

(1950) 12 MAD CK 0013
In the Madras High Court
Case No : Appeal No. 454 of 1947

Doddapaneni Sitaramiah and Others APPELLANT
Vs
Sanka Kanakaiah and Others RESPONDENT

Date of Decision : 05-12-1950

Acts Referred:

Transfer of Property Act, 1882 — Section 119

Citation : AIR 1952 Mad 602 : (1951) 1 MLJ 701

Hon'ble Judges : Subba Rao, J

Bench : Single Bench

Advocate : B.V. Subramaniam, for the Appellant; G. Chandrasekhar Sastri and K.B. Krishnamurthy, for the Respondent

Final Decision : Allowed

Judgement

Subba Rao, J.—This is an appeal against the decree and judgment of the subordinate Judge, Tenali, in a suit filed by the first respondent for

recovery of possession of the B schedule lands and for mesne profits. The plaintiff B schedule property of the extent of 2 acres 68 cents is

agraharam land situate in the village of Balijepali. A schedule property of the extent of one acre and 68 cents bearing D. No. 408/1, is situate in the

village of Nelapadu. The B schedule property originally belonged to one Vankamamidi Balakrishnayya, the paternal grandfather of defendants 1

and 2. He was also the hereditary trustee of the temple of Sri Sitharamanjaneyaswami Varu. A schedule property was an endowment to the

temple. On 17-3-1933 under Ex. A-1, Balakrishnayya sold the B schedule property to the plaintiff for Rs. 850. On 19-3-1933 by Ex. A-2,

Balakrishnayya as trustee of the temple and the plaintiff executed an exchange deed whereunder the temple gave the A schedule property to the

plaintiff in exchange of the B schedule properties which the plaintiff purchased from Balakrishnayya two days prior. Subsequently it transpired that

the northern half of the A schedule property was mortgaged to one Choparala Lakshminarayana. He filed O. S. No. 63 of 1932 in the Court of the

Subordinate Judge of Bapatla and in execution of the decree obtained therein, he purchased the property and took delivery of the northern half of

A schedule lands with crops thereon on 7-12-1943. The plaintiff therefore was dispossessed of the northern half of the A schedule land, i.e., 87

3/4th cents in extent. Meanwhile, on 4th December 1934 Balakrishnayya sold the B schedule property along with some other lands in his personal

capacity to the fifth defendant. The 6th defendant is the brother of the 5th defendant and both of them are alleged to be in possession of B schedule

property. Defendants 1 and 2 are the grandsons of Balakrishnayya. Defendants 3 and 4 are the same persons but added in their separate capacity

as the present trustees of the temple. The plaintiff, after having lost half of A schedule property he got under the exchange deed, filed this suit for

recovery of possession of B schedule lands with mesne profits and alternatively for compensation from defendants 1 to 4 for the loss incurred by

him by being dispossessed of half the lands he got under the exchange deed. Defendants 1 to 4 pleaded "inter alia" that the sale-deed in favour of

the plaintiff conveying the B schedule property was nominal and at any rate not binding on their shares of the property and that the exchange deed

was void as it was brought about by fraud and collusion and in breach of "trust. Defendants 5 and 6, apart from questioning the validity of the

exchange, also contended that Balakrishnayya was the absolute owner of the B schedule property and therefore the fifth defendant acquired a valid

title thereto under the sale-deed in his favour. The following issues reflect the contentions of the parties :

1. Whether B schedule property was the self-acquired or joint, family property of Balakrishnayya?
2. Whether the reunion set up by defendants 1 to 4 is true and valid?
3. (a) If the reunion is true, whether the sale dated 17-3-1933 is supported by consideration, valid and binding on defendants 1 and 2?
3. Whether" the exchange deed dated 19-3-1933 between the plaintiff and late Balakrishnayya was beneficial to the deity and binding on it?

4. If the exchange deed is void, is the plaintiff entitled to any and what damages?
5. Whether the plaintiff is entitled to recover any and what portion of the B schedule property?
6. Whether defendants 5 and 6 are bona fide purchasers for value and whether they have acquired any title?
7. Whether the defendants 5 and 6 are entitled to any and what improvements?
8. Whether the plaintiff is entitled to any and what mesne profits?

2. Pending the suit, the plaintiff filed I. A. No. 600 of 1947 for withdrawing the suit against defendants 1 to 4 with liberty to file a fresh suit for the reliefs against them and the petition was allowed on 9-7-1947. Thereafter, the suit proceeded against defendants 5 and 6 alone and the trial was confined to issues 5 to 8. The learned subordinate Judge on a consideration of the evidence held that the sale deed and exchange were not nominal transactions but were acted upon and that the plaintiff would be entitled to a decree for possession of B schedule property u/s 119 of the Transfer of Property Act. He also awarded mesne profits, past and future. Defendants 5 and 6 have preferred the above appeal. As the fifth defendant died pending the appeal the third and fourth appellants are added as his legal representatives along with the second appellant. The plaintiff is the first respondent and defendants 1 to 4 are also added as respondents 2 to 5.

