
(1954) 01 KAR CK 0004
In the Karnataka High Court
Case No : Second Appeal No. 488 of 1951-52

B.V. Sundariah

APPELLANT

Vs

B.R. Ramasastry and Others

RESPONDENT

Date of Decision : 12-01-1954

Acts Referred:

Transfer of Property Act, 1882 — Section 41, 43

Citation : AIR 1955 Kar 8

Hon'ble Judges : Vasudevamurthy, J

Bench : Single Bench

Advocate : A.R. Somanatha Iyer and M.K. Srinivasa Iyengar, for the Appellant;
H.K. Srinivasamurthy, for the Respondent

Judgement

1. The plaintiff sued the defendants for recovery of possession of the plaint schedule property, which is a piece of garden land, on the strength of a sale deed dated 1-11-1939 executed by defendants 1 and 2 for themselves and by defendant 1 as manager of a joint-family and as guardian of his then minor son defendant 3. He pleaded that he had been in possession and was dispossessed in October 1947. Defendant 1 pleaded that the sale deed Ex. 11 on which the plaintiff relied, was not meant to effect a sale and intended only as a security for the amount advanced by the plaintiff thereunder. Moreover as the plaintiff had been required under that deed to pay off an earlier debt due to defendant 4, a co-operative society which had obtained a decree against him and purchased the property in execution but had failed to do so, the plaintiff could not enforce the document. The society had subsequently sold the property to defendant 3 to whom it now belonged.

Defendant 2 pleaded that he merely signed Ex. 11 as desired by the plaintiff and was not liable for the suit claim. Defendant 3, who is the main contesting defendant in the suit and who has now come up in second appeal, pleaded that he had purchased the property from defendant 4 from out of his own self-acquisitions under a sale deed Ex. 3 on 16-10-1944 and that the plaintiff had

never been in possession of the suit property. He, however, admitted that the property in suit had been hypothecated to the Society by defendant 1 who was then the manager of the family for a purpose binding on the family. No question therefore now arises as to the binding nature of the debt which was due to defendant 4.

2. Both the Courts below have rightly held that the suit property is not the self-acquisition of defendant 3 but belonged to the family of defendant 1 and his sons Defendants 2 and 3 as admittedly they are members of a joint-family. They have also held that Ex. 11 was really a sale deed and was not intended to evidence a mortgage and have accordingly decreed the plaintiff's suit.

3. I think the judgments of the Courts below are correct and must be upheld. The concurrent finding of the Courts below is that Ex. 11 was really meant to convey the property by way of sale to the plaintiff and was not intended to be a mortgage. Though, defendant 1 pleaded in his written statement that Ex. 11 was intended to be a mortgage, his witness, D.W. 5, has deposed that the plaintiff told him during the earlier negotiations preceding Ex. 11 that defendant 1 might execute a sale deed and take a reconveyance whenever he wanted and that he asked defendant 1 to execute a sale deed.

He also suggested that agreements might be written in respect of the two sale deeds Exs. 11 and 12. An agreement Ex. 13 dated 2-11-1939 has been executed in favour of defendant 1 by the plaintiff. Under that agreement the plaintiff has agreed to reconvey an item of property which had been sold to him under Ex. 12 dated 1-11-1939 for Rs. 350/- back to defendant 1 if he paid that sum within three years. A similar agreement of reconveyance has not been taken in respect of the sale under Ex. 11 which was also on the same date as Ex. 12. The explanations that there was only one stamp paper available, that Ex. 13 was written up on it and that the execution of a similar agreement in respect of Ex. 11 was postponed and that while three years period was stipulated for the reconveyance of the property covered by Ex. 12, no such period was at all stipulated in respect of Ex. 11 properties are obviously unconvincing and has been rightly rejected by the Court below. Defendant 1 who was examined as D.W. 3 has deposed that the plaintiff told him that he might pay Rs. 1,000/- at any time and take a reconveyance and has not let in any evidence that Ex. 11 was really intended to be a mortgage.

4. It has been next contended for the Appellant that the suit item which had been mortgaged along with others to defendant 4 had been purchased on 18-4-39 by the society, defendant 4, at the Revenue auction held by the Amildar in execution of the decree obtained by that society against defendant 1, that that sale had been duly confirmed as evidenced by Ex. 8 dated 20-7-39 and the society had thereby become full owner of the property and that defendants 1 and 2 could not therefore validly convey any interest in that property to the plaintiff by the sale under Ex. 11, on 1-11-1939. The society had validly conveyed their rights in favour of defendant 3 on 16-10-1944 and the plaintiff could not

challenge that sale.

