

PATNA HIGH COURT

Hari Prosad Agarwalla

Vs

Abdul Haq

A.F.A.D. No. 1273 of 1948

(Das and Sinha, JJ.)

01.03.1951

JUDGMENT

Sinha, J.

1. This appeal has been filed by the pltf. They had filed the suit for declarations that the lands described in schedule A to the plaint belonged to them; that they were in possession as maiyaddi lessees; that the Defendant had no right title or interest in the same; and for permanent injunction restraining the Defendant from working the fire-clay in the aforesaid lands and from removing the fire-clay therefrom and also for damages against the Defendant

2. The pltf's.' case is that they had taken a lease for 21 years for extracting fire-clay in seven villages, including village Mandra, the village in suit, from one Shrimati Hirakumari Debi by a registered lease dated 30-1-1934 and that since then they have been in possession by extracting fireclay in village Mindra and other villages. They alleged that since January 1945 the Defendant, in collusion with one another, have been illegally extracting fire clay from that village without any right or title to do so.

3. The suit was contested by deft. 1 alone, although written statements were filed by the other Defendant as well. The contesting deft, pleaded that the pltf's. had no valid lease and that they acquired no right or title to village Mandra by virtue of the said lease. He alleged that the lease in favour of the pltf's. was merely a paper transaction and had never been acted upon and the pltf's. were never in possession of village Mandra. Ha also alleged that Hirakumari Debi had no right to execute the lease in favour of the pltf's., as she was not the owner of the village. But later on he had to admit that he had himself taken a lease of the fire-clay right of village Mandra from the said Shrimati Hirakumari Debi. His lease is dated 5-10-1943 and his allegation is that even before the execution of the registered lease he was extracting fire-clay from that village under an unregistered Hukumnama dated 5-10-1939.

4. The pltf's'. suit was decreed by the trial Court, but, on appeal, the judgment and the decree of the first Court were reversed. Hence this appeal by the pltf's.

5. The Court below has come to the following findings:

(1) that Hirakumari Debi was the owner and proprietress of the village; (2) that the pltfs'. lease is only a patta executed by Hira Kumari Debi alone, and the deft's. lease relates to the same right of extracting fire-clay from village Mandra only for a period of 25 years; (3) that the lease in favour of the pltfs. was invalid, because of the provisions contained in Section 107, T. P. Act; (4) that the pltfs. were not in possession of the village in suit and there is no evidence worth reliance that they had ever extracted fire clay from village Mandra, although the pltfs. were in possession by extracting fire-clay in village Bahira Dih, one of the seven villages mentioned in the patta in their favour; and (5) that the pltfs. were not entitled to invoke in their aid the provisions of Section 53A, T. P. Act, because those provisions are available only to a deft, in an action and not to the pltf.

6. The learned counsel appearing on behalf of the appellants has urged three points in support of the appeal: (1) that although the lease in favour of his clients was not executed in the manner prescribed by Section 107, T. P. Act, the written document, namely, the patta, can be construed to embody an oral agreement accompanied by delivery of possession, and, therefore, such a lease would be valid for one year and thereafter the pltfs-appellants should be held to have been in possession of the leasehold by holding over under Section 116, T. P. Act; (2) that the pltfs-appellants having been found to be in possession of Bahira Dih, one of the villages included in their lease, they must be deemed to be in constructive possession of the other villages including the village in suit; and (3) that the provisions of Section 53A, T. P. Act, are available to the appellants although they are the pltfs. to the action, and they are, therefore, entitled to maintain their possession under that section.

7. The relevant portion of Section 107, T. P. Act runs as follows :

"A lease of immovable property from year to year or for any term exceeding one year, or reserving an yearly rent, can be made only by a registered instrument.

All other leases of immovable property may be made either by registered instrument or by oral agreement accompanied by delivery of possession. Where a lease of immovable property is made by a registered instrument, such instrument, or where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee....."