3. Learned counsel on behalf of the appellants raised before me two points. (1) On the findings arrived at by the lower Court, defendants 5 and 6 would, be trespassers without title and therefore the plaintiff would not be entitled to possession u/s 119 of the Transfer of Property Act. (2) The lower Court should not have allowed the plaintiff to withdraw the suit as against defendants 1 to 4 at a late stage with liberty to file another suit as by that procedure, defendants 5 and 6 who were expecting defendants 1 to 4 to establish the defences raised by them, were taken unawares and therefore were prejudiced. If defendants 1 to 4 were on record and the issues framed at their instance were also decided in their favour, either on the ground that the sale-deed Ex. A-1 was nominal or did not bind the shares of defendants 1 and 2 or for the reason that the exchange deed Ex. A-2 was void for one reason or another, the suit would have been dismissed wholly or in part in which case defendants 5 and 6 would have acquired a valid title from Balakrishnayya to that extent.

4. The first question turns upon the construction of Section 119 of the Transfer of Property Act. It reads :

If any party to an exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of

the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange such other

party is liable to him or any person claiming through or under him for loss caused thereby, or at the option of the person so deprived, for the return

of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration.

This section adopted the old English Common law doctrine and implies both a condition and a warranty of title giving rise to a right of re-entry on

the thing exchanged and giving rise to compensation for damages sustained. Section 119 was substituted for the original section by Amending Act

of 1929. The old section was in the following terms :

In the absence of a contract to the contrary, the party deprived of the thing or part thereof he has received in exchange, by reason of any defect in

the title of the other party, is entitled at his option to compensation or to the return of the thing transferred by him.

There was a conflict of judicial opinion on the interpretation of the unamended section. The Madras High Court held that under that section a

transferee for consideration would also be liable to return the thing exchanged if the other party lost the property given to him in exchange by title

paramount -- See "Srinivasa Ayyangar v. Johnsa Rowther", 42 Mad 690 and Chidambara Thevar Vs. R. Swaminatha Rao Peshwa (dead) and

Others, whereas the Lahore High Court has taken the view that the original section assumed a case in which the parties to the exchange had

retained the properties exchanged and were in a position to restore them and therefore the principle of that section did not apply to an innocent

transferee for value from one of the parties to the exchange : "Ganga Singh v. Ragho Ram", AIR 1934 Lah 934 (2). This view was also accepted

by the Nagpur High Court which held that Section 119 can have no reference to the case of a third person who is not a party to the exchange and

who is not in any way bound by it. AIR 1934 61 (Nagpur) . The amended section at the same time enlarges and limits the scope of the previous

section. Under the amended section not only a party deprived but also his transferee can get back the thing transferred. He can recover the property not only from the other party to the exchange but also from any person claiming through him, his legal representative or a transferee from him without consideration. The unamended section was couched in general terms which gave scope for the argument that under the section the property could be recovered from persons who are bona fide purchasers for consideration and even from trespassers. But under the new section the right to the return of the thing transferred is limited only to the three classes of persons specified therein and that so long as they continued to be in possession of the same. It may also be mentioned that a right to a return of the thing exchanged implies a cancellation of the transaction and therefore the parties should be placed in the position in which they were before the transaction. It follows from the said proposition that a person who seeks to exercise his right of re-entry must also be in a position to restore to the other person the property he got under the exchange. u/s 119 a party to an exchange who lost the property got by him thereunder will have a statutory right of re-entry subject to certain specified conditions and limitations and if he seeks to exercise that right he must be bound by the conditions and cannot import or rely upon other equitable considerations. If the aforesaid propositions are borne in mind the solution to the instant problem is not difficult. On the facts found by the learned Subordinate Judge, defendants 5 and 6 are in the position of trespassers as they purchased from a person who had no title to alienate the same.

5. The contracting parties to the exchange were the plaintiff and the trustee of the temple. Defendants 5 and 6 are therefore neither the original parties nor their legal representatives nor transferees from them without consideration within the meaning of Section 119 of the Transfer of Property Act. The section therefore obviously cannot apply to them. It was argued with some plausibility that this construction would lead to anomalous results as a party to an exchange can exercise his right of re-entry against the other party to the exchange or his representatives but cannot recover the property from a trespasser who has no right at all to be in possession. This may be a lacuna but it is for the legislature to amend the section. But if the argument is accepted it will lead to equally curious results. Though a party to the exchange is deprived of part of the land he

got under the exchange deed, he can recover the entire property given to the other party without at the same time giving up the property in his

hands for the trespasser would not be entitled to that. The principle, viz., that on the happening of a contingency contemplated u/s 119 of the

Transfer of Property Act both the parties should be placed in- the position they occupied prior to the exchange will certainly be violated. It cannot

be said that the construction I am putting on this section which in my view is in accord with the express terms used therein, will necessarily lead to

any hardship, for the party, who was deprived of the property can exercise his alternative right viz., to recover damages from the other party. That

alternative remedy certainly is given only to meet the contingency of the other party not being in possession at the time when the first party

exercises his right of re-entry. I am therefore constrained to hold that Section 119 has no application and the plaintiff is not entitled to recover

possession under that section. He could have, if he so wished, pressed his relief for compensation against the other defendants or taken other steps

to enable the said defendants to recover possession from the trespasser; but he has chosen the course of withdrawing the suit against them and if

he suffers it is only because of his action.

6. In the view I am taking on the first point, the second question need not be gone into. The plaintiff withdrew his suit and it was dismissed against

defendants 1 to 4. They did not prefer an appeal against the order of the lower Court allowing the plaintiff to withdraw the suit with liberty to file a

fresh suit. The appellants before me obviously cannot have any grievance as the decree against them will be vacated.

7. In the result the decree of the lower Court is set aside. The appeal is allowed with costs against the first respondent here and in the Court below.