in : AIR1972Kant121; AIR1972Mys121; (1971)2MysLJ179

Judge : M. Sadanandaswamy, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 4 and 53A; Hyderabad Tenancy and Agricultural Lands Act, 1950 - Sections 47 and 47(1); Bengal Municipal Act - Sections 103; Madhya Bharat Land Revenue and Tenancy Act, 1950 - Sections 70(4); Tenancy Law; Mysore Land Reforms Act - Sections 80 and 142

Appeal No. : Second Appeal No. 395 of 1966

Appellant : Eramma

Respondent : Parwatamma

Advocate for Def. : K.R. Karanth, Adv.

Advocate for Pet/Ap. : S.G. Sundaraswamy, Adv.

Disposition : Appeal dismissed

Judgement :

M. Sadanandaswamy, J.

1. Appellant is the plaintiff. The respondent is the defendant. The suit was filed for possession of lands, survey Nos. 150, 151 and 158 of Modalapur. Manvi Taluk and for consequential reliefs. The plaintiff's case was that she was dispossessed by defendant and her husband in the year 1954 and the revenue records were manipulated in their favour. The defendant pleaded that there was an agreement of sale dated 27-6-1951 between the plaintiff and the defendant, that the plaintiff had thereunder agreed to sell the suit properties and two other properties for a sum of Rs. 6,000/-. that a sum of Rs. 5,000/- was paid to the plaintiff, that the defendant got possession of the properties in pursuance to the said agreement and continues in possession as owner. The defendant relies on Section 53-A of the Transfer of Property Act to defeat the claim of the plaintiff in the suit

2. The trial court framed the following issues:--

(i) Whether the agreement of sale dated 27-6-1951 filed by the defendant has been executed by the plaintiff and what is its legal effect?

(ii) Whether the said agreement deed is inadmissible in evidence?

(iii) Whether the possession of the suit land had been transferred in pursuance of the abovementioned agreement of sale and what is its legal effect?

(iv) Whether the court-fee paid in the case is sufficient?

(v) Whether the contract for sale as stated by the defendant is null and void under the Hyderabad Tenancy Act?

(vi) To what relief is the plaintiff entitled?

Both the lower courts have held that the agreement to sell dated 27-6-1951 has been executed by the plaintiff, that the said deed is admissible in evidence and that possession of the suit properties had been transferred in pursuance to the abovesaid deed to the defendant. These are findings on questions of fact and cannot be interfered with in this second appeal.

3. Both the lower courts have also held the 5th issue in favour of the defendant. Both the lower courts have dismissed the suit.

4. On behalf of the appellant, it is urged by the learned Advocate General, firstly that the document Ext. D-1 is not a mere agreement to sell but purpose to be a sale deed and is hit by Section 47 of the Hyderabad Tenancy Act, secondly, even assuming that it is only an agreement to sell it is hit by Section 47 of the Hyderabad Tenancy Act; and thirdly, that the defendant is not entitled to rely upon Section 53-A of the Transfer of Property Act since the transaction under Ext. D-1 is invalid as it is for-bidden by law under Section 47 (1) of the Hyderabad Tenancy Act.

5. Section 47 (1) of the Hyderabad Tenancy and Agricultural Lands Act 21 of 1950 reads as follows:--

'47 (1) Notwithstanding anything contained in any other law for the time being in force or in any decree or order of a court, no permanent alienation and no other transfer of agricultural land shall be valid unless it has been made with the previous sanction of the Collector.'

Exhibit D-1 is termed as 'Kararpatra Patra.' The recitals in the said document are to the effect that the lands are sold for Rs. 60,00/- that after receiving Rs. 5,000/- in cash, the possession of the lands was handed over to the defendant that day. It also recites that from that day the plaintiff has no right over the properties and that three months from that date, the plaintiff will give a registered rajinama and get the patta transferred and that if she fails to do so the defendant may get the patta registered on the basis of this rajinama.

6. Under Section 53-A of the Transfer of Property Act, the conditions necessary for making out the defence of part performance to an action in ejectment by the owner are as set out by the Supreme Court in AIR 1970 SC 548 (Nathulal v. Phool Chand). i. e..

(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;

(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 performed or is willing to perform his part of the contract.

