

**SUPREME COURT OF INDIA**

Jharu Ram Roy

Vs.

Kamjit Roy

C.A.No.151 of 2009

(S.B. Sinha, Dr. Mukundakam Sharma and Asok Kumar Ganguly JJ.)

13.01.2009

**ORDER**

1. Leave granted.

2. This appeal is directed against a judgment and order dated 4.6.2007 passed by the learned Single Judge of the High Court Gauhati in R.S.A No. 169/2006 preferred by the appellant herein, whereby and whereunder the judgment and order dated 18.4.2006 passed by a Civil Judge, Senior Division, was affirmed.

3. The basic fact of the matter is not in dispute.

4. One Nakho Ram was the owner of the suit property. He had two sons, namely, Rajiv Lochan Roy and Kamjit Roy. The property in the suit admeasured 16 Bighas 4 Kathas.

5. Rajiv Lochan executed two deeds of sale in 1982, in respect of about 4 2 Bighas of land, inter alia, contending that he had half share in the said property.

6. It is not in dispute that the family of Nakho Ram was governed by Dayabhaga School of Hindu Law. It is furthermore not in dispute that in 1982, Nakho Ram was alive and he expired only in the year 1990. Appellant, however, claimed that in terms of the aforementioned deeds of sale executed by Rajiv Lochan in the year 1982, he had remained in possession of the vested property since the date of purchase.

7. It is, furthermore, not in dispute that in the year 1990, a proceeding under Section 107 as also Section 145 of the Code of Criminal Procedure was initiated and therein, Respondent No.1 herein was put in possession of the property.

8. Respondent No.1 filed a suit in the year 1991 for declaration of his title, confirmation of possession as also a decree for setting aside two deeds of sale executed by Rajiv Lochan in the year 1982. The said suit was dismissed by the learned Trial Judge, inter alia holding that the legal representatives of the proforma respondents having not been brought on record, the suit had abated. It was furthermore held that the defendant-appellant acquired title to the suit

property by adverse possession. The suit so far as it related to setting aside the aforementioned deeds of sale was, however, held to be barred by limitation.

9. The First Appellate Court, however, on an appeal preferred by the contesting respondents, reversed the said findings of the Trial Court opining that as the defendant-appellant was a party to the fraud perpetrated by Rajiv Lochan in so far as he was, at all material times, aware that in the year 1990, Nakho Ram was alive and not dead, he cannot take benefit of the said deeds of sale and the same were void ab initio. The High Court, as noticed hereinbefore, has affirmed the said view.

10. Learned counsel appearing on behalf of the appellant would contend that the High Court committed a serious error in passing the impugned judgment in so far as it failed to take into consideration the provisions of Section 43 of the *Transfer of Property Act*, in terms whereof, having regard to the fact that Rajiv Lochan had also died in the year 1992, the doctrine of feeding the estoppel became applicable to the facts of the present case.

11. A finding of fact has been arrived at by the First Appellate Court that the appellant was also a party to the fraud inasmuch as he was all along aware that on the date of execution of the deeds of sale, Nakho Ram was alive.

12. Indisputably, therefore, the appellant entered into the aforementioned transaction knowing fully well that Nakho Ram was alive in the year 1992, Rajiv Lochan could not have executed the deeds of sale and only with a view to obviate the legal difficulties, Nakho Ram was shown to have expired.

13. Appellant was furthermore aware that although Rajiv Lochan did not inherit the property of Nakho Ram, he executed the aforementioned deeds of sale.

14. Rajiv Lochan, thus, having no title to the property, by said deeds of sale or otherwise, evidently could not have derived any title thereover.

“Section 43 of the Transfer of Property Act reads as under:

"43. Transfer by unauthorised person who subsequently acquires interest in property transferred.- Where a person fraudulently or erroneously represents that he is authorised to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.”

15. In this case, as the appellant averred that although in the deeds of sale, a stipulation was made by Rajiv Lochan that his father had expired, it cannot be said to be a case where he

fraudulently or erroneously represented that he was authorized to transfer the said immovable property. As noticed hereinbefore, a finding of fact had been arrived at by the First Appellate Court that the appellant was a party to the fraud and that he was not victim thereof.

16. Our attention, however, has been drawn to a decision of this Court in<sup>1</sup>. In the said decision this Court laid down the law in the following terms:

“12. In order to get the benefit of the said provision, the conditions which must be satisfied are:

(1) the contract of transfer was made by a person who was competent to contract; and (2) the contract would be subsisting at the time when a claim for recovery of the property is made.

13. However, the provisions would have no application if the transfer was invalid as being forbidden by law or contrary to public policy, as envisaged under Section 23 of the Contract Act.

Thus, no estoppel can be pleaded contrary to the provisions of a statute. The 'rule of feeding the estoppel' shall apply in absence thereof.

14. The doctrine of feeding the estoppel envisages that 'where a grantor has purported to grant an interest in land which he did not at the time possess, but subsequently acquires, the benefit of his subsequent acquisition, goes automatically to the earlier grantee, or as it is usually expressed, feeds the estoppel'.

15. The principle is based on an equitable doctrine that a person who promised to perform more than he can perform must make good his contract when he acquires the power of performance.

The difference between the ambit of Section 41 and 43 of the Act is apparent. Whereas Section 41 provides that a transfer by an ostensible owner cannot be avoided on the ground that the transferee should take reasonable care to ascertain that the transferor had power to make the transfer and to act in good faith before a benefit thereof if claimed by him. Section 43, on the other hand, enables the transferee to whom a transferor has made a fraudulent or erroneous representation to lay hold, at his option, of any interest which the transferor may subsequently acquire in the property, unless the right of any subsequent purchaser for value without notice is in effect."

Fraud vitiates all solemn acts. As the appellant was aware of the fact that Nakho Ram had not expired in 1992, in our opinion, the provisions of Section 43 of the Transfer of Property Act cannot be said to have any application in the instant case.

For the reasons aforementioned, this appeal is dismissed. However, there shall be no order as to costs.”

*2007 (2) SCC 404*