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Court : Delhi

Decided On : Feb-18-1971

Reported in : AIR1971Delhi316

Judge : Dalip K. Kapur, J.

Acts : Registration Act, 1908 - Sections 49; Transfer of Property Act, 1882 - Sections 53-A and 58; Specific Relief Act, 1963 - Sections 5; Code of Civil Procedure (CPC), 1908 - Sections 9 - Order 6, Rule 2; Evidence Act, 1872 - Sections 18; Delhi Land Reforms Act, 1954

Appeal No. : Second Appeal No. 39-D of 1960

Appellant : Debi Singh

Respondent : Bhim Singh and ors.

Advocate for Def. : Ramesh Chandra, Adv.

Advocate for Pet/Ap. : S.S. Chadha, Adv

Judgement :

1. Debi Singh, the appellant in the present case instituted a suit against the respondents for possession of the land in suite which measures 9 Bighas 2 bids was and is situated in village Ladpur, Delhi. The defendants in the suit, who are respondents in the appeal, were Bhim Singh and Mehan Singh, who were in

possession of the land and Khem Ram, who is the father of the appellant. The allegation in the plaint was that the plaintiff and his father were joint owners of the land in dispute, and the said Bhim Singh Mehar Singh had entered into possession of the land some three years before the institution of the suit. Bhim Singh and Mehar Singh, respondents, as defendants Nos, 1 and 2 disputed the plaintiff's title. They alleged that Khem Ram alone was in possession of the land and he had mortgaged the same to them with possession and they were in possession of the land in their capacity as mortgagees. The trial Court decreed the suit on the ground that the defendants Nos. 1 and 2 were in possession of the land as trespassers. The reason for this was that the document on which they relied was unregistered. It was also held that the father of the plaintiff was not entitled to mortgage the land without the consent of his co-sharer. It was also held that it was not established that Khem Ram was in sole cultivating possession of the land as the Khasra Girdwari, Exhibits D-2 and D-3 showed that the plaintiff and his father were in joint possession of the land in suit as co-owners. On the basis that the appellant was entitled to dispossess that said Bhim Singh and Mehar Singh a decree for possession was passed against them.

2. Bhim Singh and Mehar Singh then appealed to the Senior Judge, who came to the conclusion that it was clear that the land owned by the plaintiff and his father had been divided by them for the purposes of cultivation and that the area in suit had been in the sole possession of the father, who had himself let in defendants Nos. 1 and 2. The plaintiff not being in actual physical possession and his father having let defendants Nos. 1 and 2 into possession, it was held that the plaintiff could not be permitted to voice the said defendants without the settlement of the dispute between the father and his creditors. The Senior Sub Judge also felt that the son had been put up merely to dislodge defendants Nos. 1 and 2 were let in, he was not entitled to a decree for possession of the land. The only relief that could have been granted without the separation of the join Khata. In the circumstances, the appeal was accepted and the suit was dismissed. Thereafter the plaintiff appealed to this Court.

3. Mr. Ramesh Chandra on behalf of the alleged trespassers, Bhim Singh and Mehar Singh, has raised an interesting preliminary objection. He says that the

concept of propertyship of agricultural land has been abolished by the passing of the Delhi Land Reforms Act, 1954, as has been held by the Supreme Court in Hatti v. Sunder Singh, : [1971]2SCR163 . He says that the appellant is disentitled to get a decree for possession form the Civil Court and consequently, it should be held that the Civil Courts have no jurisdiction to grant the relief prayed for in the present suit. His further submission is that the appellant should seek his relief under the Delhi Reforms where in provision has been made for Bhumidar to evict a trespasser. I have given my anxious consideration to this objection. The alleged trespassers entered into the land, according to the agreed case of the parties, after the Delhi Land Reforms Act had come into force. At that time, no Bhumidar had declared. At that time, no Bhumidari had declared. The suit was also brought before any Bhumidari declaration had been made, because there was a considerable time lag between the coming into force of the Act and the declaration regarding Bhumidari made there under. At the time the suit was brought, there was no other remedy open to the appellant to evict the trespassers except by recourse to the civil Courts.

It is no doubt true that the Act Visualizes the grant Bhumidari rights to proprietors and tenants including non-occupancy tenants. The alleged trespassers came into possession by virtue of a mortgage agreement which has been held to be non-admissible in evidence because of lack of registration. He is, thereforee, neither a tenant nor a proprietor. In the circumstances, I don not know what relief the appellant could have sought against these persons under the Delhi Land Reforms Act. I, thereforee, come to the conclusion that before the Bhumidhari declaration was made the appellant could not seek any remedy under the Delhi Land Reforms Act and thereforee, was entitled to seek remedy only under the ordinary civil law. Even otherwise, unless there is any provision in the Delhi Lan Reforms Act, whereby the appellant's title had been abolished before the suit was brought, I see no reason why the suit for possession based on title could not be instituted in the Civil Court. No such provision has been brought to my notice. As I read it, the rights of a proprietor only cease to exist under the Delhi Land Reforms Act, when somebody else is granted Bhumidari rights with respect to the land owned by him. If no such rights are granted, he continues to be the proprietor to all intents and purposes and is entitled under the Specific Relief Act to claim a decree for

possession on the basis of his title. I, thereforee, overrule the preliminary objection.

