

P L D 1994 Peshawar 204

Before Mian Muhammad Ajmal, J

KHAN GUL and others---Petitioners

versus

AZIM SHAH and another ---Respondents

Civil Revision No. 105 of 1990, decided on 5th March 1994.

(a) Reg1stration Act (XVI of 1908)---

---S. 49---Unregistered document---Evidentiary value of---Unregistered document could be received in evidence for collateral purposes---Execution of document if proved, whether registered or not, would not have material bearing on the merits of the case---Such document could be admitted in evidence and also be relied upon to prove any collateral purpose i.e. factum of possession.

(b) Reg1stration Act (XVI of 1908)---

---S. 49---Transfer of Property Act (IV of 1882), S. 53-A---Entitlement to protect possession of property in question---Evidence on record manifestly proved possession of defendant on property in question, on the basis of unregistered document whose execution was established ---Factum of construction of house on property in question, was also proved which according to local commissioner was 25 years old---Defendant's (transferee's) interest was thus, protected under S. 53-A, Transfer of Property Act, 1882, to shield his rights in said property.

(c) Transfer of Property Act (IV of 1882)---

---S. 53-A---Civil Procedure Code (V of 1908), S. 115---Plaintiff's claim for ownership of property in question, stood negated by evidence on record and und1sturbed possession of defendant who had constructed house thereon, 25 years back---Concurrent finding of Courts below to the same effect being perfectly in order and in accordance with evidence on record could not be d1sturbed in absence of jurisdictional error which was lacking in the case---Defendant's possession over property in question was affirmed in circumstances.

Naib-Subedar Taj Muhammad v. Yar Muhammad Khan and others 1992 SCMR 1265; Kalim-ud-Din Ansari v. Director, Excise and Taxation, Karachi and another PLD 1971 SC 114; Sri Kalulam Subrauntanyam and another v. Kurra Subba Rao PLD 1948 SC 52; Abdullah Bhai and others v. Ahmed Din PLD 1964 SC 106 and Mst. Ghulam Sakina v. Umar Bakhsh and another PLD 1964 SC 456 ref.

H. Ghulam Basit for Petitioners.

Khalid Rehman Qureshi for Respondents.

Date of hearing: 5th March, 1994.

JUDGMENT

The plaintiff--petitioners brought a declaratory suit to the effect that they are owners in possession of land bearing Khasra No. 353 measuring 1 Kanal -10 Marks situate within the limits of Shingri, Tehsil and District Haripur and the defendants have no right to raise any construction thereon and if any construction has been made the same is liable to demolition and also sought for permanent injunction restraining the defendants from interfering in their rights. In prayer (B) the plaintiffs had sought the possession of the land through demolition of superstructure thereon. The suit was contested by defendant-respondents. Upon the pleadings of the parties the trial Court framed the following issues:

- (1) Whether the plaintiffs have got cause to action`'
- (2) Whether the suit is time-barred:'
- (3) Whether file plaintiff are estopped to sue.
- (4) Whether the suit is bad for non- joinder of necessary parties ?
- (5) Whether defendants have made improvements over the suit land. if so, to what extent and effect?
- (6) Whether the rights of defendants are safe under section 41, T.P. Act?
- (7) Whether the defendants have matured title through adverse possession for more than 12 years?
- (8) Whether the suit is incompetent in its present form?
- (9) Whether the plaintiffs are owners of the land and defendants have encroached upon?
- (10) Whether the plaintiffs are entitled to the decree as prayed for?
- (11) Relief.

Thereafter the parties led their evidence and the learned trial Court after taking the same into consideration dismissed the suit vide its judgment and decree dated 30-5-1988. Aggrieved of the judgment and decree of the learned Civil Judge, Haripur the plaintiff-petitioners filed an appeal before the learned Additional District Judge, Haripur, who also dismissed the appeal vide his judgment and decree dated 14-6-1990. Hence the present revision petition.

2. Learned counsel for the petitioner contended that the receipt Exh. D.W.1/2 whereby the property in dispute was purchased by defendants respondents for Rs.400 was inadmissible document and it could not confer any title upon the vendee. He referred to Mutation No. 9 Exh.DW/1/1 which indicate that due to the non-attendance of Attar Shah vendor the mutation could not be attested. He also referred to another document Exh.PW/1/1 wherein Attar Shah has been recorded as owner of land in dispute. He contended that the land in dispute still exist in the name of the heirs of Attar Shah, therefore, they are owners of the property. He further argued that if at all the receipt be considered then at the most the defendant-respondents would be entitled to the amount which he had paid in consideration for the property and the cost of improvement which he had made over the land in dispute. He also contended that the two pleas taken by respondent are opposed to each other, therefore, the suit was liable to dismissal.