The Courts below have held that defendant 3 has not made out that the suit item was one of the items which was sold at the Revenue auction or that its sale was duly confirmed in favour of the society. They have referred to Ex. 7 which does not contain any description of the property sold at the auction. The learned Munsiff refused to receive in evidence a copy of the sale list, which was filed before him after the case was reserved for judgment after hearing arguments and after all the evidence in the case had been recorded on the ground that the original was not got produced in time and proved.

In the first appellate Court an application was made for the admission of additional evidence in the shape of a certified copy of the sale list and some other documents relating to the sale by which it was sought to be inferred that the suit property had been sold at the auction and confirmed in favour of the society. The lower appellate Court refused to admit such additional evidence on the ground that defendant 3 had not made out a case for such admission as he had not been prevented by any sufficient cause from putting in that evidence in the trial Court. D.W. 4, now the Secretary of the society and who was one of the Directors of the society in October 1944 i.e., on the date of Ex. 20-b when the question of selling the property to defendant 3 was considered and the resolution Ex. 2 was passed, has stated that he does not even know what is the property involved in this suit, that he does not know if the plaintiff has paid any amount to the society and that they have no references to show that properties were sold at the auction and they had not taken a sale certificate.

D.W. 1 who was the President of the society to 1950 says that the society had taken possession of the property which had been sold in the Revenue sale which is obviously not true. He was also a party to the resolution Ex. 2. The best evidence in the matter would have been the sale certificate to be issued by the sale conducting officer and this the society had admittedly not obtained. As the evidence now stands the concurrent finding of the courts below and which is binding on this Court in second appeal is that defendant 3 has not proved that the suit item was one of the items purchased by defendant 4 and if so this appeal must necessarily fail.

5. In this Court a similar application for admission of additional evidence has been filed. It is contended by Mr. H.K. Sreenivasamurthy, learned Counsel for Respondent 1, that the law is strict as regards the admission of additional evidence by an appellate Court. He has referred to two cases reported in Arjan Singh v. Kartar Singh, (1951) 2 SCR 258 and Kessowji v. GIP Railway 34 LR 115 (P.C.) (B) I think that in the view I am taking it is unnecessary to consider the Appellant's application for additional evidence, though it cannot be said that the learned Subordinate Judge was not justified in refusing to admit such evidence as the reasons given by him for so doing appear to be proper. Even assuming that the suit item had been sold and had been purchased by defendant 4 and the same had been confirmed in favour of defendant 4 I think the plaintiff is still

entitled to succeed. In this connection, it is necessary briefly to refer to the circumstances under which the sale in favour of defendant 3 has taken place.

6. Defendants 1 to 3 executed Exs. 11 and 12 as already referred to on 1-11-1939 for Rs. 1,000/- and Rs. 350/- respectively. Out of the consideration under Ex. 11 Rs. 700/- was to go in discharge of a hypothecation debt due to the plaintiff under Ex. 16, which represented a debt due by defendant 1, Rs. 200/- to be paid to one Aswathanarayana Sastry on another hypothecation debt and Rs. 100/- towards the decree debt due to defendant 4. Out of the consideration of Rs. 350/- under Ex. 12 Rs. 25/- was received in cash by defendant 1 and the balance of Rs. 325/- was to be paid by the plaintiff to defendant 4 towards a decree debt. Defendant 1 admits in his evidence that the plaintiff has paid Rs. 200/- to Aswatha-narayana Sastry and Rs. 100/- to the society as per Ex. 11 recital and that Rs. 700/- was duly adjusted towards the debt due under Ex. 16 which had come into existence to discharge the previous debts due by his deceased father. The plaintiff has produced several receipts Exs. B-1 to B-9 and both the Courts below have held that he has paid the amount which he was liable to pay to defendant 4 in accordance with Exs. 11 and 12.

