(1943) 03 MAD CK 0010

In the Madras High Court

P. Kanakamma and Another — APPELLANT

Vs

B. Krishnamma and Others — RESPONDENT

Date of Decision : 02-03-1943

Acts Referred:
Transfer of Property Act, 1882 — Section 53A

Citation : AIR 1943 Mad 445 : (1943) ILR (Mad) 831 : (1943) 56 LW 244 : (1943) 1 MLJ 335

Judgement

1. The first respondent as the heir to the estate of her deceased father sued on the original side of this Court to recover possession of two houses,

one being known as No. 9, Subbarayalu Naidu Lane, and the other as No. 17, Narayana Mudali Street, G. T., Madras. The appeal is concerned

only with the first mentioned property. The respondent''s case is entirely devoid of merit, but the learned Judge found that in law she was entitled to

possession of No. 9, Subbarayahl Naidu Lane, and accordingly passed a decree giving her possession. The learned Judge indicated, however, that

no one would be more pleased than he, if, in the event of an appeal being filed, the Judges who heard it should find themselves able to arrive at a

different conclusion. We appreciate the learned Judge''s feelings in the matter and we regret as much as he that we feel bound to concur in the

decree which he has passed.

2. The appeal has been placed before a Full Bench as it involves the consideration of the question whether Section 53-A of the Transfer of

Property Act has retrospective effect, on which there is a conflict of opinion. If the section has retrospective)effect, the suit must fail, but if it has

not, the judgment of the learned Judge will stand. In Kanji and Moolji Brothers Vs. T. Shanmugam Pillai, , a Bench of this Court held that the section has not retrospective effect. This opinion is not shared by the High Courts of Calcutta, Bombay, Allahabad, Lahore and Patna, but after a

careful consideration of the arguments, both for and against, we can see no justification for departing from the opinion already expressed by this

Court.

3. The facts are not in dispute. Ankara Ramiah Chetty, the father of the respondent, died on the 17th March, 1901. He was survived in addition to

the respondent by has widow, Seethamma, and his elder daughter, Andalamma, who was the mother of the appellants. It was the intention of

Ankam Ramiah Chetty to settle on each of his daughters a house, provided that they married the bride-grooms selected by him. He died before the

marriages took place, but he directed his widow to carry out his intentions. On the 12th June, 1902, his widow executed a document in favour of

Andalamma in which she agreed to convey to her the house with which this appeal is concerned, on the condition that she married Divale

Venkatesaperumal Chetty, the bridegroom chosen for her by the deceased. Divale Venkatesaperumal Chetty is not a party to the appeal, but he

was the first defendant in the suit. The document made it quite clear that in doing this the widow was fulfilling the wishes of her deceased husband.

The marriage took place and Andalamma was given possession of the house. She lived there with her husband until she died on the 5th November,

1918, and her daughters continued in possession after her death. Unfortunately Seethamma neglected to execute a formal conveyance in favour of

Andalamma and the respondent is taking advantage of this.

4. The respondent was married in 1911 to the husband chosen for her and in accordance with her father''s wishes her mother conveyed to her a

house by a deed which was duly registered, thereby giving her an indefeasible title. Seethamma died in the month of June, 1937, and on the 4th

December, 1940, the respondent filed the suit to recover possession of the house from her nieces. Admittedly the respondent is now the heir of her

father.

5. The appellants pleaded that they had acquired a"" title to the property by adverse possession but this plea was rejected by the learned Judge and

in view of the decision of the Privy Council in Jaggo Bai v. Utsavalal (1929) 57 M.L.J. 160 : L.R. 56 IndAp 267 : ILR 51 All. 439 (P.C.) there can be no doubt of the correctness of the learned Judge''s finding. The possession of Andalammal and her daughters was undoubtedly adverse to

Seethamma, but it was not adverse to the respondent as the reversioner to her father''s estate.

6. In these circumstances the learned advocate for the appellants asks the Court to hold that Kanji and Moolji Brothers Vs. T. Shanmugam Pillai,

was wrongly decided and to accept the opinion expressed by other Indian High Courts that Section 53-A of the Transfer of Property Act has

retrospective effect.

