SHETH MANEKLAL MANSUKHBHAI

v.

MESSRS. HORMUSJI JAMSHEDJI GINWALLA AND SONS.

1950

March 21.

[SAIYID FAZL ALI, MEHR CHAND MAHAJAN and MUKHERJEA JJ.]

Transfer of Property Act (IV of 1882), s. 53-A—Agreement to lease evidenced by correspondence—Lessee put in possession—Acceptance of rent for several years—No registered lease deed—Suit for ejectment of lessee as trespasser—Maintainability—Doctrine of part-performance.

The predecessor in interest of the defendant, being desirous of putting up a factory in certain plots of land situated within a Taluqdari estate which was under the management of the Government under the Gujarat Taluqdars Act, 1888, applied in writing to the Taluqdari Settlement Officer for a permanent lease of the plots. The Taluqdari Officer agreed to grant a lease on certain terms subject to the sanction of the Government and forwarded a letter to the Government stating the offer to take the plots on lease, his provisional acceptance of the same subject to the sanction of the Government and the terms of the lease and by a Resolution dated 5th September, 1917, the Government granted the sanction. The defendant's predecessor was put in possession and though a formal lease deed was not executed and registered, the Taluqdari Officer and after the release of the estate by the Government, the agent of the taluqdar, and the plaintiffs who came in as *ijaradars* continued to receive the agreed rent up to 1932. In 1933 the plaintiffs instituted a suit to eject the defendant alleging that he was a mere trespasser as there was no registered lease deed:

Held, that the correspondence which passed between the defendant's predecessor-in-title and the Taluqdari Officer, the letter sent by the latter to the Government, and the Resolution of the Government dated 5th September, 1917, proved that there was a contract in writing to grant a lease on the terms stated in the Taluqdari Officer's letter, and as the defendant's predecessor was put in possession in furtherance of this contract and the rents agreed upon were accepted for several years, s. 53-A of the Transfer of Property Act was applicable to the case and the plaintiffs were not entitled to eject the defendant.

Judgment of the Bombay High Court reversed.

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APPEAL from the High Court of Judicature at Bombay: Appeal No. XXXVII of 1949.

This was an appeal from a judgment and decree of the Bombay High Court dated 9th March, 1943, in Second Appeal No. 717 of 1940, varying the decree of the Assistant Judge, Ahmedabad, in Appeal No. 173 of 1936 reversing the decree of the joint Sub-Judge, Ahmedabad, in Suit No. 830 of 1933.

R. J. Thakur, for the appellant.

Nanak Chand Pandit, (Diwan Charanjit Lal, with him), for the respondents.

1950. March 21. The judgment of the Court was delivered by

Mahajan J.

MAHAJAN J.—This is an appeal from the judgment and decree of the High Court of Bombay dated 9th March 1943, and made in Second Appeal No. 717 of 1940 varying the decree of the Assistant Judge, Ahmedabad, in Appeal No. 173 of 1936 reversing the decree of the Joint Sub-Judge, Ahmedabad, in Suit No. 830 of 1933.

The suit out of which this appeal arises was filed by the respondent firm in ejectment to recover possession of survey Nos. 222, 223, 225 and 226 situate in Rampura in Ahmedabad district and for mesne profits, as early as July, 1933, and during its 17 years' span of life it had a somewhat chequered career. Those responsible for drawing up the pleadings did not take pains to comprehend correctly as to what they were about and the whole litigation was conducted in a slovenly and slipshod manner. Evidence which should have been produced at the beginning was allowed to be produced at a much later stage after the case went back on remand and the suit was determined by the Assistant Judge on fresh issues and fresh materials. It was in this confused state of the record that it was eventually decided by the High Court and its judgment is by no means satisfactory. The long time take in deciding the suit which involved determination of a few simple issues is such as is calculated to bring into ridicule the administration of justice.

