

(1914) 11 MAD CK 0010
In the Madras High Court

Hattikudur Narain Rao and Others

APPELLANT

Vs

Andar Sayad Abbas Sahib

RESPONDENT

Date of Decision : 24-11-1914

Acts Referred:

Transfer of Property Act, 1882 — Section 43

Citation : AIR 1915 Mad 1085 : (1915) 28 MLJ 44

Hon'ble Judges : Sadasiva Aiyar, J;Hannay, J

Bench : Full Bench

Judgement

Sadasiva Aiyar, J.—The plaintiffs represent the interests of the mulgeni tenants who obtained a mulgeni lease in 1862 from the predecessor-

in-title of the defendant who is the purchaser from the purchaser of the mul right from the original landlord. The lands leased to the plaintiff's father

consisted of several items. The small extent now in dispute is alleged by the plaintiffs to be a part of the lands leased on mulgeni right while the

defendant denies it. The defendant obtained this small extent of land now in dispute on dharkast grant from the Government in 1911 and is in

possession of it. The first plaintiff's contention is that he and his father had been in possession of it along with the other mulgeni lands till September

1911 and that the defendant on the strength of the dharkast grant dispossessed the plaintiff in 1911. The defendant's case is that the plaint lands

were not included in the mulgeni grant and that in any view, the lands having belonged to the Government, the defendant is entitled to possession of

them as against his lessee after he (the defendant) obtained it from the real owner, the Government.

2. The District Munsif held that the plaint lands were included in the old mulgeni lease of 1862 and he further held that by virtue of Section 43 of

the Transfer of Property Act, the mulgeni right will attach to the plaint plot also in favour of the first plaintiff notwithstanding that the plaint land did

always belong to Government and was granted to the defendant in August 1911. The District Munsif therefore decreed the plaintiff's suit.

3. On appeal, the learned Subordinate Judge without deciding the question whether the plaint land was included in the old mulgeni lease held that

Section 43 of the Transfer of Property Act did not apply so as to give the first plaintiff a right to hold the plaint land on mulgeni lease and that the

first plaintiff cannot claim such right on the strength of any other rule of law. He therefore dismissed the plaintiffs' suit with costs. The contention in

second appeal is that both u/s 43 of the Transfer of Property Act and on general principles of estoppel, the first plaintiff is entitled to a mulgeni right

over the plaint land. (Of course, if the 1st plaintiff succeeds in this legal contention, the case would have to go back to the Subordinate Judge as the

learned Subordinate judge has not decided the question whether the plaint land was included in the old mulgeni lease).

4. Section 43 of the Transfer of Property Act is as follows:

Where a person 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.

5. The illustration to Section 115 of the Evidence Act is as follows: A intentionally and falsely leads B to believe that certain land belongs to A, and

thereby induces B to buy and pay for it. The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at

the time of the sale, he had no title. He must not be allowed to prove his want of title. The difference in language between Section 43 of the

Transfer of Property Act and the language of the illustration to Section 115 of the Evidence Act seems to be that u/s 43 of the Transfer of Property

Act, mere erroneous representation will apparently suffice and the representation need not be intentionally false whereas the illustration to Section

115 (Evidence Act) uses the words "intentionally and falsely. Again u/s 43, there

is nothing said about the belief of the transferee in the truth of the erroneous representation whereas the illustration to Section 115 implies that the transferee must have believed the intentional and false representation and acted on the faith of such representation. However, even as regards Section 115 of the Evidence Act, it has been held that the representation of the transferor need not be fraudulent or dishonest in order to estop the transferor (See *Helan Dasi v. Durga Das Mundal* (1906) Cri.L.J. 323).

6. As stated already, in dealing with this legal question we have to assume without deciding that the plaint land was included in the old mulgeni lease of 1862 to the first plaintiff's father and that the defendant's predecessor in interest erroneously represented to the first plaintiff's father when granting the lease of 1862 that the plaint land belonged to him and that he had the power to grant a permanent lease of it though, as a matter of fact, the land belonged to the Government. I am unable to accept the respondent's learned Vakil's contention that Section 43 of the Transfer of Property Act does not apply to transfers by way of lease nor can I accept his contention that Section 43 applies only as between the original transferor and the original transferee and does not bind the privies of the original transferor and cannot be taken advantage of by the privies of the original transferee. Unless a statute expressly or by necessary implication precludes the application of provision awarding rights to or imposing civil liabilities on the privies of the person to whom the rights are given or on whom the liabilities are imposed, or entitled or are bound as the case may be, to the extent to which the original parties are so entitled or are so bound, under the general principles of jurisprudence.

7. Privies are usually described as of three classes: Privies in blood, (as heirs); privies by estate (as feoffees, lessees, assignees, etc.); and privies in law (as the lord by escheat, the tenant by the courtesy, executors and administrators). It is of course rather loosely said that the privy stands in no better position than the party through whom he derives his title. But it is well established that the extent of privies' liability is not always coequal with the extent of the liability of the person through whom he claims. Privies by blood are liable only to the extent of assets inherited by them. As regards privies by estate the extent of their liability is not so well settled. In

Halsbury's Laws of England, Vol. XIII, page 403 it is broadly stated

that a lessor is estopped from repudiating the lease under which possession has been given or a tenancy which he has acknowledged and that the

assignee of the lessor's interest is estopped from denying anything which the lessor is estopped from denying. The footnote at the same page

begins by saying that ""This is an example of the dictum that estoppels must be mutual and reciprocal."" In *Kuru Chowbey v. Jankee Pershad* (1866)

1. Agr 164 it was held that when a Raja granted a perpetual lease of certain lands in which the Raja had only an interest for a term, the plaintiff

who purchased in auction sale the proprietary rights of the Raja who had after the lease to the defendant acquired such proprietary rights was

estopped from denying that the defendant had acquired perpetual occupancy rights. In *Kazee Abdoll Mannah and Ors. v. Buroda Kant Banerjee*

(1871) 15 W.R. 394 it was held that "" parties holding an estate under a permanent settlement from Government cannot question the validity of a

mokuraree pottah previously granted by themselves when they sold the property under a temporary settlement."" The principle of Section 43 of the

Transfer of Property Act is also embodied in Section 18-A of the Specific Relief Act.