7. Section 53-A reads as follows:

Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms

necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in

possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered or, where there is an instrument of transfer, that

the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming

under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the

transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part

performance thereof.

The section was inserted in the Act by the Transfer of Property (Amendment) Act, 1929. Before its amendment this Court and other Indian High

Courts had applied the English doctrine of part performance, but in (1931) L.R. 58 I.A. 91 (Privy Council) the Privy Council held that this was

wrong. The English equitable doctrine could not override the express provisions of the Transfer of Property Act. The insertion of Section 53-A now applies the English doctrine to a limited extent.

8. Section 63 of the Transfer of Property (Amendment) Act, 1929, has an important bearing on the question whether Section 53-A of the Transfer

of Property Act has retrospective effect and before discussing the authorities to which we propose to refer, we will set out its provisions. The

section reads as follows:

Nothing in any of the following provisions of this Act, namely, Sections 3, 4,9, 10, 15, 18, 19, 127, 30, Clause (c) of Section 31, Sections 32, 33,

34, 35, 46, 52, 55, 57, 58, 59, 61 and 62, shall be deemed in any way to affect:

(a) the terms or incidents of any transfer of property made or effected before the 1st day of April, 1930,

(b) the validity, invalidity, effect or consequences of anything already done or suffered before the aforesaid date,

(c) any right, title, obligation or liability already acquired, accrued or incurred before such date, or

(d) any remedy or proceeding in respect of such right, title, obligation'' or, liability : and nothing in any other provision of this Act shall render invalid

or in any--way affect anything already done before the first day of April, 1930, in any proceeding pending in a Court on that date, and any such

remedy'' and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Act had not been

passed.

In Delhi Cloth and General Mills Co., Ltd. v. The Income Tax Commissioner, Delhi (1927) 53 M.L.J. 819 : L.R. 54 IndAp 421 the Privy Council

pointed out that the Board had authoritatively enunciated in Colonial Sugar Refining Co., Ltd. v. Irving (1905) A.C. 369 that while the provisions

of a statute dealing merely With matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect

attributed to them, provisions which touch a right in existence at the time of passing of the statute are not to be applied retrospectively in the

absence of express enactment or necessary intendment. This principle is to be borne in mind when we are considering the effect of Section 53-A.

Kanji and Moolji Brothers Vs. T. Shanmugam Pillai, , was decided by Beaseley, C.J. and Cornish, J. and in holding that Section 53-A has not

restrospective effect, they had regard to this principle and their judgment shows that they were fully aware of the implications to be drawn from the

wording of the concluding portion of Section 63 of the Transfer of Property (Amendment) Act, 1929.

9. It is not necessary to refer to all the decisions of the other High Courts which have expressed a contrary opinion to that expressed in Kanji and

Moolji Brothers Vs. T. Shanmugam Pillai, , The arguments which have prevailed with other High Courts are sufficiently expressed in the judgment

of the Bombay High Court in Rustomji Dossabhai v. Bai Mota ILR (1940) Bom. 50 and of the Patna High Court in Tika Sao v. Harilal I.L.R.

(1940) Pat. 753 In the former of these cases, emphasis was laid on the following words in Section 63 (d) of the Transfer of Property

(Amendment) Act, 1929,

Nothing in any other provision of this Act shall render invalid or in any way affect anything already done before the first day of April, 1930, in any

proceeding pending in a Court on that date, and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or

continued, as the case may be, as if this Act had not been passed.

Beaumont, C.J., considered that by reason of the insertion of these words the section meant that in the case of the sections enumerated at the

beginning of it their provisions had no retrospective effect and did not apply to any transaction which had taken place before the 1 st April, 1930,

but that the provisions of the other amended sections had retrospective effect except in the case of suits pending in a Court on the 1st April, 1930.

In other words, all sections which are not enumerated at the beginning of Section 63 are to be deemed to have retrospective effect, except in

respect of actions already pending on the 1st April, 1930.