According to the findings of the lower courts, all the four requirements have been complied with in this case by the defendant. What is contended on behalf of the appellant is that Section 53-A cannot be availed of by the defendant on account of the fact that the document Ext. D-1 is invalid and unenforceable in law by virtue of Section 47 (1) of the Hyderabad Tenancy and Agricultural Lands Act.

7. It is not disputed that the properties are agricultural lands and that the sanction contemplated under Section 47 (1) has not been obtained. The decision of this court in (1963) 2 Mys LJ 146. (Kempe Hussain Saheb v. Murtuza Sab) is relied on. That was a case of an unregistered sale deed under which an agricultural land was purported to be sold and the sanction contemplated under Section 47 (1) had not been obtained. Following the decision in AIR 1928 PC 273. it was held that the equitable doctrine of part performance cannot overrule the straight provisions of a statute and since the provisions contained in Section 47 (1) have to be enforced 'notwithstanding anything contained in any other law' the provisions of Section 53-A of the Transfer of Property Act have to yield to the provisions of Section 47 of the Hyderabad Tenancy Act. It was accordingly held that the purchaser could not seek the protection of Section 53-A of the Transfer of Property Act. The appellant also relied on the decision in AIR 1957 Andh Pra 859. (Akram Mea v. Secunderabad Municipal Corporation) wherein it has been held that the contract contemplated by Section 53-A is a valid contract, but that if the contract is invalid under any other law, that section cannot validate that which the law says is invalid. In this case, the decision of the Privy Council in AIR 1928 PC 273 was followed: But in : AIR 1963 AP232 , it was held that in a suit for recovery of possession, the plea of the defendant that under an unregistered contract of sale he has been in possession of the land, would not render possession of the defendant illegal when

his defence under Section 53-A of the Transfer of Property Act cannot be shut out on account of the provisions of Section 47 of the Hyderabad Tenancy Act. Again in (1965) 2 Andh WR 61 it was held that the defendant who claimed protection of Section 53-A of the Transfer of Property Act on the basis that he obtained possession under an agreement to sell from the plaintiff was negated on the ground that the transaction was made in contravention of Section 47 of the Hyderabad Tenancy and Agricultural Lands Act. The decisions of the Andhra Pradesh High Court are not uniform. The appellant next relied on the decision in : AIR1967 Cal423 , (Jitendra Nath v. Baduria Municipality) wherein it was held that Section 53-A is not available since in that case it was held that there was no transfer at all as it is contrary to the mandatory provisions of Section 103 of the Bengal Municipal Act. It was held that due to non-compliance with the said provisions there was no contract and there was no instrument of transfer at all as denied under Section 53-A. The next decision relied on is : AIR1956 Pat308 . (Raju Roy v. Kasinath Roy) wherein it has been observed that the contract contemplated under Section 53-A is a contract which is enforceable under law and in that case, it was held that possession had not been delivered to the transferee in pursuance to the contract, under Section 53-A. This will not apply to the facts of the present case.

It is contended on behalf of the appellant, that the terms of Ext. D-1 show that it purports to be a sale deed. Alternatively, it was contended by the learned Advocate General that even if it is held to be an agreement to sell, even then the transaction under Ext. D-1 is hit by Section 47 (1) of the Hyderabad Tenancy Act. He has relied on (1970) 1 Mys LJ 16, (Totappa v. Kalappa) for this purpose. In that case, the defendant resisted the suit on the ground that he had paid the full price and taken possession under an agreement of sale from the plaintiff. It was held that the transaction was really a permanent alienation which was prohibited by Section 47 Hyderabad Tenancy and Agricultural Lands Act and that the defendant could not rely on Section 53-A of Transfer of Property Act since the transaction was expressly prohibited by statute.

8. On behalf of the respondent, Sri Karanth. her learned counsel, contended that the two decisions of this court in (1963) 2 Mys LJ 146 and (1970) 1 Mys LJ 16, are

no longer good law in view of the decisions of the Supreme Court in : [1964]2SCR495 and : [1970]2SCR854 . The question to be considered therefore is whether his contention is correct In : AIR1957 Bom138 . (Nanasaheb v. Appa) it was held that where the sale is not duly completed by law that instrument may be looked upon as a contract within the meaning of Section 53-A of the Transfer of Property Act. It cannot be disputed that in this case Ext. D-1 could be considered as an instrument of transfer of property within the meaning of Section 53-A of the Transfer of Property Act.

