ALLAHABAD HIGH COURT

Shyam Narain Misir

Vs

Mangal Prasad

(Sulaiman C.J. and Rachhpal singh, J.)

12.09.1934

JUDGMENT

Sulaiman C.J.

1. This is a plaintiffs' appeal arising out of a suit for redemption of a usufructuary mortgage of 1879. The plaintiffs claim to be the representatives of the mortgagor under a sale-deed, dated 13th September 1927, executed by Ram Narayan son of Mt. Bhagwanti, who was the daughter of Mt. Budna the mortgagor. The defendants, who are the representatives of the mortgagees, pleaded that the plaintiffs had no right of redemption left inasmuch as they had acquired proprietary title under the sale-deeds of 2nd August 1910, and 4th January 1927, executed by Ram Narayan previous to that in favour of the plaintiffs.

2. It appears that on the death of Mt. Budna, she was succeeded by two or three daughters, one of whom Mt. Bhagwanti died in 1904, another daughter having died earlier. On the death of Mt. Bhagwanti, the name of Ram Narayan was entered against a half-share in the estate, while the name of the other daughter, Mt. Akashi continued to remain recorded against the other half. In 1910, Ram Narayan sold that half-share in the property which was in his possession. Mt. Akashi was then alive and died much later in 1926. On her death, Ram. Narayan executed a second sale-deed on 4th September 1927, in which he acknowledged the validity of the previous sale-deed of 1910 and also transferred the remaining half-share to the same vendees. It was after this that the plaintiffs took the sale-deed from Ram Narayan. The lower appellate Court has held that the defendants vendees are perfectly protected and the plaintiffs as representatives of Ram Narayan are estopped from going behind the previous two transactions. On appeal a learned Judge of this Court has affirmed that decree, holding that Section 41 as well as Section 43, T.P. Act, are a bar to the claim so far as the half-share sold in 1910 is concerned. As regards the remaining half-share, the validity of the sale-deed of 1927 has to be accepted.

3. The learned advocate for the plaintiffs urges before us that Section 43, T.P. Act, cannot apply to a case where a person, who is a mere contingent reversioner, purports to transfer the property

and then subsequently succeeds to it. The argument is that such an interpretation of Section 43 would be in conflict with Section 6(a) under which the chance of an heir-apparent succeeding to an estate cannot be transferred. He relies strongly on Bindeshwari Singh v. Har Narain Singh 1929 Oudh 185, and the case of Official Assignee of Madras v. Sampath Naidu 1933 Mad 795. These cases certainly support his contention; but they proceed on the authority of certain earlier cases which can be easily distinguished. The case of *Sumsuddin Goolam Husein v. Abdul Husein Kalimuddin*[1] was one where the transferor had agreed to relinquish and release all her right, title and interest, present or future, by way of inheritance or otherwise in certain properties; Section 6(a) was clearly applicable and Section 43 could have no application.

4. Similarly the case of Sri *Jagannada Raju v. Sri Rajah Prasada Row*[2] was a case of a contract by an expectant reversionary heir to an estate, to sell the same if and when it devolved upon him. It was, of course, held that such a contract could not be specifically enforced. On the other hand, in *K. Nabi Sab v. Murukuti Papiah*[3] Ayling and Tyabji, JJ., distinctly held that where the transferor represents himself to be an absolute owner, of the property transferred, when he is not, and on a data subsequent to the transfer, acquires title to such property by inheritance, the transfer is not a transfer of spes successions and invalid under Section 6(a), T.P. Act, but is one under Section 43 of the Act and is enforceable against the transferor. A distinction was drawn between the transfer of a mere right of succession and the transfer of the property professing to be full owner. This case is directly against the appellants.

5. But another Division Bench of the Madras High Court has distinctly dissented from this case without referring the question to a larger Bench. In Official Assignee of Madras v. Sampath Naidu 1933 Mad. 795, it was considered that the mortgages, executed by a person who, although he professed to be the full owner, was in reality a mere reversioner, could not be governed by Section 43 at all. It was thought that to apply Section 43 would be to contravene the provisions of Section 6(a). The learned Judges relied on the case of Sri *Jagannada Raju v. Sri Rajah Prasada Row*[4] although as it has been pointed out, that was a case of a promise to transfer the fruits of the expectations. The learned Judges felt compelled to go to the length of holding that the illustration to Section 43 which directly applies to the case of an heir, is repugnant to the provisions of Section 6(a) and is therefore wrong. The other cases relied upon also are cases either of mere contracts or of transfers of a mere chance of succession. An Allahabad case holding the contrary view was not followed on the ground that Section 6(a) had not been considered there.

6. It also appears that a Division Bench of the Lucknow Chief Court in *Bindewhwari Singh v. Har Narain Singh*[5] have apparently expressed the same view. There also it has been considered that the transfer of property by a person, who is in reality not the owner, is really the transfer of a chance of succession, and is therefore void under Section 6, T.P. Act. We do not think that the Full Bench case of the Madras High Court *Sannamma v. Radhabhayi*[6], necessarily decides this point in favour of the appellants. In that case the alienation was prohibited by statute, and it could therefore not be given a retrospective effect by virtue of Section 47, T.P. Act. Possibly on the

same ground an earlier case of the Madras High Court in *Ramasami Naik v. Ramasami Chetty*[7] may also be, distinguished.