8. The contention of Mr. Sen, the learned counsel for the appellants, is that the document in question should be considered as a lease of immovable property for a term not exceeding one year made by an oral agreement accompanied by delivery of possession. In my opinion, this contention is not well-founded. Once there is a lease of immovable property for a term exceeding one year and the lease is made by more than one instrument, each of such instruments must be registered and executed by both the lessor and the lessee, and such lease cannot be construed as a lease for a term of one year made by oral agreement accompanied by delivery of possession. If the section is construed in the manner suggested by the learned counsel, it will make the provisions of Section 107 absolutely nugatory and nullify the statute itself. The first part of the section lays down that there must be a registered instrument for a lease of immovable property

from year to year or for any term exceeding one year or reserving an yearly rent, and the next para of the section says that leases other than those mentioned in the preceding para can be made by registered instrument or by oral agreement accompanied by delivery of possession That is to say, if there is a lease which is not covered by the first para of the section, such lease can be made by a registered instrument or by oral agreement accompanied by delivery of possession. If a lease has, in fact, been made by a registered instrument, such instrument, and if there are more than one, then, in my opinion, each of such instruments must be executed by both the parties to the lease. In the present case, the lease in favour of the plaintiffs. was for 21 years and the instrument creating the lease was a registered instrument. It follows, therefore, that such instrument should have been executed by both the lessor and the lessee and that not having been done, it neither constitutes nor creates any valid lease. The contention of the learned counsel supposes that there has been a delivery of possession to the plaintiffs; but the finding of the final Court of fact is to the contrary. However, I will consider this aspect of the matter later on. Mr. Sen has cited the cases of *Aziz Ahmad v. Alauddin Ahmad*¹, and *Alaudin Ahmad v. Aziz Ahmad, a.i.r.*². The judgment in AIR (20) 1933 Pat. 485 was confirmed in the Letters Patent appeal reported in AIR (21) 1934 Pat. 369. The facts of that case were quite simple. That was a suit for arrears of rent against the Defendant who had taken verbal leases for the years 1321 to 1327 Fs. After the leases expired in 1327, there were fresh verbal leases granted by the predecessor-in-interest of the plaintiffs. and the suit was for recovery of arrears of rent for the years 1331 to 1334 Fs. The finding was that the Defendant were in possession, but the suit was dismissed because the lower Court held that the leases were hit by Section 107, T. P. Act, and on the facts of that case Khwaja Mohammad Noor, J., relying upon a Calcutta decision, held that a verbal lease accompanied by delivery of possession was valid for one year and thereafter if the deft-lessee continued in possession, his continuance in possession could not be otherwise than by holding over and the provision of Section 116, T. P. Act, was attracted and upon that footing his Lordship held that the Defendant were tenants of the plaintiffs. for the subsequent years also and decreed the suit for rent. This decision was upheld in the Letters Patent Appeal and Courtney Terrell, C. J., with whom Kulwant Sahay, J., concurred, came to the following finding :

"In my opinion, on these facts the Defendant are estopped by their conduct from denying the relationship of landlord and tenant. It is perfectly true that the plaintiff. cannot set up the verbal lease for the specified period. But I agree with Noor J., that a verbal lease for more than one year accompanied by delivery of possession is valid for the first year 1328. There was no fresh lease and the Defendant continue in possession after its termination (admittedly as tenants) for successive years, by holding over and Section 116, T. P. Act, applies."