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There is a talukdari estate called the Bhankoda estate in Viramgam taluka in Ahmedabad district. It is jointly owned by several talukdars in different shares and comprises twelve villages one of which is Rampura in which the suit lands are situate. By Government Resolution No. 8179, dated 30th August 1912, the estate was taken under Government management under section 28 of the Gujarat Talukdars Act (Bombay Act VI of 1888). The firm of Shah Manilal Maganlal and Bros. (predecessors in interest of the appellant) desired to erect a ginning factory on survey Nos. 223, 225, and 226 and with that object approached the Talukdari Settlement Officer for a permanent lease of these survey numbers. The said officer agreed to grant a lease subject to sanction of Government. By Resolution No. 10795 of 1917 dated 5th September, 1917, the Government of Bombay granted the requisite sanction. Exhibit 181 is a certified copy of the letter from the Chief Secretary to Government to the Commissioner and to the Talukdari Settlement Officer and in detail it mentions the various steps taken to effect the transaction.

On 9th December 1916 an application was made by Shah Manilal Maganlal in writing signed by him to the Talukdari Settlement Officer offering to take a permanent lease of the above mentioned survey numbers on an annual rental of Rs. 290 for the purpose of erecting a ginning factory. On 12th July, 1917, the said officer accepted provisionally this offer after taking into consideration the objections raised by some of the talukdars in respect of the grant of a lease. He submitted the papers to government with the following recommendations :—

"As the petitioner was in urgent need to start operations during the current ginning season I have in anticipation of Government sanction permitted him to enter upon the land and have the honour to approach you for sanction under section 27 (A) of the Court of Wards Act, the provisions of which have been made applicable to Talukdari Estates by section 29 (G) of the Gujarat Talukdars Act."

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The conditions of the lease agreed upon by the parties were annexed with this letter and a copy of the offer was also sent to Government. Ex. 181 recites the contents of the offer and states the undertaking given by the lessee. There is intrinsic evidence within its contents to show that these writings were signed by the proposer. The Talukdari Settlement Officer in a signed writing accepted the offer and sent it for Government sanction. It further appears that he communicated his acceptance to the lessee and agreed to give a lease if Government gave sanction. The survey numbers in question were in possession of tenants and it was agreed that the lessee would take possession after making private settlements with them. It was also agreed that if no such private arrangement could be made, then the settlement officer would take steps to issue ejectment notice against the tenants. On 20th July, 1917, the Commissioner forwarded the papers to Government with his recommendations and the Government on 5th September, 1917, sanctioned the arrangement agreed to by the Talukdari Settlement Officer with Shah Manilal Maganlal. The sanction order is signed by the Chief Secretary to the Government and it contains an endorsement of its having been sent to the officers concerned. It is thus clear that a binding agreement to lease the survey numbers in question was effected between the Talukdari Settlement Officer and Shah Manilal Maganlal with the sanction of the Government. Though a draft of a formal deed of lease was prepared, no such document was formally executed or registered for reasons which it is not necessary to state herein.

Soon after the agreement the lessee took possession of the survey numbers in suit and put up thereupon a ginning and a pressing factory, a bungalow, engine rooms and other structures. He tendered the agreed rent to the Talukdari Settlement Officer who received it from him. He continued receiving it for about two years when the estate was released from the management of the Government and came under the management of the talukdars. The manager appointed by the talukdars continued to receive rent from the lessee as had been settled by the Talukdari Settlement Officer.

On 4th May, 1924, a possessory mortgage of the ginning factory along with all its buildings was effected by Shah Manilal Maganlal in the sum of Rs. 1,40,000 in favour of the defendant. The mortgage included in the schedule of the mortgaged property some other property as well. The two contestants in the suit, the defendant and the plaintiffs, acquired their rights in this property during the years 1924-25. The defendant came in as a mortgagee as above stated, while the plaintiffs came in as ijaradar and assignee of certain mortgage rights. The plaintiffs since then have been receiving the rent according to the grant made by the Talukdari Officer. In the year 1933 the appellant purchased the equity of redemption of the suit property at a court auction and became vested with all the rights of Manilal Maganlal in this property, the value of which has now been estimated in the neighbourhood of Rs. 38,000.

In the year 1933 the plaintiffs discovered that the defendant had no registered lease in his favour and therefore in law he was not entitled to the rights of a permanent tenant in respect of the survey numbers in dispute. They therefore instituted the present suit for ejectment of the defendant. In the 2nd and 3rd paragraphs of the plaint it was admitted that in the course of the correspondence with the Government of Bombay a lease was negotiated between the firm of Shah Manilal Maganlal and the Talukdari Settlement Officer in respect of the survey numbers in dispute for a period of fifty years at an annual rental of Rs. 290, but it was stated that because Manilal Maganlal did not execute a formal registered lease they were in possession as trespassers. In the 4th paragraph the authority of the Talukdari Settlement Officer to grant the lease was also challenged. In the 8th paragraph it was said that the plaintiffs received the amount of the lease up to 31st July 1932 and that no notice was necessary to be given, the position of the defendant being that of a trespasser. It was however alleged that a notice was given on 25th December 1930.

