
(1961) 11 KL CK 0016
In the High Court Of Kerala
Case No : Appeal Suit No. 68 of 1956-E

Ramaswamy Pattamali and Others

APPELLANT

Vs

Lakshmi and Others

RESPONDENT

Date of Decision : 30-11-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 35
Transfer of Property Act, 1882 — Section 43

Citation : AIR 1962 Ker 313

Hon'ble Judges : M.S. Menon, Acting C.J.; T.K. Joseph, J; M. Madhavan Nair, J

Bench : Full Bench

Advocate : A.S. Krishna Iyer and A.K. Ramaseshadrinathan, for the Appellant; S. Narayanan Poti, N.K. Varkey, P. Karunakaran Nair, for Respondent No. 1, P.K. Subramania Iyer, For Respondent No. 3, C.S. Ananthakrishna Iyer, C.R. Bhima Rao and T.S. Venkiteswara Iyer for Respondents No. 4 and 5, for the Respondent

Judgement

Nair, J.—The suit properties belonged to two brothers of a Hindu family, Ayya Pattamali and Paramaswaran Pattamali. Plaintiffs 1 to 7 and the 2nd defendant are the descendants of Ayya Pattamali, and defendants 3 to 5 of, the latter. Ayya Pattamali had four sons Subramonian, Krishnan, Chamu and Raman. Subramonian Pattamali had a son by name Nilacantan in whose favour the former, as the Kartha of the family, in the year 1041 M. E. granted two kanoms regarding the suit properties. Nilacantan Pattamali died in Makaram 1058, leaving behind him his widow Meenakshi Ammal and a daughter Ananthalakshmi Ammal. Disputes arose between the widow and the nephews of Nilacantan Pattamali as to the right of succession to his estate, which ultimately ended in a family settlement evidenced by Ext. F dated Makaram 6, 1059 under which Meenakshi Ammal surrendered all the properties of her late husband to his nephews, retaining with her only the suit properties to be enjoyed for her life and then to be taken absolutely by the nephews of her husband. Nothing was said in Ext. F. about Ananthalakshmi Animal's right to succeed to her father's estate.

2. Parameswaran Pattamali, a member of the collateral branch, instituted a suit,

O. S. No. 122 of 1085, for partition of the family. Meenakshi Ammal was the 55th defendant in that case, and the present suit properties items 18 and 19 of Schedule A appended to the plaint therein. Meenakshi Ammal claimed special rights in regard to the suit properties, Ext. G is the judgment and Ext. H the decree dated Thulam 2, 1089, in that suit. It was held therein that the aforesaid kanom right was the separate property of Nilacantan Pattamali and therefore the family was not entitled to possession of the suit properties without, redeeming the same. Soon after that judgment Meenakshi Ammal died, in 1090. In execution of the decree, defendants 36 to 39, 45 and 46 thereof obtained their shares; but the correctness of the allocation was disputed by the other members of the family. The parties who took their shares in execution gave up their rights thereto and all the members of the family entered into an agreement of partition in Ext. M dated Mithunam 17, 1091, dividing the family properties, inclusive of the present suit properties, among themselves.

Ananthalakshmi Ammal, being a married woman, was then not a member of that family and therefore was not made a party to Ext. M. The parties assumed that the Kanom right of Nilacantan Pattamali lapsed to the branch of Ayya Pattamali on the death of Meenakshi Ammal as was provided in Ext. F. The lenm right was in the family itself. In Ext. M, the suit properties were therefore allotted in absolute rights to the branch of Parameswaran Pattamali. It was expressed therein that the suit properties were allotted to that branch to make up the deficiency in the share set apart to them, and that if in recovering the properties they were compelled to spend anything out of pocket the other members of the family would contribute thereto within fifteen days of the expenditure, and also that if any loss occurred to them in respect of the suit properties they would be indemnified in regard thereto. These special assurances in Ext. M would appear to indicate the consciousness of the parties of a defect in title in the suit properties.