3. Opposing the aforesaid contentions, the learned' counsel for the defendant-respondents contended that the property in dispute was purchased by the defendant-respondents in the year 1962 and in this regard entry was made in the column No.15 of the Mutation No.9, but the same could not be attested due to the absence of the vendor. One Kala Khan appeared for plaintiff No. 1 but was not holding any power of attorney for plaintiffs Nos.2 to 5. In the cross-examination Kala Khan admitted that he is living in Khalabat for the last 12 years and Khan Gul and Sherin are living at Karachi. He also admitted that defendants have constructed 3 houses and during their construction no application was submitted to any Court restraining them from the construction of the houses. As against this Azim Shah defendant-petitioner himself appeared who affirmed the sale in his favour by Attar Shah and that mutation to this effect was also entered in the revenue record but due to illness of Attar Shah on the date of attestation, he could not appear before the Revenue Officer so the mutation could not be attested. He also stated that Attar Shah had delivered the possession of the suit land to him whereupon he had constructed three houses for the last about 25 years. After the sale Attar Shah remained alive for 10/12 years but he never objected to the construction of the defendant. Zarullah, D.W.2 corroborated the statement of D.W.1 and affirmed that the construction was made by defendant No.2 about 20 years back. He also referred to the commission report wherein the local commissioner has opined that the houses which were constructed by defendant No.2 were 25 years old according to the information collected at the spot. The local commissioner also estimated the value of superstructure to be Rs.62,070. Learned counsel also submitted that the plaintiff Khan Gul did not appear himself and an adverse presumption can be drawn against him. He had appointed one Kala Khan as his attorney in the lower Court and Chan Shah was appointed by him as attorney for this Court.

4. I have heard the learned counsel for the parties and have perused the record of the case.

5. The record shows that the predecessor-in-interest of the plaintiffs sold the property to defendants vide receipt Exh.DW/1/2 and it was acted upon and entry was made in the mutation. Although this document is not registered as required under section 17 of the Registration Act, nonetheless this can be taken into consideration for collateral purposes. An unregistered document can be received in evidence for collateral purposes under amended section 49 of the Registration Act. Execution of document if provided, whether registered or not, would not have material bearing on the merits of the case. Such a document can be admitted in evidence and also be relied upon to prove any collateral purpose i.e. factum of possession. As per report of the local

commissioner the houses constructed by the defendant No. 2 on the land in dispute were as old as 25 years which would show that the said construction was made during the lifetime of Attar Shah who never objected to the construction of the said houses. Admittedly the plaintiffs had left the village and gone to Karachi and none of them bothered to appear in support of their claim. The evidence on record manifestly proves the possession of respondent on the property in dispute on the basis of unregistered document whose execution stands established, The factum of construction of houses is also proved which according to local commissioner were 25 years old. In such circumstances transferee's interest is protected under section 53-A of the Transfer of Property Act to shield his rights in the property. Section 53-A ibid is reproduced hereunder:--

"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 of 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 therefore 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."

The august Supreme Court of Pakistan in case, Naib-Subedar Taj Muhammad v. Yar Muhammad Khan and others (1992 SCMR 1265), while interpreting the aforesaid section, held as under:--

"Section 53-A of the Transfer of Property Act enunciates equitable principle to protect the rights of such purchasers who have entered into agreement and in pursuance thereof obtained the possession of the immovable property and have further either performed their part of the agreement or are agreeable to perform the same. In such circumstances, mere non-registration of a deed which requires registration under section 17 of the Registration Act, will not deprive him of the benefit which he is entitled to protect by virtue of section 53-A of the Transfer of Property Act. It is true that section 53-A does not confer or create any right but it provides a defence to a transferee to protect his possession. Reference can be made to the cases of Kalim-ud-Din Ansari v. Director, Excise and Taxation, Karachi and another PLD 1971. SC 114 and Sri Kalulam , Subranmanyam and another v. Kurra Subba Rao PLD 1948 SC 52. Section 53-A debars a transferor from enforcing any right other than rights specifically provided by the contract against a transferee who 'in," part performance of a contract has taken possession. Reference may be made to the cases of Abdullah Bhai and others v. Ahmed Din PLD 1964 SC 106 and Mst. Ghulam Sakina v. Umar Bakhsh and another PLD 1964 SC 456. In the present case, the agreement itself recites that the appellant in part performance of the agreement had been put in possession of the property- The appellant is, therefore, entitled to the protection of his possession. Likewise, the respondent No. 1 and his sons (respondents Nos.2 to 4) cannot enforce

any rights against the appellant except the rights which have been specifically mentioned in the contract."

Kala Khan attorney who appeared for plaintiff No. 1 in the trial Court was representing only plaintiff No. 1 and the other plaintiffs were non represented. The said Kala Khan also admitted that Attar Shah died about 8/9 years ago which would be indicative of the fact that the construction was made by the defendant-respondents during the lifetime of Attar Shah who never objected to it. Keeping in view the evidence and undisturbed possession of defendants who had constructed the houses more than 25 years back conclusively negate the assertions of the plaintiff and both the lower Courts keeping in view the evidence and the material on record rightly dismissed the suit. The judgments of both the Courts are perfectly in order and in accordance with evidence and the learned counsel for the petitioners could not point out any jurisdictional error, therefore, no exception thereto can be taken. This revision petition being without any force is dismissed with costs.

A.A./1563/P

Revision dismissed.