It is quite clear, therefore, that that was an entirely different case from the one we have to deal with in this appeal and that gives no support to the contention of the appellants to the effect that a registered lease, because it does not fulfill the conditions prescribed by Section 107, T. P. Act, could be construed as a lease by oral agreement accompanied by delivery of possession. The other case relied upon by the learned counsel in the case of *Mohan Lal v. Ganga Singh*³, In this case, there was a lease by the usufructuary mortgagee to the mortgagor of a house on a monthly rental. This document was unregistered and was not, under law, required to be registered. A suit was filed for arrears of rent as also for the ejectment of the deft, from the house. It was held in that case that a lease could only be created in the

manner stated in Section 107, T. P. Act, and it was further held that the document in that case, a kabuliyat, could be looked at as an admission or an acknowledgment by the person attempted to be made liable and that would furnish the best evidence as to the oral agreement between the parties. In that view of the matter, their Lordships held that the pltfs. suit could be decreed. This case also, in my opinion, is of no help to the appellants the facts being entirely different. The view which I have taken finds support from a Division Bench decision of this Court in *Budhan Mahton v. Ramanugrah Singh*⁴, In this case, the pltfs. had brought a suit for recovery of possession of a certain share in a village and for mesne profits, or in the alternative, for damages. The pltfs. claimed title under a thicca lease date 28-6-1940 granted by deft. 2 of that case for the period 1348 to 1354 Fs. The same share in the village had been given by deft. 2 in zarpeshgi lease to deft. 1 under a patta dated 13-10-1939 for 1341 to 1347 Fs. The deft, took the defence that there was no valid title created in favor of the pltfs. under their alleged lease. One of the points taken in second appeal was that as the documents of lease, namely, the patta and the kabuliyat. had not been executed by both the parties to the documents, the lease was bad and it was dealt with by Chatterji J., with whom Pande J., concurred, as follows :

"Lastly, it is urged by Mr. Dasu Sinha that even though the patta Ex. 3 may not create a valid lease, the lease may be operative as a lease for one year, inasmuch as it was accompanied by delivery of possession According to Section 107, T. P. Act, a lease for one year may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. The argument of Mr. Dasu Sinha cannot succeed, unless it be held that the lease was treated by oral argument accompanied by delivery of possession. The pltfs. never made out a case that the lease was created by an oral agreement. Their definite case was that the lease was created by the registered patta Ex. 3."

In that case, their Lordships did not accept the contention of Mr. Dasu Sinha that although the lease purported to be made by an agreement in writing and registered, it could be construed as an oral agreement for one year and thereafter it could be a case of holding over. Their Lordships' view lends support to my opinion that if a lease is purported to be made by a written and registered agreement for a period exceeding one year; or from year to year, it cannot be construed to be an oral agreement of lease for one year and thus defeat the provisions of Section 107 of the Act. I would, therefore hold that in the present case the lease is within the mischief of Section 107, T. P. Act, and the lease is invalid and its invalidity cannot be cured by construing it to be a lease by oral agreement accompanied by delivery of possession. I would,

therefore, reject this contention of the appellants.

9. The next point that has been urged is that possession of a portion of the leasehold should be construed to be possession of the other portions of the lands comprised in the leasehold. This argument is founded upon the finding that the pltfs. were in possession of village Bahira Dih, one of the seven villages covered by their lease, and it is said that if the pltfs. were in possession of Bahira Dih they must be held to be in constructive possession of village Mandra, the village in suit, although the pltfs. might have failed to prove their actual physical possession of this village. In my view, this contention is also without merit. The doctrine of constructive possession of the

entire lands in the leasehold by proving possession of a part can be pressed in aid by a person who has the legal title vested in him in the leasehold. If his lease is invalid, because it is not in accordance with the provisions of the law, then he cannot be held to be in possession of the entire leasehold by showing that he was in possession of a portion of it. A person in possession under an invalid lease is a mere trespasser and it is well settled that a trespasser cannot invoke the aid of the principle of constructive possession. The possession of a trespasser is limited to the lands which are actually in his physical possession. The finding in this case is that the appellants have failed to prove their possession of the village in suit. Their lease not having been made in accordance with the provisions of Section 107, Transfer of Property Act, the lease must be held to be an invalid lease and their possession of village Bahira Dih, one of the villages covered by the lease, must be held to be that of trespassers as the legal title did not vest in them by the lease in question. Mr. Sen has drawn our attention to a portion of a sentence at p. 1271 of 'Wood on Limitations', 4th Edn. which runs as follows :

"..... while he is in possession of a part of the premises, his possession is entitled to the benefit of the constructive possession, and can only be ousted by, and to the extent of, the actual occupation of a mere intruder."

