
(1959) 11 MAD CK 0052

In the Madras High Court

Case No : Letter Patent Appeal No. 35 of 1956

Gulam Ahmed Mustafa Saheb

APPELLANT

Vs

K.T.A. Basheer Ahmed Dawood and Others

RESPONDENT

Date of Decision : 04-11-1959

Acts Referred:

Transfer of Property Act, 1882 — Section 41

Citation : AIR 1960 Mad 399 : (1960) 2 MLJ 570

Hon'ble Judges : Ramaswami, J;Anantanarayanan, J

Bench : Division Bench

Judgement

Anantanarayanan, J.

(1) This is a Letters Patent Appeal by the first respondent in C. C. C. Appeal No. 135 of 1952 before Basheer Ahmed Sayeed, J. which was itself an appeal by the plaintiff in O. S. No. 1592 of 1950 on the file of the Third Additional Judge, City Civil Court, Madras. In that judgment and decree the trial court had held that the first defendant (appellant here) was a bona fide transferee for value from the ostensible owner, with reference to the western 2/3rd portion of house No. 39, Khana Bagh Street, Triplicane, which was the subject-matter of litigation, upon the principle of Section 41 of the Transfer of Property Act. In the appeal by the plaintiff, the learned Judge (Basheer Ahmed Sayeed, J.) went into the facts of evidence at length, and came to the conclusion that--

"the judgment and decree of the learned City Civil Judge holding that the 1st defendant is a bona fide purchaser for valuable consideration in good faith, cannot be upheld and must be set aside."

The first defendant--first respondent is the appellant now before us.

(2) Though the suit and the appeal before the learned Judge seemingly traversed on wider area of fact than the point in issue which we have indicated above, actually that is the only matter now in controversy. For instance, it was originally contended that Pyari Begum, the predecessor-in-title of the appellant, was a

minor on the date of the preliminary decree in O. S. No. 640 of 1920 on the file of the District Munsif's Court, Tanjore, and that, as she was not properly represented, that decree was a nullity.

It was contended that plaintiff had not proved possession within 12 years of this suit, and that the suit was barred by limitation. Upon the facts of the record, which we shall presently state, it can be shown that this argument has no force. It was contended that the suit ought not to have been decreed for the entire two thirds share held by the later Abdul Khuddus Sahib, as the other heirs (brothers and sisters of plaintiff) having specific shares in the property, did not choose to file an appeal against the dismissal of the suit by the learned City Judge.

(3) These incidental contentions do not now concern us, in the form in which the appeal was pressed and argued. The main question is whether the first defendant (here appellant) is a bona fide transferee for value from an ostensible owner, protected in respect of his rights acquired by sale by virtue of the principle of section 41 of the Transfer of Property Act. We must, of course, also see whether the suit is in time, and whether there has been ouster or loss through adverse possession in respect of plaintiff's title, either in favour of the supposed owner and vendor to 1st defendant-appellant, or of any one claiming through or under her. But this is the crux of the controversy in the appeal.

(4) The facts of plaintiff's title are quire clear and largely indisputable. The plaintiff is the son of one K. T. M. Abdul Khuddus sahib, whose widow is the 3rd defendant, and whose other children are defendants 4 to 9. The man filed the suit O. S. No. 640 of 1920 in District Munsif's Court Tanjore, against Pyari Begum and two others for partition and separate possession of his two-thirds share in the Triplicane house (the subject matter of litigation) and certain other properties.

It is very important to note that this Pyari Begum, the vendor of 1st defendant (appellant) under the sale deed Ex. B-10, and another Zainub Bi who is said to have executed the release deed Ex. B-5 in favour of Pyari Begum by virtue of which Pyari Begum claimed the title to sell, were both parties to the said suit, and that, admittedly, they did not contest it. A final decree was passed in this suit in favour of Khuddus Sahib on 29-11-1922. (Ex. A-4).

The decree was transmitted to the City Civil Court, Madras, for execution. In E. A. No. 706 of 1933 on the file of the City Civil Court, Madras, the suit-property was actually divided by metes and bounds, and possession of the two-thirds share was delivered over to the said K. T. M. Abdul Khuddus Sahib. The relevant documents, commencing with the judgment in O. S. No. 640 of 1920 District Munsif's Court, Tanjore, are Exs. A-1, A-2, A-3, A-6 and A-7. From A-7 it is clear that possession was delivered on 5-1-1934.

(5) This title and the subsequent proceedings culminating in the delivery cannot be refuted upon any grounds and no such attempt was made before us. Pyari Begum seems to have faintly alleged that the court delivery proceedings were

gone through only in order to protect the property from her maternal uncle with whom she was living, but this was not substantiated. Certainly she and her predecessor Zainub Bai, were bound by the judgment and decree, and the delivery proceedings in pursuance thereof.

The result is that Khuddus Sahib became the rightful owner of the present two thirds share, and obtained possession through court on the relevant date, 5-1-1934. Equally, the consequence of this delivery is that it terminated any adverse possession or ouster, assuming that time was running against Khuddus Sahib upon such possession by Zainub Bi, or Pyari Begum or anyone else, at that time.

(6) Not merely this. One Swaminatha Sastri, admittedly a tenant of this property, executed a registered lease deed in respect of the property, in favour of Abdul Khuddus Sahib, the decree-holder. This is the registered deed (Ex. A-8) dated 25-8-1935; undeniably, as a registered instrument, it is constructive notice. Abdul Khuddus died in 1935. The suit was filed on 5-2-1947 by the descendants of Khuddus Sahib, and was in time. The learned City Civil Judge who ultimately proceeded to dismiss the suit upon other grounds, himself observed that the suit was in time, and not barred by limitation (conclusion of paragraph 10).