9. In , (Motilal v. Nanhelal) it has been held that where the vendor agreed to transfer the cultivating rights in Sir land, there was an implied covenant on his part to do all things necessary to effect such transfer. This decision was followed in : [1964]2SCR495 . In that case, the plaintiff entered into a contract of sale of a house belonging to the defendant on the plot granted by the Government. One of the terms of the contract was that the vendor had to obtain the necessary permission of the Chief Commissioner of Delhi for the sale within two months of the agreement and that if permission was not produced within the time, it was open to the vendees to extend the time or cancel the contract. The vendor made an application for permission but it was refused. The vendees filed a suit for specific performance of the contract or alternatively for damages. It was found that the vendees were always ready to perform their part of the contract and that it was the vendor who wilfully refused to perform her part of the contract and that time was the essence of the contract. It was held that the court had to enforce the terms of the contract and enjoin upon the vendor to make the necessary application for permission and that in the event the permission was refused the vendees would be entitled to damages. The High Court relying mainly on the decision of the Privy Council in had come to the conclusion that there was a completed contract, that the contention in the agreement that the vendor would obtain sanction of the Commissioner did not render the contract incomplete. The High Court also had pointed out that if the Chief Commissioner refused to grant the sanction, the plain-tiff may not be able to enforce the decree for specific performance of the contract but that it would be no bar for the court passing the decree. The Supreme Court modified the decree of the High Court and added the clause that the defendant-vendor should make the necessary application to the

Chief Commissioner within one month, and further within one month of the receipt of such sanction the vendor should convey the property to the plaintiffs, and that in the event of the sanction being refused, the plaintiffs-purchasers should be entitled to damages. In that case, there was an express agreement of contract that the vendor should obtain sanction of the Chief Commissioner, but that circumstance is not material for the application of the principle laid down in that decision in view of the Privy Council decision in which was followed in that decision.

10. In : [1970]2SCR854 , the lands stood in the name of the brother of the vendor. The vendor agreed to sell the land and the factory standing thereon and received part of the purchase price and put the purchaser in possession of the property. The agreement was entered into on February 26, 1951. The purchaser agreed to pay the balance on May 7, 1951. The terms of the agreement were reduced to writing. On the plea that the purchaser failed to pay on the due date the balance of price, the vendor rescinded the contract on October 8, 1951 and filed a suit in May 1954 for a decree for possession of the land and the factory and for mesne profits from the date of delivery till possession was restored alleging that the purchaser was a trespasser because he had, contrary to the express terms of the agreement, made default in payment of the balance of the purchase price on or before May, 1951. The said purchaser contended that the vendor had failed to get the name of his brother deleted from the revenue record according to the terms of the agreement, that the purchaser was ready and willing to pay the balance price. The trial court decreed the suit holding that the purchaser had committed breach of contract. In appeal, the High Court reversed the decree and declared that the vendor was entitled to the balance of the consideration as also the mesne profits till the date on which the balance price was deposited by the purchaser. Subject to this direction the purchaser was allowed to retain possession of the property. It was also directed that if the purchaser committed default the vendor may claim possession of the entire property with mesne profits.

11. The High Court held that the vendor was not guilty of breach of contract for the purchaser had arranged with a Bank to borrow the sum needed by him and that the purchaser had sufficient source at his disposal to pay the balance amount due. The trial court as well as the High Court held that the purchaser failed to pay the