Mr. Sen has not referred to the earlier part of the sentence which runs as follows :

"The rule is well settled that title draws to it the possession, and it remains with the owner of the legal title until he is divested of it by an actual adverse possession;"

I have underlined (here italicised) the important words in this quotation and Mr. Sen only relies on what follows this part of the sentence and it is quite clear that the benefit of constructive possession is to go to the owner of the legal title and not to a person who has got no legal title. This quotation from 'Wood on Limitations' does not support Mr. Sen, but is against him. That a person in possession under an invalid lease is in possession as a trespasser, is established now beyond doubt. In the case of *President and Governors of the Magdalen Hospital v. Alfred Knotts*⁵, it has been held that a lease which was against the provision of law was an absolutely void lease from its very inception and that if the lessee was put in possession under that invalid lease, the right of the lessor to re-enter on the land existed from the moment of the execution of that lease and that right not having been sought to be enforced within limitation, was barred. This case was followed in our Court in *Bhukhan Mian v. Radhika Kumari Debi*⁶, This was a case of mortgage which had not been registered as was required by law and Manohar Lall J. made the following observation :

"The pltf., therefore, all the time was entitled to institute a suit for recovery of possession of his land within 12 years of the date of the invalid mortgage-invalid in the sense that it could not be enforced owing to the absence of registration; the possession of the deft, became adverse to the pltf. from the very date of the invalid mortgage."

His Lordship relied upon the aforesaid case of the President and Governor of the Magdalen Hospital. In *Mt. Jasoda Kuar v. Janak Missir*⁷, the observations of Jwala Prasad J., with whom Adami J., agreed, lend support to the view that if a person is in possession under an invalid title

for more than 12 years, he gets absolute title to the property by adverse possession, that is to say, the person holding under an invalid title is a trespasser and can get his title perfected by adverse possession if he remains on the land for 12 years. In that case, the pltf. had brought a suit for ejectment on the ground of dispossession, the pltf's. title being founded upon a deed of sale. The defense was that the sale-deed was not a valid one and was not executed by the vendors. The other defence was that the deed of sale was not validly registered because the registration was invalid. Their Lordships held that the execution of the document by the vendors had been proved, there was no fraud and that the registration was also valid. But their Lordships held that even if the registration of the document was illegal, the pltf. having remained in possession for over 12 years, had acquired absolute title to the property by adverse possession. This observation of their Lordships may be an obiter dictum, but that shows the view of their Lordships in regard to the possession of a person under an invalid deed. This judgment of their Lordships was followed by the Allahabad High Court in *Kashi Nath v. Makchhed*⁸, This view also finds support from the case of *Kandasami Pillai v. Chhinnabha*⁹, where their Lordships made the following observation;

"An unregistered sale cannot be set up as a transaction having effect of itself to transfer any interest in the property; but it is permissible to consider it, as showing the nature of the transferee's subsequent possession that is, when the sale is of mortgaged property to the mortgagee that it was not as a mortgagee, but as a full owner. That being established it would after the expiry of 12 years ripen into full title and bar mortgagor's right of redemption."

I would, therefore, hold that the possession of the pltf's. of village Bahira Dih does not prove constructive possession by the plts, of village Mandra, the village in suit, and, therefore, it must be held, as has been held by the lower appellate Court, that the pltf's. were not in possession of village Mandra. This finding alone is sufficient to dispose of the whole appeal; but as arguments were addressed to us at length, I have thought it fit to consider the other argument as well.