It is seen from Ext. K that Ananthalakshmi Ammal had filed O. S. No. 138 of 1091 for realisation of rent of the suit properties from the tenants, and contemporaneously some members of Ayya Pattamali's branch had also filed a parallel suit claiming the same rent from the same tenants; and that, after a joint trial, the former was decreed and the latter dismissed on Meenam 26, 1091, (about three months before the execution of Ext. M) upholding Ananthalakshmi Ammal's right of succession to the suit properties as part of her father's estate untrammelled by the covenants in Ext. F to which she was no party.

3. On Vrischikam 9, 1092, the members of Parameswaran Pattamali's branch entered into a partition of their properties evidenced by Ext. XX. The suit properties allotted to that branch under Ext. M were set apart to Subramonian Pattamali, the predecessor-in-interest of the 3rd defendant, and Ananthanarayanan Pattamali, the father of defendants 4 and 5. On Meenam 4, 1096, the aforesaid, persons Subramonian Pattamali and Ananthanarayanan Pattamali, jointly issued a notice to the other members of the family intimating

them of their inability to secure possession of the suit properties and calling upon them to make amends therefor. In 1099, the sons of Subramonian Pattamali instituted a suit O. S. No. 58 of 1099, to recover the suit properties from Ananthalakshmi Ammal, but was defeated therein, the relative judgment being Ext. K, dated Makaram 16, 1102.

4. On Meenam 18, 1092, Ananthalakshmi Ammal had leased the suit properties to Vella, the late husband of the 1st defendant, as per Ext. A, on an annual rent of 1050 parahs of paddy and 750 sheaves of straw, Ananthalakshmi Ammal died on Karkitakam 21, 1128. Defendants 3 to 5 instituted O. S. No. 228 of 1954 to collect the rent of the suit properties under the aforesaid lease by virtue of their title under Exts. M and XX. The plaintiffs, claiming to be the reversioners of Nilacantan Pattamali, set up a rival title to the properties and sought to get impleaded in the aforesaid suit; but did not succeed. They have therefore instituted the present suit to establish their right of succession to the estate of Nilacantan Pattamali along with the 2nd defendant, for partition of their 7/8th share therein and for recovery of the rent of the suit properties from the 1st defendant, the legal representative of the original lessee under Ext. A.

5. The 1st defendant admitted the suit lease and deposited the arrears of rent in court to be drawn by the rightful claimant thereto.

6. Defendants 3 to 5 opposed the suit on the ground that, by the allotments made in Exts. M and XX, the suit properties had vested in them absolutely, and therefore they alone were entitled to collect the rent of the suit properties and urged further that the plaintiffs were estopped by their covenants in Ext. M from asserting anything to the contrary.

7. The Subordinate Judge applied Section 43 of the Transfer of Property Act, and held the assignment of the suit properties as per Ext. M to the branch of defendants 3 to 5 (which will be referred to hereinafter as the defendant's branch) was valid and binding on the present plaintiffs and therefore dismissed the suit with costs to defendants 3 to 5. This appeal is by the plaintiffs against that decision; and the 1st defendant has preferred a cross-objection claiming her costs disallowed by the trial court.

8. Counsel for the appellants-plaintiffs vehemently opposed the application of Section 43 of the Transfer of Property Act to the instant case. He contended that Ext. M was a partition not amounting to a transfer for consideration within the meaning of the section, that even if Ext. M be construed to contain a transfer of the suit properties by the plaintiff's branch to the defendant's branch it amounted in law to a transfer of spes successionis and was therefore, void that there was no representation by one party to another in Ext. M regarding title to the properties, that the predecessors of defendants 3 to 5 have rescinded the transfer when they issued Ext. C notice and that on all these grounds Section 43, Transfer of Property Act could not apply to the facts of this case.

9. The jenm right of the suit properties, was admittedly vested in the family of

the Pattamalis and became vested in the defendants" branch by the allotment in Ext. M. The dispute is only with regard to the kanom right which Nilcantan Pattamali had in the suit properties. Meenakshi Ammal and after her Aanathalakshmi Ammal could have only limited estates therein, and they having expired the plaintiffs 1 to 7 claim to have succeeded to the same as reversioners under Hindu law. The recitals in Ext. M are to the effect that these properties were allotted in absolute rights to the share of the defendants" branch and directed to be recovered by them from the tenants. It was expressed therein that the suit properties were allotted to the defendant"s branch because the share that was given to them was otherwise too low.