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The suit was defended on a number of grounds, *inter alia*, it was pleaded that the plaintiffs had no right to sue in ejectment, not being the landlord inasmuch as they had not obtained any right in the land itself and had not acquired complete title by an assignment of the whole of the interest of the talukdars in the survey numbers in dispute. It was pleaded that the defendant was a permanent tenant of the survey numbers and that the plaintiffs' own conduct debarred them from claiming ejectment.

The trial Judge decreed the suit on the finding that as no written lease was forthcoming it should be deemed to be non-existent. It was said that no efforts had been made to show that the Settlement Officer had sanctioned with the approval of the Government a permanent lease in respect of survey Nos. 223 and 225 to Shah Manilal Maganlal. In the concluding part of the judgment it was remarked that the doctrine of equitable part performance could not apply to the present case. Though no specific issue was raised on this point, the matter seems to have been argued at some stage before the trial Judge on facts found or admitted. There was an unsuccessful effort to obtain a review of this decision on the ground of discovery of fresh materials. Thereafter the matter was taken to the court of appeal and it was alleged in ground No. 3 that the Subordinate Judge had erred in not considering the position created in the case by the equitable rule of law embodied in section 53-A of the Transfer of Property Act. On 30th July, 1938, the appellate court made an order of remand under Order XLI, Rule 25, and called for a report on the following two issues :—

(1) Whether the plaintiff was a mortgagee in occupation of S. Nos. 222, 223, 225 and 226 ?

(2) Whether the suit was bad for non-joinder of parties ?

The trial Judge reported on the remand issues against the plaintiffs. He also admitted in evidence a number of documents produced after remand and one of these is Ex. 181. A point was raised that documents produced after remand were not relevant to the issues remanded

and should not be admitted. This contention was overruled. The Assistant Judge allowed the appeal on 27th April, 1940. He held that the plaintiffs had failed to establish their right to maintain the suit either as ijaradars or as assignees of mortgage rights. In para. 21 of his judgment he observed as follows:—

"Ex. 181 shows that the terms of the lease have been reduced to writing though no regular lease appears to have been executed. On the question whether the lease is binding on the plaintiff, I think section 53-A of the Transfer of the Property Act is a complete answer. Ex. 181 shows that the Talukdari Settlement Officer, with the sanction of the Government, contracted to lease out these lands. The writing is signed by the Government. The terms of the lease can be ascertained clearly from Ex. 181. It is not denied that the defendant's predecessor-in-title was put in possession of this property in performance of that contract. Also the acceptance by the Talukdari Settlement Officer as well as by the plaintiff of the rent of the property as fixed by that contract shows that the possession of the defendant and his predecessor-in-title was in part performance of the contract of lease. Admittedly, there is no registered lease. The conditions of section 53-A of the Transfer of Property Act are fully satisfied and the plaintiff cannot, therefore, eject the defendant on the ground that there is no registered lease."

Further on the learned Judge said that section 53-A of the Transfer of Property Act embodied the doctrine of estoppel and a plea to that effect had been taken inasmuch as the defendant had pleaded that the plaintiffs were estopped by their conduct from asking for possession and that therefore no separate issue was raised on this point.

The unsuccessful plaintiffs went up in second appeal against this decision to the High Court of Bombay. The High Court allowed the appeal and modified the decree of the Assistant Judge. It decreed the plaintiffs' suit in respect of survey Nos. 223 and 225 and dismissed the suit in respect of survey Nos. 222 and 226.

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On the question of the plaintiffs' title to maintain the suit the High Court reached the following decision:—

"If it were necessary we would hold that the plaintiff has sufficiently proved that it is entitled to maintain this suit in its capacity as ijaradar as well as assignee from the mortgagees. But we think even apart from that, plaintiff is entitled to bring this suit because on the defendant's own admission he has paid rent to the plaintiff for three of the suit fields, *viz.*, survey Nos. 223, 225 and 226, and that too not the interest of 84 Dakdas in them but for all the 100 Dakdas. In fact, ever since the plaintiff came on the scene the defendant has treated the plaintiff as the landlord as regards these three survey numbers, and in the present suit, therefore, the defendant cannot dispute the plaintiff's right to sue."