No attempt has been made either by defendant 1 or defendant 3 to show that he had not so paid and that he was still due to pay any further sums to the society for and on account of defendants 1 to 3. The khata of the suit property was made out in his name as seen from Ex. H, the R.R. extract and Ex. J. the endorsement regarding transfer of khata and the plaintiff has paid kadayam as per Exs. K to K-4. Immediately after the sale on 2-11-1939 or thereabout the plaintiff is said to have sent a petition to the society informing them that he had purchased the suit property and asking them to receive the amount from him; that he made such application is clear from Ex. C, an acknowledgment dated 2-11-1939 signed by the Secretary of the society and which defendant 1 who was the President of the society at the concerned times has admitted to be genuine. Ex. 19 which is a suit register of the society shows nil balance after receiving six annas from the plaintiff on 19-8-1944; and it is urged for Respondent 1 that there was really no amount due to the society thereafter from defendant 1.

In Ex. 20 (b) which is a copy of the resolution dated 2-10-44 of defendant 4 society, it is stated that defendant 1's son defendant 3 has made an application that he would discharge Rs. 39-9-0 being the balance of interest due in Case No. 369/36-37 wherein the mortgaged property had been sold and Rs. 67-12-3 principal and Rs. 34-6-9 interest due under a decree in Case No. 509/36-37 aggregating Rs. 141-12-0 that the same may be received from him and the Society may reconvey the property to him that the society had agreed to do so and might execute a reconveyance accordingly after receiving the amount. It is noteworthy that the interest of Rs. 39-9-0 is not shown as due and outstanding under Ex. 19 in Case No. 369/36-37 and it is shown only as a claim on 17-10-44. Ex. 21 is an application dated 5-8-44 by defendant 3 referred to in Ex.

20 (b) and Ex. 3 is the sale deed dated 16-10-1944 executed by the society in favour of defendant 3.

It is admitted by D.W. 1 who was the President of the society in 1950 and who was a Director in 1944 that defendant 1 was the President in 1944 though defendant 1 says he does not remember if he was the President in 1944; and that he does not even remember if he was a Director then. Neither D.W. 1 nor D.W. 4 nor any one else on behalf of the society has explained how a balance of Rs. 39-9-0 was claimed as still due when nil balance was shown in Ex. 19 much less that the same was claimed from the plaintiff. D.W. 1 who admits that he and defendant 1 are on good terms says that he is illiterate and knows only how to sign and that he does not know if the plaintiff had paid any money towards the decrees obtained by the society. He admits that the plaintiff had paid kadayam for the suit land, that the khata was in his name and that it was in the possession of the plaintiff for some years.

7. It is clear from the above that defendant 1 taking advantage of the fact that he was the President of the Society, with the aid of people like D.W. 1 and D.W. 4 to support him managed to obtain a speculative sale deed Ex. 3 in favour of his son defendant 3, having in mind the legal argument now advanced for him that the title to the property having vested in the society in 1938 alone the conveyance under Ex. 11 may be challenged through a subsequent purchase from the society.

I think this is a clear case where Section 43, T.P. Act would in effect if not in terms apply. That section provides that 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, and that nothing in that section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option. The section is based on the general rule of equity that where a transferor purports to convey a particular property and has not the title under which he professes to convey, the transferee must be satisfied out of any title which the transferor then has or afterwards acquires in the said property. It may be regarded as only an extension of the law of specific performance of contracts. When there is a contract for sale, the law compels the vendor to perform the contract specifically by conveying to the vendee the property sold and to execute a sale deed.

".....It is a species of relief which the courts are on the constant watch of giving either against the vendor himself or any person claiming as heir or volunteer under him, whether, the contract for the sale remains wholly unexecuted, or is defectively executed and whether the vendor Had good title to the premises at the time of the sale, or whether such title accrued to him afterwards: See Gour's Law of Transfer, Vol. I page 503."

It is but just and reasonable that a person who conveys property to another representing that he is entitled to do so and puts him in possession of the property he or persons claiming under him other than the "bona fide" purchaser from him for value without notice should not be permitted to deny the right which he so represented and under which he purported to transfer the property; and even if there was some defect in his title or his right to convey he should be compelled to make good the same out of any subsequently acquired rights.

8. In -- "7 Mys. L.J. 249 (C)", which was a case of a mortgage by a person who had erroneously represented that he was authorised to mortgage certain property and, while the mortgage was still subsisting, the mortgagor acquired an interest in the property as legatee under the will executed by the real owner, it was held that the mortgage would operate on such subsequently acquired interest or the mortgagor and could be enforced against It.