It is clear that if the suit properties had not been included in the share allotted to the defendants" branch, the plaintiffs" branch could not have taken all that they did under Ext. M. In other words, by allotting the suit properties to the defendants" branch, the plaintiff"s branch did secure a benefit which they would not have had otherwise. A party taking a benefit under a transac-tion with another cannot be heard to assert subsequently that the transaction was ineffective or void to the prejudice of the other. Plaintiffs having taken a benefit by the allotment of the suit properties to the defendants" branch at the expense of the latter have precluded themselves from denying the validity of that allotment. In such circumstances the equitable principle embodied in Section 43, Transfer of Property Act, comes into play to make the allotment operative on the interests that became subsequently available for the parties to effectuate the allotment.

10. Counsel for the appellants contended that Ext. M was only a deed of partition and did not involve a transfer of property to attract application of Section 43, T. P. Act to the arrangements embodied therein. Partition, in common as well as legal parlance, denotes a division of properties among co-sharers or joint tenants. A trans action by which property belonging to one is given or allotted to another can in no sense be a partition. The kanom right that was of the plaintiffs" branch and their predecessor-in-interest was assigned to the defendant"s branch by Ext. M. Ext. M was therefore not a simple deed of partition; it was in fact a composite deed of partition and assignment. No doubt, it is styled a partition deed; but name is apt very often to be deceptive, at any rate not conclusive. Properties obtained by certain members in execution of the decree for partition Ext. H, were given to other members of the family under Ext, M. That also was no partition but only an assignment. It is thus clear that nothing turned on the name of the deed; Ext. M was a composite deed, and, as mentioned above in regard to the suit properties was a deed of assignment only. The argument that Ext. M is a deed of partition and therefore Section 43 cannot be applied to the allotments therein has little force.

11. That the transfer of the suit properties to the defendants" branch was for consideration is borne out by the recitals in Ext. M itself. It is mentioned therein that the allotment was made in order to level up the deficiency in the share of

properties set apart for the defendant's branch. It then follows that this assignment was in fact made in exchange for certain other properties which belonged to the family and ought to have gone to the defendants' branch in equal partition. Family properties have been taken in a larger share by the plaintiffs' branch, the excess involved therein constituted the consideration for their assignment of the suit properties to the defendant's branch. The transfer concerned was therefore fully supported by valuable consideration.

12. Counsel for the appellants contended that on the date of Ext. M. the plaintiffs' branch had no real interest in the suit properties which were then held by Ananthalakshmi Ammal in succession to her father, that they had nothing more than a mere possibility of becoming the reversioners in the off-chance of Ananthalakshmi Ammal dying issueless, that such a possibility not being transferable there could not be a transfer in regard to the suit properties under Ext. M. The recitals in Ext. M do not purport to transfer an expectancy or a possibility of reversion. What it purports to transfer is property in praesenti. It might be that the assignors had at the time only a chance of becoming reversioners, and therefore had nothing further than that to assign but certainly that was not what they professed to assign to the defendants' branch as per the terms and recitals in Ext. M. It may be that the assignors had no real title to the properties assigned; but as observed by Viswanatha Sastri J. in *Veeraswami v. Durga Venkata Subbarao*

"To attract an application of Section 43, T. P. Act, it is not prohibited by law though it may not be effective to vest ownership of the property in the transferee".

To attract an application of Section 43, T. P. Act, it is enough if the transferor in form professed to transfer property which he erroneously or fraudulently represented to be within his power to transfer and received consideration for his act. In other words, if a person who has no, title to the property purports to transfer it to another by a deed which in form carries the legal estate and receives consideration therefore and he subsequently acquires an interest in the property sufficient to satisfy the transfer, the estate will pass to the transferee without any further act on the part of the transferor provided the transferee having not rescinded the transfer opts for such effectuation.