10. The last point contended for by the appellants was that under the provisions of Section 53a, T. P. Act, the pltf's. were entitled to maintain their possession. Upon the finding that the pltf's. are not in possession, the question does not fall to be decided; but as Mr. Sen has argued this point at length, I would briefly give my opinion on this point. In my judgment, the provisions of Section 53a do not create a right in the transferee to go to Court for the redress of his grievances. It imposes a bar on the exercise of some of the legal rights of the transferor in a Court of law. The relevant portion of the section runs as follows :

"..... 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 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."

I have underlined (here italicised) the important words in the extract from the section and it is clear to me that the transferor or persons claiming under him cannot enforce any right in respect of, the property which the transferee has been put in possession of, other than a right reserved expressly in the contract. No right to enforce his right in Court has been given to the transferee. If the transferor or a person claiming under him desires to evict a transferee or a person claiming under him from the land of which the transferee had taken or continued in possession in the absence of any express agreement to the contrary, the transferor or a person claiming under him cannot do so and the transferee or a person claiming under him can successfully raise the plea of part performance, that is to say, of having been put in possession of the property in pursuance of the contract. In other words, this provision contained in section 53A, does not give any active right to the transferee and it has, therefore, been held by their Lordships of the Judicial Committee in *Probodh Kumar v. Dantmara Tea Co. Ltd*¹⁰. that the amendment of the law effected by the enactment of Section 53a. conferred no right of action on a transferee in possession under an unregistered contract of sale. Their Lordships agree with the view expressed by Mitter J., in the High Court that "the right conferred by Section 53a is a right available only to the deft, to protect his possession..... The section is so framed as to impose a statutory bar on the transferor; it confers no active title on the transferee." It must, therefore, be held that the provisions of Section 53a, T. p. Act, give no right to a transferee to come to Court as a pltf. either to maintain his possession or to recover possession, if dispossessed, after having been put in possession in pursuance of the contract. Mr. Sen has placed before us a case of the Allahabad High Court in *Ram Chander v. Maharaj Kunivar*¹¹, This case, no doubt, supports his contention. But with very great respect to their Lordships, I do not feel bound to accept their interpretation of the section specially in view of the construction put upon this section by the Privy Council Mr. Sen argues that it looks anomalous that a transferee who was put in possession cannot come to a Court of law as a pltf for declaration of his possession, or, in the alternative, for recovery of possession in pursuance of a contract between him and the transferor. I do not think there is any anomaly. A Court of law can only recognize or give effect to a title which is made perfect in law and if any of the legal formalities is wanting to make a title good in law that title is an imperfect title and the Court will not help a person who has an imperfect title in law. A transferee who is not clothed with title in the manner recognized by law, cannot be said to be a person having a valid title in law and therefore, Courts of law can not recognise such a title. If the transferee though not clothed with a perfect legal title has been put in possession or continued in possession, the Court on grounds of equity alone can refuse to enforce the rights of the transferor except so far as those rights are expressly mentioned in the contract in writing and the equitable right in favour of the transferee has been embodied in Section 53a. In that view of the matter the provisions of Section 53a cannot be brought to the aid of the pltf.

11. I would, therefore, dismiss this appeal with costs.

Das. J.

12. I agree with my learned brother on points (1) and (2), but would like to add a few observations.

13. There is no doubt that the document which purported to create a lease in favour of the appellants in this case came under para. 1 of Section 107, Transfer of Property Act. It is equally clear that the document was not executed in the manner required by para 3 of the said section;