10. The Transfer of Property (Amendment) Supplementary Act, 1929, was passed immediately after the Transfer of Property (Amendment) Act,

1929, as it was expedient that certain amendments should be made in other enactments. By Section 10 of the later Amending Act, Section 49 of

the Registration Act was amended and Section 15 says,

(1) Save as provided in Sub-section (2), nothing in this Act shall be deemed to affect:

(a) the terms or incidents of any transfer or disposition of property made or effected before the first day of April, 1930;

(b) the validity, invalidity, effect or consequences of anything already done Or suffered before the aforesaid date;

(c) any right, title, obligation or liability already acquired, accrued or incurred before such date;

(d) any remedy or proceeding in respect of such right, title, obligation or liability; or

(e) anything done in the course of any proceeding pending in any Court on the aforesaid date : and any such remedy or proceeding may be

enforced, instituted or continued, as the case may be as if this Act had not been passed.

In the Bombay case it was argued that as the transfers there had been made before the 1st April, 1930, and had not been registered they could not

be used in evidence and that the amendment of Section 49 of the Registration Act had not been given retrospective effect. .Beaumont, C.J.,

accepted the contention that the amendment of Section 49 of the Registration Act was not retrospective, but he considered that there must have

been a slip made in the drafting of the Amending Acts. It could not, he said, have been intended to make the amendment of the Transfer of

Property Act retrospective and to make the consequential amendment of the Registration Act non-retrospective.

11. In Wakefield v. Kumar Rani Sayeeda Khatun I.L.R.(1936) Pat. 786 the Patna High Court held that Section 53-A of the Transfer of Property

Act has retrospective effect. The Court changed its opinion in Jagadamba Prasad Lalla v. Anadinath Roy I.L.R.(1938) Pat. 460 but reverted to its

former opinion in Tika Sao v. Harilal I.L.R.(1940) Pat. 752 which was decided by a Full Bench. The last mentioned case had reference to Section

92 of the amended Transfer of Property Act, but the same reasoning applies to this section as to Section 53-A. The Court was not unanimous.

Two of the learned Judges, Fazl Ali and Dhavle, JJ. were of the opinion that Section 92 was retrospective, but Manohar Lall, J. dissented. In the

course of his judgment, Fazl Ali, J. considered that if the Legislature had intended that none of the provisions of the Amending Act of 1929 should

be retrospective, it was hardly necessary to insert such a long and elaborate section as Section 63. He thought that it would have been enough to

make a simple provision that none of the sections was to have retrospective effect or to make no provision whatsoever in this respect; because the general rule is that a new law shall not ordinarily affect past transactions.

12. The question, whether Section 92 of the Transfer of Property Act as amended by the Transfer of Property (Amendment), Act, 1929, was

retrospective was discussed, by this Court in Lakshmi Amma v. Sankaranarayana Menon (1935) 70 M.L.J. I : ILR Mad. 359 and the opinion

expressed by Varadachariar, J. was that it was not. He considered that Section 63 of the Amending Act had been inserted merely as ex majorie

cautela. It has been said by the learned advocate for the appellants that a decision on the question was not necessary in that case and that the

remarks of the learned Judge must be regarded as obiter dicta. This is no doubt the case, but at the same time it does not detract from the weight

of the opinion, which follows a similar opinion expressed by Lord Hatherly in Gardner v. Lucas (1878) 3 A.C. 582 . In Srinivasalu Naidu v.

Damodarasami Naidu (1938) M.W.N. 708 a Bench of this Court, consisting of Venkatasubba Rao and Abdur Rahman, JJ. expressed the same

opinion, and in that case, the question did arise.