7. On the other hand, in several cases of this Court it has been laid down that Section 43 applies even to cases of heirs who profess to transfer the property itself and not only their right of succession. We may mention the cases of *Sarju Prasad v. Ghissa*[8] *Sunder Lal v. Ghissa 1929 All. 589(Supra) and Eshaq Lal v. Dulla*[9] The inapplicability of Section 6 to such a case was not discussed at length, because obviously the section was considered to be irrelevant. The learned Judicial Commissioner of the Nagpur Court in Bismilla v. Manulal Chabildas 1931 Nag. 51(Supra), reviewed many cases on this point and came to the same conclusion as this Court. It seems to us that when there were clear cases under the unamended Transfer of Property Act, applying Section 43 to the cases of heirs, and there was a specific illustration to Section 43 which was in point, and the Legislature has not thought fit to delete the illustration in the Amended Act, it is impossible to hold that the illustration is repugnant to the provisions of Section 6 and is really wrong. Every attempt should be made to reconcile the provisions of Section 43 together with the illustration with the provisions of Section 6. Such a reconciliation is, in our opinion, patent enough. Section 6 docs not prohibit emphatically the transfer of a chance of an heir; nor does it make it absolutely illegal so as to vitiate the entire contract. It merely lays down that the property of any kind may be transferred, but the chance of an heir cannot be transferred. This is no more than saying that a transfer of a mere chance of an heir is void in law and is of no effect. Section 6(a) would therefore apply to cases where professedly there is a transfer of a mere spes successionis, the parties knowing that the transferor has no more right than that of a mere expectant heir. The result, of course, would be the same where the parties knowing the full facts fraudulently clothe the transaction in the garb of an out and out sale of the property, and there is no erroneous representation made by the transferor to the transferee as to his ownership.

8. But where an erroneous representation is made by the transferor to the transferee that he is the full owner of the property transferred and is authorized to transfer it and the property transferred is not a mere chance of succession, but immovable property itself, and the transferee acts upon such erroneous representation, then if the transferor happen later, before the contract of transfer comes to an end, to acquire an interest in that property no matter whether by private purchase, gift, legacy or by inheritance or otherwise, the previous transfer can at the option of the transferee operate on the interest which has been subsequently acquired, although it did not exist at the time of the transfer. The illustration to Section 43 is, in our opinion directly applicable to such a case. Under it if a Hindu son who has separated from his father and the joint property is divided on partition so that the son no longer owns a particular property which has been allotted to the father, but transfers the same professing to own it, then, if while the contract of sale has not been rescinded the heir succeeds to the estate of his father on his death, the transferee may require the son to deliver such property to him. This is a case of an heir, who had at the time a mere chance of a succession to the estate of his father in case he survived him, transferring the property itself and not his chance of succession. Under the illustration he is bound to restore the property to the transferee if before the contract is rescinded he succeeds to such property. Of course, the

protection is not afforded for a transaction which wears the garb of a transfer, but only to such a transfer as has been taken by the transferee acting upon an erroneous representation made to him that his transferor had authority to transfer the property itself vide Mularaj v. Indar Singh 1926 All. 102. We accordingly agree with the view expressed by Niamat Ullah, J., in disagreement with the Lucknow Chief Court, that Section 43 would be applicable. We however think that Section 41, T.P. Act, cannot be of any avail to the defendants. Under that section when a person who is the ostensible owner of a property with the consent express or implied of the true owner transfers the same for consideration, the owner is bound by the transfer under certain circumstances. Here if we regard the daughter, Mt. Akashi as the true owner and Ram Narayan as the ostensible owner, then Mt. Akashi would have been bound by the transfer; but she is now dead and the question of a limited owner being bound by the transfer no longer arises. Section 41 cannot be invoked against the plaintiffs themselves, simply because they had previously made the transfer. It is Section 43 which is the appropriate section.

9. The lower appellate Court has recorded a distinct finding that the vendees acted in perfect good faith. We have got to accept this finding in second appeal, however incomplete it may be. Putting it at its very lowest, this finding must mean that the defendants vendees were not aware that their vendor had no authority to sell the property. Whether they were aware of any other circumstances has not been made clear by the lower appellate Court; but we must assume that they were not aware that their vendor had not any authority to transfer the property. Now, from the sale-deed it is quite clear that Ram Narayan professed to transfer all his zamindari rights in the property over which he was in possession and did not mean to retain any interest. He provided that the vendees would generation after generation remain in proprietary possession of the property sold; and towards the end of the document he in particular stated that from the date of the sale-deed the vendees should like the vendor remain in proprietary possession and occupation of the property sold and that now the vendees are the permanent owners of the property sold. I and my heirs have nothing to do therewith.

10. The earlier portion of the sale-deed in question was not drafted in a way which would make a clear admission of the full ownership of the executant. At the same time there is no clear recital in it which would suggest that he was not the absolute owner. He has certainly said that he sold the property absolutely and that the vendees would remain in proprietary possession of the property like himself generation after generation and that they had become the absolute owners of the property. We think that these recitals are sufficient to warrant the conclusion that there was an erroneous representation made to the vendees that the executant had full power to make them absolute and complete owners. In this view of the matter we are of opinion that the defendants are entitled at their option, as the transaction has not been rescinded, to make the transfer operate on the interest which Ram Narayan has acquired since. It is not necessary to consider how far his confirmation of this sale-deed and his acknowledgment of its validity as contained in his subsequent sale-deed of 1927 is binding upon him. As a mere question of ratification the point could not be argued that a transfer which was void could be made valid by a mere subsequent

ratification. On the other hand, if there was a fresh contract between the parties, one of the terms of which was that the previous void transfer should be accepted, it may well operate as estoppel. In the view which we have taken of the consequences of the representations made in the earlier sale-deed, it is not necessary to express any final opinion as to the inference to be drawn from the second sale-deed.

11. The appeal is accordingly dismissed with costs.

Cases Referred.

1(1907) 31 Bom. L.R. 781
21916 Mad. 579
31915 Mad. 972
41916 Mad 579
51929 Oudh. 185
61918 Mad. 123
7(1907) 30 Mad. 255
81929 All. 589
91930 All. 115