therefore, it did not create nor constitute a valid lease. Now, the question is - can this document be so construed as to spell out the creation of a lease by oral agreement accompanied by delivery of possession of the kind mentioned in the second para, of Section 107, T. P. Act? In my opinion, the answer must be in the negative, and for these reasons. Firstly, the appellants never set up a case of a lease by oral agreement accompanied by delivery of possession, independent of the document, for which the document could be a piece of evidence. Secondly, I do not think that the document can be used so as to create by an indirect or back-door method what the statute says can be done in a particular way only. I emphasise the word only in para. 1 of Section 107, Section 105 defines a lease, which is a transfer of the right to enjoy immovable properties, i. e., a right in rem; it must be made for "a certain time expressed or implied", which may be (1) less than a year, (2) more than a year. Section 9, T. P. Act, lays down that a transfer of property may be made without writing in every case in which a writing is not expressly required by law. Section 107, provides that a lease of immovable property from year to year or for any term exceeding one year or reserving yearly rent can be made only by registered instrument. The transfer of a right to enjoy immovable property in consideration of rent for a year or less than a year can be made without any writing. Thus, there are decisions which say that an oral lease, purporting to be for more than a year, accompanied by delivery of possession is good, at least for the first year. If after the first year, the lessor accepts rent from the lessee and assents to his continuing in possession, the lease by reason of Section 16, T. P. Act, is renewed from year to year or month to month according to the purpose for which the property is leased as specified in Section 106, T. P. Act. (See *Adi Nath v. Krishna Chandra*¹², *Anwarali Bepari v. Jamini Lal*¹³, *Naim Sahib v. Tata Iron and Steel Co. Ltd*¹⁴. *Aziz Ahmad v. Alauddin Ahmad*¹⁵ confirmed in Letters Patent Appeal in *Alauddin Ahmad v. Aziz Ahmed*¹⁶.) But no decision has been brought to our notice, except, perhaps, a Lahore decision to which I shall presently refer, which has hold that a registered document purporting to create a lease but not executed in the manner required by law can be construed so as to create a lease by oral agreement accompanied by delivery of possession. The Lahore decision (*Mohan Lal v. Ganda Singh*¹⁷.) related to a kabuliyat, which it was stated, was not a lease within the meaning of Section 107 and which did not require registration; this kabuliyat was looked at as evidence of an admission or acknowledgment of an oral agreement. The position in the case before us is quite different. No case of an oral agreement of lease having been pleaded, there is no question of looking at the document as evidence of such an agreement. I do not wish to make any observations regarding a hypothetical case where the lease is effected by an oral agreement accompanied by delivery of possession and there is also an unregistered instrument evidencing it. In such a case the question may arise if the existence of the unregistered instrument prevents the passing of title by delivery. If and when such a question arises, the answer may have to be given with reference to Section 49, Registration Act, 1908, after its amendment in 1929.

14. On the question of possession, it was argued that the position of the appellants was that of licensees and not trespassers. Assuming that contention to be correct, though I doubt its correctness, the appellants can be licensees only with regard to Bahira Dih. I do not understand how they can be licensees in respect of property which was in somebody else's possession.

15. As to the provisions of Section 53A, T. P. Act, it is really unnecessary to express any final opinion on to distinction which has been made in some reported decisions between defending possession and recovering possession and the view (based on that distinction) that a transferee may come to Court to defend his possession against acts of aggression on the part of the

transferor or his representative, though he cannot ask for recovery of possession for want of a perfect title. As the question does not arise in the view which I take on the other two points, I express no opinion on it.

16. I agree that the appeal be dismissed with costs.
Appeal dismissed.

Cases Referred.

¹ AIR (20) 1933 Pat. 485

²(21) 1934 Pat. 369

³ AIR (30) 1943 Lah. 127

⁴ AIR (34) 1947 Pat. 78

⁵(1879) 4 a. C. 324

⁶19 P. I. T. 489

⁷ AIR (12) 1925 Pat. 787

⁸ AIR (26) 1939 all. 504

⁹44 Mad. 253

¹⁰66 I. A. 293

¹¹ AIR (26) 1939 all. 611

¹² I. L. R. (1943) 1 Cal. 34

¹³ AIR (27) 1940 Cal. 89

¹⁴ AIR (28) 1941 Pat. 244

¹⁵ AIR (20) 1933 Pat. 485

¹⁶ AIR (21) 1934 Pat. 369

¹⁷ AIR (30) 1913 Lah. 127