amount on or before the stipulated date. May 7, 1951 and that he had not paid the amount as pleaded by him. Though the vendor had undertaken to get the name of his brother removed from the revenue records and to get Ms own name entered the land used to stand in the name of his brother till October 1952 and before that date the vendor rescinded the contract. By virtue of Section 70 (4) of the Madhya Bharat Land Revenue and Tenancy Act 66 of 1950, the purchaser not being an agriculturist, the property could not be sold to him without the sanction of the State Government. Even in the absence of any specific clause dealing with this matter, it was held that a condition that the vendor will secure the sanction under Section 70 (4) must be implied since it is well settled that where by statute property is not transferable without the permission of the authority, an agreement to transfer the property must be deemed subject to the implied condition that the transferor will obtain the sanction of the authority concerned. The decisions in and : [1964]2SCR495 , (Chandnee Widya Vati Madden v. C. L. Katial) were relied on. Another argument was raised on behalf of the vendor that under Section 70 (8) of the Madhya Bharat Land Revenue and Tenancy Act the plea of part performance under Section 53-A of the Transfer of Property Act was not available to a person put in possession of the property under contract of sale. Section 70 (8) provided that no sale under this section shall be deemed to be valid until the sale deed had been registered in accordance with the law of registration. It was held that this clause only requires not only the conditions prescribed by Section 70 but also registration of the sale deed as a condition required to be complied with before a sale is valid. Since the plaintiff relied upon a contract of sale and the equity which he was entitled to set up to defend his possession against the claim made by the vendor relying upon the doctrine of part performance under Section 53-A of the Transfer of Property Act it was held that there is nothing in Section 70 (8) which would operate as a bar. After setting out the conditions necessary for making out the defence of part performance to an action of an ejectment by the owner as set out already above, it was observed:--

'If these conditions are fulfilled 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 is debarred from enforcing against the transferee 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.'

It was contended in that case that the plaintiff-purchaser was not willing to perform his part of the contract. It was held that by virtue of Section 4 of the Transfer of Property Act, the Chapters on Transfer of Property Act which relate to contract are to be taken as part of the Indian Contract Act, 1872, and that therefore, under the terms of the contract the obligation of the parties have to be performed in certain sequence and that one of the parties to the contract cannot require compliance by the other party without in the first instance performing his own part of the contract in the sequence the obligations are perform-able by him earlier. Consequently, it was held that since the implied condition of the contract that the vendor shall secure the sanction of the Collector to the transfer under Section 70 (4) of the Madhya Bharat Land Revenue and Tenancy Act. 1950 was never fulfilled the purchaser-defendant could not be called upon to pay the balance of the price and that therefore there is no default on the part of defendant-purchaser. The defendant-purchaser, was, therefore, held entitled to the protection of Section 53-A of the Transfer of Property Act.

12. Under Section 47 (1) of the Hyderabad Tenancy Act, no permanent alienation and no other transfer of agricultural land shall be valid unless it has been made with the previous sanction of the Collector. Hence a permanent alienation or other transfer of agricultural land is valid if the previous sanction of the Collector has been obtained for the transaction. It is clear from the decision in : [1964]2SCR495 that if there had been an express term in the contract of sale in the present case that the plaintiff would undertake to obtain the previous sanction of the collector to the sale, then the defendant would enforce the terms of the contract by a suit for specific performance and the court could pass a decree in terms similar to the one passed in the case before the Supreme Court, namely, a decree directing the vendor to apply for the necessary sanction within a specified time and to execute the sale deed within a specified time, thereafter, and that in case the sanction is refused by the Collector the purchaser would be entitled to damages. The fact that there is no such express condition in Ext. D-1 that the vendor would undertake to

obtain the previous sanction of the Collector for the transaction makes no difference to the application of the principles of Section 53-A of the Transfer of Property Act by virtue of the decision in : [1970]2SCR854 . Such an undertaking on the part of the vendor is an implied condition of the terms of the contract under Ext. D-1. Hence the defendant is entitled to rely upon the provisions of Section 53-A of the Transfer of Property Act to protect her possession of the suit properties.

13. It was contended on behalf of the appellant by the learned Advocate General that under Section 53-A of the Transfer of Property Act, the protection afforded to the transferee who has obtained possession of the property in performance of the contract, is available only in cases where the contract which is required to be registered has not been registered and not in any other case. To accept this argument would be to ignore that part of the section which reads '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 Supreme Court has also held in : [1970]2SCR854 that one of the conditions for completing the contract in that case was the sanction required under Section 70 (4) of the Madhya Bharat Act, and though the transaction in that case had not been completed due to want of the sanction, the transferor was debarred from enforcing against the transferee any right other than a right expressly provided by the contract. Hence this contention of the appellant has to be rejected.