4. Coming now to the merits, the first question to be considered is whether defendants Nos. 1 and 2 were trespassers as alleged by the plaintiff. The said defendants claim to have come into possession of the land in suit at the instance of defendant No. 3, who is the father of the plaintiff. Their case is that they advanced Rs. 2,000/- and came into possession. Unfortunately, their document of title is not registered and is inadmissible in evidence except under the proviso to Section 49 of the Indian Registration Act. As the doctrine of part performance would apply to a mortgage it is now to be seen as to whether Section 53-A of the Transfer of Property Act, 1882, comes to the help of defendants Nos.1 and 2. An un-registered mortgage deed can be looked into for the purpose of this Section. There is also other evidence on the record which has been taken into consideration by the lower appellate court to support the view that the said defendants Nos. 1 and 2 came into possession under the said unregistered mortgage deed.

5. I shall first consider the position of defendants Nos. 1 and 2 qua defendant No. 3, under the said Section 53-A of the Transfer of Property Act. Defendant No. 3, who is the father of the plaintiff could not have evicted the defendants Nos. 1 and 2 because of the part performance of the mortgage contract as provided by the said Section. The question now to be seen is whether the fact that the father is debarred from enforcing his right to possession by reason of Section 53-A also debars the son from making a similar claim. It seems to me that part performance by the father who is a joint owner should, in equity, prevent the son, who is the other joint owner, from getting round the transaction by treating the defendants Nos. 1 and 2 as mere trespassers. The doctrine of part performance has been explained by English Courts to be merely a method of letting in proof of the real contract although the said contract may not be registered. And the question I have to consider is whether a co-owner of the transferor can defeat the right which has come to the defendants who have come into possession by reason of part performance of the mortgage agreement. It would be a peculiar situation that the father is not entitled to dispossess the transferees but the son, who is co-owner is.

But, even so, if this is the law as enacted in Section 53-A. I will be bound to hold that this anomaly can come about.

6. The law appears to me to be that a co-owner is entitled to mortgage his share in the property. Assuming that the plaintiff and defendant No.3 are co-owners who do not form a Hindu Joint Family, it appears to me that the father is entitled to mortgage his interest in the property and thereby put defendants Nos. 1 and 2 into possession. This has been held in Gulab Singh v. L. Hira Lal, : AIR1954 All314 , Mt. Zura v. Mohd. Ayub Air 1943, Pesh 17, and the right has been recognised in many other cases. I have seen no judgment to the contrary. Even the definition of mortgage given in Section 58 of the Transfer of Property Act shows that a mortgage is, 'a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan ....'. thereforee, it seems to me clear that the father has mortgaged his interest in the property in suit to defendants Nos. 1 and 2. Hence qua the father the said defendants have a right to claim that he is disentitled to remove them without terminating the mortgage.

Now, what is the position of the son qua these mortgages of his father's share? Is he entitled to defeat the mortgage which is protected by Section 53-A of the Transfer of Property Act by saying that the transfer is not binding upon him and the section does not apply to him? It is true that Section 53-A does not apply to a person other than the transferor or a person claiming under him? The son cannot be said to be a person claiming under his father because he is a joint owner. There is no proof on the record as to the manner in which he (the plaintiff) has acquired his title. However, I do not think that the law should be interpreted in such a manner as to allow the son to defeat the mortgage made by the father as in the present case. This controversy in my opinion can be resolved by merely saying that the son is not entitled toget possession from the transferees of his father on the footing that they are trespassers. If in relation to the father who is the co-owner and in joint possession, the transferees or mortgagees are not trespassers, they cannot be trespassers qua the son. In the circumstances, I come to the conclusion that the son cannot succeed in the suit for possession because defendants Nos. 1 and 2 are not trespassers.

7. The learned lower appellate Court has decided this case on the footing, that there was an agreement between the son and the father, whereby the father was in sole cultivating possession of that part of the land which was mortgaged under the unregistered document to defendants Nos. 1 and 2. The Court has proceeded to decide the case on this basis. This is based on an admission of the son in his evidence in Court. Counsel for the appellant challenges this conclusion on the ground that there is no plea to this effect in the written statement. I have examined the written statement and find that he is right in this respect. However an admission made in Court regarding the true state of affairs should not disentitle the respondents from succeeding merely because of the absence of a plea. The transferees in this case did not even know that the son had an interest in the property, in fact they denied it in the written statement. They were let into possession by the father on the assumption that the father was the sole owner and in sole possession of the land. In view of the fact that I agree with the lower appellate court that this suit is merely and attempt to avoid the mortgage through the instrumentality of the son, I come to the conclusion that the admission made in the evidence, is equally effective to defeat the suit of the plaintiff. In the circumstances, in spite of the absence of a plea on this point, I agree with the lower appellate Court that the fact do not disclose that the plaintiff is entitled to get a decree for possession as he was not in possession before defendants Nos.1 and 2 were put into possession by the plaintiff's father.

8. In this connection, I must refer to Section 5 of the Specific Relief Act, 1963, which is in the following terms :-

' A person entitled to the possession of specific immovable property may recover it in the manner provided by the Code of Civil Procedure, 1908 (5 of 1908)'.

In order to succeed, the plaintiff has to show that he is a person entitle to get possession, hence he must show he had possession before the alleged trespassers got possession. Inasmuch as the appellant in the present case has not been dispossessed by defendants Nos. 1 and 2, who have been put into possession by defendant No.3, I come to the conclusion that the appellant has no better claim against them than he has against his own father. He cannot get

possession from his father because they are joint owners, and, thereforee, he cannot dispossess the transferees of his father, who can be treated for this purpose to have the same rights as the father. The lower appellate court has rightly held that exclusive possession can be obtained by the plaintiff only if the first gets a partition of the joint holding.

9. In the circumstances, I come to the conclusion that the suit has rightly been dismissed by the lower appellate court.

10. In this view of the matter, I dismiss the appeal but leave the parties to bear their own costs in this appeal.

11. Appeal dismissed.

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