

MYSORE HIGH COURT

Babu Murlidhar

Vs

Soudagar Mohammad Abdul Bashir

Second Appeal No. 723 of 1965

(A.R. Somnath Iyer, Actg. C.J.)

31.10.1969

JUDGMENT

A.R. Somnath Iyer, Actg. C.J.

1. This is a plaintiffs appeal arising out of a suit which he brought for the redemption of a mortgage with possession which he created in favour of defendant 1 in the year 1342 fasli. The suit was resisted on the ground that under a subsequent agreement which was executed on May 30, 1940, by the plaintiff in favour of defendant 1, the right of redemption has been lost and defendant 1, had become the owner of the property. The appeal in that context was to the doctrine of part performance which Section 53-A of the Transfer of Property Act incorporates. Both the Subordinate Judge and the District Judge accepted the plea of defendant 1 and dismissed the suit. So, this second appeal.

2. Exhibit D-3 which is the subsequent agreement executed by the plaintiff in favour of defendant 1 on May 30, 1940, states that there was a mortgage with possession in favour of defendant 1 for a period of five years for securing the repayment of a sum of ₹ 2,500/- borrowed by the plaintiff from defendant 1 and that the plaintiff had constituted defendant 1 owner of the property in supersession of the mortgage, having received from defendant 1 a further sum of ₹ 2,000/-. The document recited that defendant 1 was already in possession of the property and that the plaintiff would no longer have any right and interest therein and that defendant 1 was at liberty to get the property transferred to his name in the municipal registers.

3. The courts below dismissed the plaintiff's suit principally on the ground that there was part performance under Section 53-A of the Transfer of Property Act and this finding is assailed in this appeal by Mr. Murlidhar Rao on the contention that since Exhibit D-3 the subsequent agreement does not display any transformation to defendant 1's possession as mortgagee, into

possession as owner under the agreement of sale, and there was no act done in furtherance of the contract which advanced the matter beyond the stage of the contract and resulted in part performance, the appeal to the doctrine of part performance became unavailable.

4. It was urged by Mr. Murlidhar Rao that Exhibit D-3 should have itself stated that the possession of defendant 1 after the date of the agreement of sale was no longer possession as mortgagee but was possession as owner, and, that, since there was no other indication of the transformation of possession as mortgagee into possession as owner, the right of redemption did not cease to subsist and defendant 1 could not resist redemption.

5. I do not find it possible to accede to this contention. We explained in *Jamil Ahmed Saheb v. Mahabub Bi*¹, all that is necessary in order to sustain an appeal to the doctrine of part performance is the demonstration of the fact that the matter advanced beyond the stage of contract and resulted in part performance. Although one of the requirements of Section 53-A of the Transfer of Property Act as explained in that case was that there should be such taking of possession by the transferee in part performance of the contract before he could contend that there was a part performance, it was also explained that it is not always necessary that the agreement should incorporate a recital that there was a transformation of possession as mortgagee, into possession as purchaser or transferee. This court observed that it was enough if there was some indication of such transformation.

6. If that be the principle by which the Courts below should have allowed themselves to be guided, it becomes clear that they were not in error in reaching the conclusion that there was more than sufficient indication in Exhibit D-3 of the transformation of possession of one character into another. The agreement Exhibit D-3 recited that defendant 1 was a mortgagee and then proceeded to recite that after the date of the agreement he would become the owner and that the plaintiff would not have any right or interest in the property thereafter. It then proceeded to state that defendant 1 was in possession as mortgagee and that he had been constituted the owner. What is of the greatest importance is that it incorporated a further covenant that defendant 1 could get his name introduced into the mutation registers of the municipality.

7. It was impossible, in my opinion, for the Courts below to overlook the importance of the recital that defendant 1 could get his name entered in the municipal registers as owner. The covenant for the change of mutation which is always associated with possession has only one meaning namely, that such mutation should be made in order to display the transformation of possession as mortgagee, into possession as owner. If during the subsistence of the mortgage the mutation registers contained only the name of the mortgagor and there was an agreement of sale under which the mortgagee was constituted owner although there was no registered conveyance in his name, and that agreement provided for the change of mutation, no further indication is necessary in the agreement of sale, of transformation of possession. The provision for such mutation is itself the clearest indication which is essential for an appeal to that doctrine.

8. There is the additional fact that there was also under the provisions of Section 53-A a very important act performed in furtherance of the contract so as to take the case fully into its provisions. In implementation of the agreement of sale, the plaintiff himself made an application Exhibit D-1 to the municipal authorities for mutation and

¹1964 Mys LJ (Supp) 619

that mutation was made in favour of defendant 1. It is thus clear that all the conditions necessary for the application of the doctrine of part performance existed in this case.

9. So, I dismiss this second appeal with costs.

Appeal dismissed.