In a later part of the judgment it was observed that in any case Ginwalla as the manager of the plaintiff firm would be entitled to continue the present suit as receiver. On the second question the learned judges of the High Court observed as follows:—

"We do not think it necessary to decide whether if there had been a signed contract by the transferor in the present case, it would have fallen under section 53-A, because, in our opinion, the correspondence which is summarized in the Government Resolution cannot be regarded as evidence of the contract, and secondly, the terms of the contract also cannot be deduced from the correspondence with any reasonable certainty. We, therefore, hold that the Government Resolution on which the defendant relies is no evidence of the writing of a contract referred to in section 53-A of the Transfer of Property Act, and apart from that the defendant has no legal basis on which he can claim to hold the land either as a permanent lessee or for a particular period."

The principal questions canvassed in this appeal are, whether the plaintiff firm has proved its title to maintain the present suit in ejectment against the defendant and whether the defendant is entitled to the benefit of the provisions of sec. 53-A of the Transfer of Property Act. The question as to the maintainability of the suit

against the defendant without a proper notice was raised before the High Court but permission to argue it was refused because the matter had not been raised in either of the lower Courts.

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The appeal was elaborately argued before us by the learned counsel for the parties, but in our view, it is not necessary to consider and decide all the points urged because we consider that the Assistant Judge was right in entertaining and giving effect to the plea under sec. 53-A of the Transfer of Property Act and we are satisfied that no substantial grounds existed for reversing that decision in second appeal. This section introduced in the Transfer of Property Act in 1929 is in these terms:—

"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.......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........ 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........".

The section is a partial importation in the statute law of India of the English doctrine of part performance. It furnishes a statutory defence to a person who has no registered title deed in his favour to maintain his possession if he can prove a written and signed contract in his favour and some action on his part in part-performance of that contract. In order to find whether the defendant in the present case has satisfied the conditions of the

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section, it has to be held proved that the Talukdari Settlement Officer contracted to give a lease of the survey numbers in suit to Manilal Maganlal by a writing signed by him and that from this writing the terms of the tenancy can be ascertained with reasonable certainty. It has further to be held established that the transferee took possession of the property or did any acts in furtherance of the contract. It may be mentioned that in cases of lease the legislature has recognized that the equity of part performance is an active equity as in English law and is sufficient to support an independent action by the plaintiff. (Vide S. 27-A of the Specific Relief Act). This section however applies to contracts executed after 1st Rpril, 1930, and has no application in the present case; but there can be no manner of doubt that the defence under Section 53-A is available to a person who has an agreement of lease in his favour though no lease has been executed and registered. We are satisfied that the defendant has fulfilled both the conditions necessary to attract the application of the section in the present case. The High Court was in error when it held that the correspondence summarised in Ex. 181 could not be treated as evidence of the contract and that its terms could not be reasonably deduced from this document. It is no doubt true that Ex. 181 is merely secondary evidence of the agreement of lease but it is equally true that it is a very reliable piece of secondary evidence coming as it does from government records. It furnishes proof of the fact that there was an acceptance in writing under which the contract to transfer the survey numbers in suit by way of lease was effected by the Talukdari Settlement Officer in favour of Manilal Maganlal. The offer was also in writing signed by the offeror. The Government Resolution which made the agreement binding was also in writing and was signed by competent authority. No objection as to admission of secondary evidence could be taken in this case as the primary evidence was in the possession either of the plaintiff or of the talukdars, the predecessors in interest and in spite of notice it was not produced. Reference in this connection may be made to the statement of the

plaintiff in the witness box which is to the following effect :—

"I must have read the correspondence with T.S.O. since it is so recited in the para. 2 of the plaint. I cannot say whether that correspondence is in my office or with the talukdars. I cannot say without that correspondence as to whether T.S.O. has called survey No. 226 as Lalliti and hence the talukdars are not entitled to any income for it. I also cannot say without that correspondence that the rents of survey Nos. 225 and 223 were fixed at Rs. 135 and Rs. 115 respectively and that Rs. 45 were to be taken by way of *sugar*...."