13. That such a case is covered by Section 43, Transfer of Property Act, is clear from the illustration to 1 the section, which reads :

"A, a Hindu who has separated from his father B, sells to C three fields X, Y and Z, representing that A is authorised to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition; but on B's dying A as heir, obtains Z. C., not having rescinded the contract of sale, may require A to deliver Z to him."

In the property Z, retained by B at the partition, what A can have at the time of the transfer is nothing but a chance of succession on B's death, which, by the

provisions of Section 6(a) of the Act, cannot be the subject of a transfer. Nonetheless the legislature has said that the transfer would become valid if ever in fact A became the owner of that property. Illustrations in enactments provided by the legislature are valuable aids in understanding the real scope of the text thereof. It may be that if the text is clear and an illustration is beyond it, the illustration cannot be taken as extending or limiting the scope of the text. But in all other cases the illustration shall be taken as explanatory of the section. It has been laid down by the Privy Council :

"In the construction of the Act, it is the duty of a Court of law to accept--if that can be done--the illustrations given as being both of relevance and value in the construction of the text". (Mahomed Syedol Ariffin v. Yeoh Ooi Gark AIR 1916 PC 242.)

14. Nor is the principle far to seek. If a person purports to transfer property to which he has really no title then and receives consideration therefor, he will be held always bound by his transfer and will not be heard to assert the contrary thereto. If subsequent to the transfer, the property becomes his then also he will not be heard to disown the title of his transferee to the property, if the transfer has not been rescinded by the transferee. (See Vaddadi Kamaraju Vs. Kocherlakota Venkatalakshmi and Others, Here one distinction has to be kept in view. If the transfer was one forbidden by law, that cannot be effectuated by an application of Section 43, Transfer of Property Act. Thus in the illustration cited above if A has purported to transfer his chance of succession to his father in the estate Z, the transfer will not be validated by the section when subsequently the chance turns a reality.

15. In Ext. M, the assignment to the defendants branch was not of an expectancy of a succession to the suit properties on the death of Ananthalakshmi Ammal, but the suit properties themselves in absolute rights. The other clauses in the document empowering them to recover the properties from the tenants, assuring contribution towards the cost of such recovery inclusive of any compensation for improvements that the defendant's branch may have to meet in connection therewith and above all the indemnity expressly provided against any loss of the suit properties virtually amount to representation to the defendant's branch that they do get a real title to the suit properties by the allotment in their favour.

16. It was contended that a representation can only be by one party addressed to another and that in a partition jointly executed by all members, a recital or term cannot be a representation by some of its executants to the rest of them. We have already held that Ext. M is not a simple deed of partition but is a composite deed of partition and exchange. The provisions for indemnity contained therein cannot be a covenant made by all the members of the family to themselves; it can only be by the assignor parties to the assignee parties. Ext. M does not contain a provision for indemnity in regard to any of the pretty large number of properties involved therein save the suit items. It is conceded in this

case that at the time of execution of Ext. M everybody thought that the suit properties lapsed to the plaintiffs" branch by force of Ext. F. It is then crystal clear that the assignors were the plaintiffs" branch and the assignees the defendants" branch in the transfer concerned and the representation involved was by the assignors to the assignees.

17. Counsel for the appellants contended further that the right to a limited estate vested in Ananthalakshmi Ammal at the time of Ext. M was well known to the members of the defendants" branch and therefore the representation could not have misled them to act on its faith as now to entitle them to the benefit of Section 43 of the Transfer of Property Act. The section prescribes only three conditions for its applicability, and they are: (1) the transferor should have made a fraudulent or erroneous representation (2) the transfer should be for consideration, and (3) there should not be another transferee in good faith for consideration without notice of the existence of the option to be prejudicially affected by its exercise. No fourth requirement for the attraction of Section 43 finds a place in the enactment. As held in *Parma Nand Vs. Champa Lal and Others*, .

"Section 43, T. P. Act, does not require that the transferee who can take advantage of it should be one to whom not only a fraudulent or erroneous representation about the transferor's authority to transfer the property is made but should also be one who did not have knowledge of the true factual position and had merely acted on the belief of the erroneous or fraudulent representation made to him by the transferor".