(7) The requirements of Section 41 have been expounded and reiterated in so many decisions that we can see little profit in further traversing such well-beaten tracks of the case law. One of these requirements, that the transfer was for valuable consideration, and that the transferee acted in good faith to this extent at least, we shall assume in our analysis of the facts. The other requirements are (1) that the transferor is the ostensible owner (2) that he is so by the consent, express or implied, of the real owner and (3) that the transferee took reasonable care to ascertain that the transferor had power to transfer. (See Mulla's "The Transfer of Property Act"-4th Edition 1956. P. 185).

We shall also assume in favour of the appellant, that, after the death of Khuddus Sahib, his descendants did not come near the property or exercise acts of ownership, perhaps owing to their residence and interests in the mufassil, till the plaintiff filed this suit within 12 years.

(8) Even so, how can the other tests be considered as even prima facie applicable to the facts in the present case? The true rule of section 41 is that it is a statutory embodiment of a law of estoppel, the principle of which was laid down by the House of Lords in the well-known case of *Cairncross v. Lorimer*, (1860) 3 Macq 827 (see also the observations of the Judicial committee in *Ramcoomar v. Mcqueen*, 11 Beng. LR 46.)

If either by words or conduct, a man permits another to hold himself out to be the owner of the estate, and a third person purchases it for value from the ostensible owner after reasonable enquiry into title, then the real owner will be estopped from recovering upon the secret title. That is the principle; surely not that a person like the 1st defendant (appellant) who purchased from the co-

owners, accepting without further examination some vague claim to possessory title, and when the rightful owner of this interest (Khuddus) neither expressly permitted such ostensible title to be flaunted, nor impliedly consented to it, can claim the protection of the court to enforce his insubstantial title as against the true owner.

In fact, it is impossible to see how the mere possession of one co-owner, can amount to the flaunting of an ostensible title against another. Again, surely the appellant must have been aware that the property belonged to Muslims, where co-ownership or ownership in shares is the usual incident of inheritance. The appellant should have enquired about the existence of other shares, and the slightest enquiry in this direction would have led him to the facts of O. S. No. 640 of 1920, and the rightful title of Khuddus to this two-thirds of the property.

(9) We set forth below, seriatim, the several pieces of evidence relied on by the appellant for invoking the aid of the principle of S. 41 of the Transfer of Property Act. They also indicate that the vendors themselves never advanced more than a most clouded and imperfect title: that in fact, they were studiously vague. Any man of the most ordinary prudence would have been put on guard by this. The facts also show that the appellant failed to obtain an Encumbrance Certificate for the preceding 12 years, when he would immediately have come to know of the registered lease deed executed by Swaminatha Sastry in favour of Khuddus in 1935. He obtained an Encumbrance (Ex. B-11) Certificate only between certain years, which totally missed this. As we assume that appellant paid full value, the charitable construction is that some broker, or similar person, who had knowledge of the lease deed, deceived him.

(a) Rental agreement, Ex. B-1 dated 31-7-1922: This proves nothing except that the co-owner Zainub Bi obtained a lease of both house and site, from a tenant Narasimhalu Naidu.

(b) Ex B-2 dated 8-8-1927. Similar lease deed by Swaminatha Sastrigal.

(c) Exs. B-3 and B-4. Mortgages by Zainub Bi in 1931. Nothing except a vague possessory title appears, which possession itself is hardly unusual in a co-owner. A mortgagor is only dealing with a limited interest, and is not the "ostensible owner", AIR 1931 144 (Nagpur)

(d) Ex. B-5. Deed of release by Zainub Bi in favour of Pyari Begum dated 1-3-1933; again, studiously vague about the source of title.

(e) Since the site belonged to one M. Venkataramanujulu Naidu, the site and super-structure having different histories of title, this gentleman filed O. S. No. 820 of 1940, City Civil Court (Ex. B-18), a claim for recovery of property under the City Tenants' Protection Act. In this, there was a compromise decree by which Pyari Begum (1st defendant) agreed to purchase the land for a specified sum. The sale deed Ex. B-7 dated 7-1-1946, is the consequence. It is difficult to see how this action of the owner of the site, affects the right of Khuddus or his

descendants, or make Pyari Begum into an "ostensible owner".

(f) Other circumstances, such as payments of taxes, corporation register, entries, collection of rent, attornment by Swaminatha Sastry to Pyari Begum under the lease, Ex. B-6, etc. These prove, at the worst for Khuddus and his heirs, that they permitted the co-owners of the original one third share to enjoy their interest also, while they were busy with preoccupations of residence in a District and interests there. At worst, this can only constitute the running of an adverse possession.

"But silence will not work an estoppel, unless it is such as to induce a belief that the party keeping silence has no rights" (Mulla Op-Cit) p. 188, on the authority of Joy Chandra v. Srinath, ILR 32 Cal 357 (PC). also in interpreting this evidence, the fact that the husband of Pyari Begum was the power-of-attorney agent of plaintiff himself, cannot be lost sight of, whether he was so only with respect to the Bangalore properties, or also in respect of Madras properties.

(10) In brief, this was not a case to which the principle of Sec. 41 Transfer of Property Act could apply. Even if the appellant paid the value, he made no reasonable enquiry into title. The title exhibited in the so-called documents of title is so suspiciously indefinite and vague, that elementary prudence would have dictated further enquiry. Even a perfunctory enquiry would have unearthed the true ownership of Khuddus and his descendants. There was no "ostensible ownership" in the vendors, no "express or implied consent" of the true owner. The appeal is quite devoid of merits, upon all these aspects.

(11) With the necessary clarification that the site itself has now been excluded from the scope of the controversy, as the owner sold this to Pyari Begum who admittedly sold it to appellant, the appeal is dismissed with costs.

(12) Appeal dismissed.