In another part of the same statement he said that the talukdars had got the records of the time preceding his management. It appears that the original documents were returned to the talukdars after the discharge of the Talukdari Settlement Officer and were in the possession and power of the plaintiff or his predecessors in interest and they were not produced by him in spite of notice. Para. 2 of the plaint clearly recites that there was correspondence between the Talukdari Settlement Officer and the defendant's predecessor in interest under which a lease was negotiated. The plaintiff's knowledge of this correspondence and its contents is thus *prima facie* established and leads to the conclusion that it was in his possession or power and he has intentionally withheld it. Without a perusal of this correspondence the facts recited in para. 2 of the plaint could not have been mentioned in the plaint. Once it is held that Ex. 181 is good secondary evidence of the agreement of lease, there can then be no hesitation in holding that by an offer and an acceptance made in writing and signed by the respective parties an agreement was completed between the Talukdari Settlement Officer and the predecessor in interest of the defendant and that necessary sanction of the Government was also in writing signed by the officer concerned. It has further to be held that the terms of the contract can be fairly deduced from the recitals of this document. The only important clause with which we are concerned in the present case is as to the nature of the tenancy. It is clearly recited therein

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that the lease was to be of a permanent character and the terms as regards rental could be revised after a period of fifty years. The rent payable is recited in unambiguous terms in the document as Rs. 290 per annum.

It was not denied that the lessee took possession after this agreement was arrived at. It was argued that possession was taken before sanction of the Government was obtained in September, 1917. There is however no proof of this except a bare recital in the Talukdari Settlement Officer's letter to Government that he had permitted the defendant to enter on the land in anticipation of Government's sanction. As already pointed out, the possession was with the tenants and had to be taken after entering into an arrangement with them or by issuing notice to them. It is not possible to think that this could have happened in such a short space of time as elapsed between the middle of July and the beginning of September. In any case the factory could not have been built before the sanction of the Government was received. Not only did the lessee take possession in part-performance of the agreement but he offered the rent agreed upon and paid it not only to the Talukdari Settlement Officer but to all those who subsequently managed the interest of the talukdars in the survey numbers in dispute. The original lessee after having entered into possession of the property effected a mortgage of it in favour of the defendant. The defendant advanced a substantial sum on security of the property to the lessee. The equity of redemption was sold at an auction sale. The defendant and his predecessor in interest were willing to perform their part of the contract. As a matter of fact, they have performed the whole of it. All that remains to be done is the execution of a lease deed by the lessor in favour of the lessee and of getting it registered. The plaintiff in para. 6 of the plaint in unambiguous terms admitted that he received the amount of the lease up to 31st July, 1932, in respect of the survey numbers in dispute. It is difficult to imagine what lease he was referring to in the absence of a registered deed of lease. It could only mean the agreement of lease given in writing

and signed by the Talukdari Settlement Officer. It is in pursuance of this agreement of lease that all the subsequent acts above mentioned were done. It may also be observed that an agreement of lease creating a present demise but not registered is admissible under S. 49 of the Indian Registration Act as evidence of part performance and Ex. 181 is secondary evidence of that agreement. A formed lease is not necessary to attract the application of S. 53-A of the Transfer of Property Act. All that is required is that an agreement in writing signed by the transferor can be gathered from the evidence. The correspondence mentioned in Ex. 181 fully establishes that fact.

We are therefore of the opinion that the learned Assistant Judge rightly dismissed the plaintiff's suit and the High Court was in error in interfering with that decision in second appeal. The result therefore is that the appeal is allowed, the decision of the Assistant Judge restored and that of the High Court reversed. The circumstances of the case are such that we would make no order as to costs. The defendant was at fault in not producing all the documentary evidence at the proper stage of the case and he has been enabled to avail himself of the defence furnished to him under S. 53-A by reason of the admission in evidence after remand of Ex. 181, which though not properly admitted at that stage was not rejected by the High Court and could not be rejected at the stage when we dealt with the case. The parties are therefore left to bear their own costs throughout.

Appeal allowed.

Agent for the appellant : *S. P. Varma.*

Agent for the respondent : *Ganpat Rai.*

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