AIR 1957 Andh Pra 288 also held :

"In the application of the doctrine of equity it is immaterial that the transferee knew the truth that the transferor had no authority to transfer the interest which he purported to transfer".

We are in respectful agreement with the above dicta and hold that even if the defendants" branch knew of the defect in the title of the plaintiffs" branch it is of no relevance so far as the applicability of Section 43 is concerned.

18. The principle applicable to a case of this kind has been pointed out by the Supreme Court in *T. V. R. Subbu Chetty's Family Charities v. M. Raghava Mudaliar* AIR 1961 SC 797 thus :

".....it may be taken to be well-settled that if a presumptive reversioner is a party to an arrangement which may properly be called a family arrangement and takes benefit under it, he would be precluded from disputing the validity of the said arrangement when reversion falls open and he becomes the actual reversioner."

it is often characterised as a rule of estoppel (See *Dhiyan Singh and Another Vs. Jugal Kishore and Another*, but it is not the estoppel which is a rule of evidence preventing a party from alleging and proving the truth of facts. Plaintiffs are not

prevented from proving anything in the case. Having allowed the parties to prove every detail about the transaction we are only finding the legal consequences thereof; and the consequence is found to be that the arrangement or transfer made by the plaintiffs for consideration is binding on them and their interests in the properties though made before they became actually entitled thereto. (See *Sahu Madho Das and Others Vs. Mukand Ram and Another*, . If it be a rule of estoppel in the words of Denning L. J. in *Lyle-meller v. A. Lawis and Co. (Westminster), Ltd.* (1956) 1 All ER 247 (251)p> "It was not the old kind of estoppel, which was only a rule of evidence. It was the new kind of estoppel which affects legal relations."

19. The contention is that the option u/s 43, Transfer of Property Act, had been exercised by them or been lost to them when they issued the notice Ext. C does not also appeal to us. No doubt, in Ext. c the predecessors-in-interest of defendants 3 to 5 had called upon the plaintiffs" branch to make amends for the loss of income they suffered by being not able to get possession of the suit properties. But they never said that they rescinded the allotment of the suit properties in their favour. Ext. C itself refers to the necessity of instituting a suit to recover the properties from its holders. Their subsequent conduct in instituting a suit for damages in respect of such loss of income, vide the judgment, Ext. XIX In this case, only indicates that they stood by the assignment of the suit properties in their favour and insisted on its being given full effect to.

Further, the occasion for exercise of the option u/s 43, Transfer of Property Act, arises only when a real interest in the properties concerned becomes vested in the transferors; and it is not disputed that such interest became vested in the plaintiffs" branch only on the death of Ananthalakshmi Ammal in 1128 M. E. (1953 A.D.). Soon thereafter we find defendants 3 to 5 trying to enforce their rights to the suit properties in O. S. No 228 of 1954 claiming the rent from the tenants thereon. To bring the subsequent interest within the scope of the original transfer, the consent or concurrence of the quon. dam transferor is not required u/s 43, Transfer of Property Act. It is enough if the transferee exercises his option to take the subsequent interest under the earlier transfer in his favour. No further conveyance is contemplated by the section. The assertion of the defendants" tills to the suit properties subsequent to the death of Ananthalakshmi Animal is an exercise of their option u/s 43. It then follows that the option conceded to them by Section 43 of the Transfer of Property Act, has not been lost to them by any act on their part.

20. It follows that the court below was right in upholding the defendants" title to the suit properties as perfected by the application of Section 43, Transfer of Property Act. The decree of the court below is affirmed and this appeal dismissed with costs.

21. The cross-objection relates to the costs disallowed to the 1st defendant in the trial court. The 1st defendant was more or less a formal party to the suit, The real contest in the suit was between the plaintiffs and defendants 3 to 5. She did

not pay the rent to the plaintiffs or to the defendants 3 to 5. In the circumstances the discretion exercised by the court below in the matter of awarding costs does not call for any interference by us. The cross-objection is therefore dismissed, but without costs.