8. If the matter were *res integra* therefore and if I am at liberty to construe Section 43 of Act IV of 1882 according to its strict literal interpretation,

I would hold that the defendant (assuming that he is a privy in estate to the original lessor as regards the disputed lands) cannot deny the right of the

first plaintiff and the first plaintiff's option to treat the mulgeni right as attaching to the plaint lands which the defendant has recently obtained from

the Government. But I am pressed by two decisions of this Court, the one in *Subbaraya v. Krishnappa* ILR (1888) M. 422 and the other in

Padbhanabayya v. Ranga ILR (1910) M. 161 : 20 M.L.J. 930. In *Subbaraya v. Krishnappa* ILR (1888) M. 422 where the first defendant got into

possession of the disputed land as assignee of the second defendant who was the plaintiff's lessee in respect of a barren sandhill which really

belonged to Government as unassessed waste (though the plaintiff was entitled to Umki privilege in it) and who afterwards obtained a land on

darkhast from the Government, it was held that the tenant (1st defendant) was not estopped from setting up a title adverse to the plaintiff as

regards the land granted to him by the Government and that the plaintiff was not entitled to eject the 1st defendant simply because the 1st

defendant entered into possession as plaintiff's tenant's assignee. The learned Judges (Collins C.J. and Parker J.) state quite broadly that when the

plot was declared by the revenue authorities to be at the disposal of the Government and when they granted it to the defendant No. 1 (the assignee

of the defendant No. 2) the tenancy of defendant No. 2 became determined. If this ruling is correct, it follows that when the Government granted

the plaintiff land to the defendant the plaintiff's tenancy was determined, the defendant was no longer the landlord of the first plaintiff as regards the

plaint lands and the 1st plaintiff cannot take advantage of Section 43 (Act IV of 1882) or of the principle of estoppel embodied therein. Then in

Pandair Bangaram v. Kurmoorg Subba Raju ILR (1910) M. 159 Benson and Krishnaswami Iyer, JJ, while conceding that Section 43 of the

Transfer of Property Act does not state that the transferee should have in good faith and after due inquiry believed in the erroneous representation

made by the transferor and should have acted on that representation if he wanted to rely upon the rights given to him by Section 43 to fasten upon

the transferors after acquired title, the learned Judges nevertheless held that such words should be understood as embodied in that section and they

rely in support of their opinion on the decision in *Gangu Bai v. Bhaswant* ILR (1911) B. 175. Now in paragraph 3 of the plaint in this case, it is not

stated that the plaintiff's father when he got the mulgeni right to the plaintiff lands in 1862 believed in good faith after taking reasonable care and

making reasonable enquiry that the defendant's predecessor-in-title had power to grant the perpetual lease and he therefore obtained the said lease.

In the absence of any allegation or proof to that effect, he is clearly not entitled (if *Pandair Bangaram v. Kurmoorg Subba Raju* ILR (1910) M.

159 was rightly decided) to rely upon the principle of estoppel embodied in S 43 while I reserve my opinion on the question whether the decision

in *Subbaraya v. Krishnappa* ILR (1888) m. 422 has not been decided on too broad grounds (even the tenant's obligation to surrender possession

before setting up the non-existence of the landlord's title not being referred to in the judgment in that case) and while I am free to confess that I feel

some doubts as to whether the unqualified words of Section 43 of the Transfer of Property Act can be qualified by importing expressions found in

Section 41 of the Transfer of Property Act" as seems to have been done in the case in Pandair Bangaram v. Kurmoorg Subba Raju ILR (1910)

M. 159. I do not feel myself strong enough to overrule the evidently considered judgment of the very learned Judges who decided the latter case.

In the result, I would dismiss the second appeal with costs.

9. In conclusion, I might be permitted to express my appreciation of the very able manner in which this case has been argued for the appellants by

Mr. H. Balakrishna Rao.

Hannay, J.

10. I agree with my learned brother that on the authority of the cases cited by him viz., Subbaraya v. Krishnappa ILR (1888) M. 422 and Pandair

Bangaram v. Kurmoorg Subba Raju ILR (1910) M. 159 this second appeal must fail and be dismissed with costs. Following the former decision I

concur in holding that when the suit land was declared to be at the disposal of Government, the plaintiff's lease ceased to subsist and that therefore

Section 43 of the Transfer of Property Act is inapplicable and the plaintiffs cannot take the benefit of the section. The latter case is also authority

that the plaintiffs cannot take the benefit of the section on another ground as well, namely, because they have failed to allege and prove that in

taking the lease their predecessor believed in good faith and after due enquiry the erroneous representation made by the transferor. In this view it is

unnecessary for me to express an opinion upon the question whether apart from these decisions the defendant assuming he is a privy in estate to

the original lessor in respect of the disputed land would have been bound to concede to the plaintiffs, the option allowed by Section 43 of the

Transfer of Property Act, in the circumstances of the case.