13. It is true that the draftsmanship of Section 63 of the Transfer of Property (Amendment) Act, 1929, is open to criticism, but unless there is

something in the section, or elsewhere in the Act itself, which clearly indicates that the sections not enumerated at the beginning of the section are to

be given retrospective effect, the Court must hold that they have not this effect. We do not share the opinion of the other High Courts that the

proviso embodied in the concluding portion of the section is sufficient to justify the Court in holding that Section 53-A has retrospective effect. If

Section 53-A has retrospective effect it means that all the sections which are not enumerated ''at the beginning of the section must be retrospective,

and clearly this cannot be the ease. We have only to look at the provisions of Section 55 of the Transfer of Property Act, which is not one of the

sections unenumerated in Section 63 of the amending Act of 1929. Before its amendment in 1929, Section 55 (6) (b) of the Transfer of Property

Act said that a buyer of Immovable property was entitled, unless he had improperly declined to accept delivery of the property to a charge on it as

against the seller and all persons claiming under him with notice of the payment for the amount of the purchase money properly paid by the buyer in

anticipation of delivery. By Section 17 of the amending Act, the words ""with notice of the payment"" were omitted. The effect of this was to give a

charge whether the subsequent purchaser had notice or not. Therefore, the section made a material alteration in rights and such an alteration cannot

be given retrospective effect, if regard must be had to the principle stated by the Privy Council in Delhi Cloth and General ''Mills, Co., Ltd. v. The

Income Tax Commissioner, Delhi (1927) 53 M.L.J. 819 : 1927 L.R. 54 IndAp 421 and Colonial Sugar Refining Co''., Ltd. v. Irving (1905) A.C.

369 as it must. This factor was not sufficiently taken into consideration in any of the judgments which run counter to Kanji and Moolji Brothers Vs.

T. Shanmugam Pillai, , and we regard it as the deciding factor.

14. Support for this opinion is to be found in the judgment of the Privy Council in M.M.R.M. Chettiar Firm v. S.R.M.S.L. Chettiar Firm 46

C.W.N. 57 In that case, the appellant firm, purchased from the first respondent lands of which the second and third respondents were in

possession, and the appellant firm brought a suit to recover possession from them. The defence was that the defendants had agreed to buy the

lands, but this contract was cancelled on the condition that they should remain in possession until the owner had repaid them the amount which he

had received from them towards the purchase price. The only question in the trial Court was whether there had been a novation of contract. The

trial Judge held that they had failed to prove a novation. On appeal to the Rangoon High Court, it was contended by the respondents that they

were entitled to a charge by reason of the provisions of Section 55 (6) (b) of the Transfer of Property Act, and this plea was accepted. The Privy

Council held that the .High Court was not justified in giving effect to this new contention. In delivering the judgment of the Board, Lord Thankerton

said:

The only case submitted to the District Judge was a simple one and it was not inaccurately described as a case of novation, viz., the cancellation of

the original contracts of sale and the substitution of the new agreement of 30th May, 1924, in their place. In the opinion of their Lordships, the

learned Judges of the High Court were not justified on the failure of this simple issue, in entertaining the question of a statutory charge, as, owing to

its absence from the pleadings and the issues, two important issues of fact, which were essential to its success, had not been considered. These two questions are (a) whether the buyer has improperly declined to accept delivery of the property, (b) '' whether the appellant firm, as a

transferee from the seller prior to the Amending Act of 1929 had "" notice of the payment."" These words were taken out in 1929. It cannot be

suggested that the evidence, which was directed to the somewhat inconsistent case of cancellation of the sale contract and a new agreement,

contains the material on which, with any justice, these two matters can be determined.

The Judicial Committee did not deal expressly with the question whether the amendment to the section had retrospective effect, but their decision

indicates that in their Lordships'' opinion it had not. The question of notice could only arise before the amendment.

15. For these reasons, we hold that Kanji and Moolji Brothers Vs. T. Shanmugam Pillai, , was rightly decided and consequently this appeal must

be dismissed. It is an unfortunate situation, but the Court must decide the case in accordance with the wording of the statute. The unsisterly

conduct of the respondent is lamentable, but the law is on her side. She must be given possession of the house and left to reconcile her action with

her conscience, should she ever acquire one.

16. The appeal will be dismissed, but in the circumstances we make no order as to costs.