14. It is clear from the two decisions of the Supreme Court referred to above, that in a case like the present one, there is an implied term of the contract between the parties that the previous sanction of the Collector has to be obtained by the vendor in order to complete the transfer and that until and unless such sanction is obtained, the transaction is not complete and enforceable. It is also clear that the transferee can file a suit for specific performance in terms of the contract to enforce the terms of such a contract. The transferee who has obtained possession in terms of the contract and has satisfied the court that the other conditions in Section 53-A of the Transfer of Property Act are fulfilled can rely upon the terms of such a contract to seek the protection of the Court under Section 53-A of the Transfer of Property Act, and the vendor will be debarred from enforcing any right in the property against the transferee except the rights expressly provided by the

terms of the contract. The decision in (1963) 2 Mys LJ 146 proceeds on the basis that the equitable doctrine of part performance cannot override the provisions of the statute by which an agreement affecting land not executed in the manner provided therein is rendered of no force or of no avail in law relying upon the decision of the Privy Council in it was held that the agreement of sale coupled with delivery of possession was in substance and truth really a permanent alienation which was prohibited by Section 47 of the Hyderabad Tenancy and Agricultural Lands Act except with the previous sanction of the Collector, and that therefore the transferees could not rely on Section 53-A of the Transfer of Property Act. Both these decisions proceed on the footing that the transactions are hit by Section 47 (1) of the Hyderabad Act and since no sanction was obtained from the Collector no reliance could be placed upon the terms of the contract under Section 53-A of the Transfer of Property Act since the transaction was one prohibited by law. This view is not correct in view of the two decisions of the Supreme Court referred to above. Hence the two decisions of this court must be held to be no longer good law in view of the decisions of the Supreme Court referred to above. The defendant in this case is therefore entitled to rely upon Section 53-A of the Transfer of Property Act to protect her possession.

15. It is urged by Sri Karanth appearing for the respondent that since the Hyderabad Tenancy and Agricultural Lands Act, 1950 was repealed subsequent to the filing of the suit and that the Mysore Land Reforms Act, 1961 came into force from 2-10-1965, the plaintiff cannot rely upon Section 47 of the Hyderabad Act; that it is Section 80 of the Mysore Land Reforms Act which is the corresponding provision in the latter Act which applies to the facts of the case and that since the defendant is an agriculturist, no previous sanction of the Collector was necessary for the suit transaction. His contention is that the defendant was given possession of 5 lands under the suit document and that the suit is in the respect of 3 out of the 5 items only and that the defendant is an agriculturist as defined under the Mysore Land Reforms Act 1961 since he is cultivating the lands personally. Under Section 80 of the Mysore Land Reforms Act transfers of land in favour of a person who is not an agriculturist shall not be valid unless the permission of the Assistant Commissioner is obtained for the same. Under Section 142 of the Mysore Land Reforms Act it is provided that 'Save as otherwise provided in this Act' the repeal

of the enactments specified in the schedule shall not affect the previous operation of the said enactments, or any obligation or liability acquired under the said enactments. The Hyderabad Act is one of the Acts repealed under Section 142. The second proviso to that section states that any reference to any enactment or other law or in any instrument to any provision of any of the repealed enactments or provisions of law shall, unless a different intention appears, be construed as a reference to the corresponding provisions of this Act. He relied upon the decision in (1969) 2 Mys LJ 358, (Yamunamma v. Ramachandra Samukha) and contended that the provisions of Section 80 of the Mysore Land Reforms Act govern the rights of the parties and since the Hyderabad Act is repealed during the course of the proceedings the defendant is entitled to rely on the provisions of Section 53-A of the Transfer of Property Act since no permission of the Assistant Commissioner is necessary for the suit transaction. He also relied on the decision in : [1963]2SCR707 , (Mohanlal v. Tribhovan) for the proposition that it is the law as is prevalent at the time of the decision of the appellate court that must be enforced if the law has changed after the suit is filed. On the other hand, the learned Advocate General relied upon the decision in : [1969]1SCR342 . (Ram Kristo v. Dhankisto) wherein it is held that a transaction which is invalid is not rendered valid by the repeal of the enactment. In reply to that argument it was contended by Sri Karanth that in that case the repealing section did not contain the words 'Save as otherwise provided in this Act' and that the above decision does not apply to the facts of this case. In my opinion, it is not necessary to decide this question in view of the fact that I have held that the defendant is entitled to rely upon the provisions of Section 53-A of the Transfer of Property Act even on the assumption that Section 47 (1) of the Hyderabad Tenancy and Agricultural Lands Act. 1950 applies to the suit transaction.

16. This appeal is therefore dismissed with costs.