9. In -- Ram Japan Missir Vs. Mt. Jagesara Kuer and Others, on the death of a person his daughter became the sole life holder of the estate. During her lifetime the maternal grandsons of the deceased fraudulently representing that they were in possession of the estate and were entitled to mortgage the same mortgaged it to a certain person. The daughter brought a suit for setting aside the sale held in execution of the mortgage decree. During the pendency of the appeal from the decision of that suit the daughter who had instituted the suit died and the estate of the deceased devolved on the maternal grandsons at the deceased. It was held that u/s 43, the maternal grandsons could not retain their share in the mortgaged property and the mortgagee could insist that though the mortgagors were not entitled to transfer the property which they did, but as a portion of the estate had devolved upon them the transfer and sale should be held good to the extent of their shares.

To a similar effect is the case reported in - Behari Lal Sen Vs. Indra Narayan Bandopadya and Others, . In that case where some of the members of a joint Hindu family mortgaged the joint family properties, each of them representing to the mortgagee that whatever interest did not belong to others belonged to him, and the mortgagee brought a suit on his mortgage against one of them, the suit being time-barred against others, it was held that whatever share the defendant got by inheritance after the institution of the suit would be liable for the mortgage debt. In that case reference has been made to -- "Kishan Datt Bam v. Mumtaz Alikhan" 5 Cal 198 (PC) (P), where it was held that English Law as regards this matter is found in justice and may be applied to an Indian mortgage also as it was undoubtedly based on equity.

10. It is urged for the Appellant that defendant 3 was a minor on the date of the sale under Ex. 11 and that as there could be no representation on his part erroneous or otherwise, Section 43, or its principles could not be invoked against him. It must be remembered that defendant 3 is no other than the undivided son of defendant 1. Defendant 1 purported to sell the property as the natural and lawful guardian of defendant 3 and as the manager of the family along with the

only other adult member then living, defendant 2. The purchase under Ex. 3 in the name of defendant 3 has been rightly held to be a purchase by the family and defendant 3 is at the most merely a name lender.

In -- Lal Somnath Singh and Others Vs. Ambika Prasad Dube and Others, it has been held by Malik C.J. and Desai J. that while a representation made by an infant is not allowed to operate against him as an estoppel, where the estoppel, if allowed, would have the effect of depriving him of the protection against liability on his contract, still where the representation was made on behalf of the infant by his guardian, or next friend, or other person legally competent to bind him by such representation, the infant on attaining his majority, or the person so making the representation on his behalf until that event, as the case may be, is liable to be estopped thereby; see Bower on Estoppel by Representation, 1923, page 162.

11. In this connection Mr. M, K. Srinivasa Iyengar, learned counsel for the Appellant has relied on a case reported in -- "Ram Charan v. Joy Ram" 17 CWN 10 (H) and urged that a purchaser is bound to make enquiry into the title and if he does not take reasonable care to do so, he takes a chance of his claim being defeated by the real owner and that an infant is not estopped by the acts or admissions of other persons. In that case the Court was concerned with the application of Section 41, T.P. Act and not S. 43.

There is in my opinion a substantial difference between the ambit of those two sections. In Section 41, it is provided that a transfer by an ostensible owner cannot be avoided on the ground that the transferor was not authorised to make it; and that rule is made subject to an express provision that the transferee should take reasonable care to ascertain that the transferor had power to make the transfer and act in good faith before he can claim its benefit. On the other hand, Section 43 enables a 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 provided his doing so does not adversely affect the rights of any subsequent "bona fide" purchaser for value without notice. The right to obtain relief u/s 43, is based, not on the diligence of the transferee but, on the principle that the transferor who has made an erroneous or fraudulent representation should not be allowed to get away with it and should be compelled to make good the bargain which it has become possible for him later on to do subject of course to any subsequent lawful rights.

12. In -- "17 CWN 10 (H)", the consideration of Section 43 never arose. On the question whether the infant is bound by estoppel their Lordships observe as follows:

"In so far as the first of these contentions is concerned, viz., that there can never be an estoppel against an infant, we are of opinion, that the proposition is too broadly formulated. The decision in -- "Mohun Bibi v. Saral Chand" 2 CWN 18 (I) indicates that the statement requires qualification in cases of fraud (see also the

decision in -- "Dhurmadass v. Brohmo Dutt" 2 Gal WN 330 (J); -- "Brohmo Dutt v. Dharmo Das," 3 CWN 468 (K); -- "Mohori Bibi v. Dharmo Das" 30 Cal 539 (PC) (L); -- Sarat Chandra v. Rajoni Mohan" 12 CWN 481 (M). As Lord Cowper said in -- "Watts v. Creswell" (1714) 2 Eq Cas Abr 515 (N) if an infant is old and cunning enough to contrive and carry on a fraud he ought to make satisfaction for it. - -- "(Lampriere v. Lange" (1879) 41 LT 378 (O)".

A similar view is supported by well-known text-writers (Bigelow on Estoppel, page 602 and Herman on Estoppel, Vol. 2, Sections 1116 and 1121). The cases on the subject, however, specially in England, are difficult to reconcile, and --"Bateman v. Kingston" (1830) 6 Ir 328 (P) and --"Bartlett V. Wells" (1862) 1B and S 836 (Q) may possibly support the view that an estoppel does not arise against the infant, whereas Exp. -- "Unity Joint Stock v. Mutual Banking Association" (1858) 3 De G J 63 (B); --"Overton v. Banister" (1844) 3 Hare 503 (S)", and -- "Cornwall v. Hawkins" (1872) 41 LJ Ch 435 (T), may perhaps be relied upon in support of the view that a false representation by an infant may create an estoppel against him. See also Laws of England by Lord Halsbury, Vol. 13, Section 537, note (s) and Section 560, note (o). But it is not necessary to pursue the subject further or to decide for the purposes of this case whether in a case of fraudulent representation, an infant may be bound by an estoppel, because it is plain in the case before us, that there was no representation by the infant himself". (See page 13).

Again at page 14 of the report they point out that even if it be conceded that the infant could be estopped by the conduct of his mother, there has been no such conduct on her part as could create an estoppel; and they hold that as the mother of the infant did not place the transferor in a position where she knew he should be able to commit a fraud there was no ground for a plea of estoppel as contemplated by Section 41, T.P. Act. That case therefore has no application to the present.

13. It is pointed in Bigelow on Estoppel, 6th Edn. page 628 as follows:

"It appears to be the better doctrine with these authorities that both infants (of years of discretion) and married women may be estopped to set up a claim to their property against a purchaser. Both are liable when properly sued for their torts in an action which does not seek the enforcement of a contract or demand damages for repudiating, or for fraudulently inducing the plaintiff to make a contract; and in an action for a fraudulent representation of title whereby the plaintiff has been induced to expend money for the purchase of property belonging in reality to the defendant the measure of damages must of course be the sum paid. Now, to prevent a circuitry of action (which indeed is the ground of many estoppels, if not also of this very class of equitable estoppels) it is but right on analogy that the infant or female should be rebutted when proceeding to regain possession."

In Ex. 21 defendant 3 has stated that he was prepared to pay the balance due to

the society after taking into account the amounts already credited towards it. By that time the plaintiff had paid the whole amount claimed by the society. Defendant 3 could not take advantage of those payments as if they had been made by himself and secure a conveyance of the suit property by paying a small sum of Rs. 39/- and odd the alleged dues in Case No. 369/36-37 which alone concerned the plaintiff and not Case No. 509/36-37.

14. It is not even contended much less proved that in entering into Ex. 11 transaction defendants 1 and 2 were in any way imprudent or that it is a transaction which was not for the benefit of the minor defendant 3 or that it was not binding on him. It was mainly in order to discharge prior debts due by the deceased father of defendant 1 and to the society by defendant 1; and as noticed already it is admitted in this case even by defendant 3 in his written statement that that latter debt was binding on him. So any "representation made in that connection would be similarly bin ding.

It is clear that defendants 1 and 2 then were clearly under the belief, may be erroneous, that defendants 1 to 3 could convey the property to plaintiff and that if the latter paid off the society he would become the absolute owner and that there was no need for a sale deed from the society. It seems probable that the society of which defendant 1 was the President was then quite agreeable to this course and not to enforce or pursue its remedies under the Revenue sale in its favour. If defendant 1 therefore made such a representation to the plaintiff which the plaintiff was led to believe on account of the position held by defendant 1 vis-a-vis the society, I think a case clearly arises for the application of Section 43, T. P. Act.

15. The appeal has been argued fully before me and I have been taken through the entire oral and documentary evidence and I am unable to come to a conclusion different from that reached by the Courts below. This appeal is accordingly dismissed with costs.

16. Appeal dismissed.