

(1996) 02 MAD CK 0006
In the Madras High Court
Case No : Second Appeal No. 1074 of 1985

S. Raj and Others	Vs	APPELLANT
Rajakaniammal and Another		RESPONDENT

Date of Decision : 13-02-1996

Acts Referred:

Transfer of Property Act, 1882 — Section 43, 8

Citation : (1996) 2 CTC 270 : (1997) 1 LW 17

Hon'ble Judges : S.S. Subramani, J

Bench : Single Bench

Advocate : M.I. Meera Sahib, for the Appellant; G. Rajan, for the Respondent

Final Decision : Dismissed

Judgement

S.S. Subramani, J.—First defendant and legal heirs of second defendant in O.S.No.101 of 1983, on the file of the Principal Subordinate

Judge's Court, Tirunelveli, are the appellants before this Court.

2. First respondent herein filed the above suit for partition on the following grounds: The property originally belonged to one Abubucker Maricar,

his brothers Mohammed Ali, Muthu Wappa and his three sisters Mohammed Bathumuthu, Sheera Mudalial, and Mohideen Bathu and their mother

Ahammed Meera Ammal. The shares of all the daughters, i.e., 21/72 shares were purchased by the plaintiff on 27.9.1979 as per Ex. A.I. It is seen

that the mother had executed a gift of her 1/8th share in the property to her son Muthu Wappa, i.e., Ex.A.2, dated 18.5.1971. Later, Muthu

Wappa sold that share to the plaintiff herein, as per Ex. A.3. On the basis of these documents, plaintiff claims that she is entitled to 30/72 shares in

the suit property. She wants the same to be partitioned by metes and bounds.

3. The contention of the appellants was that Muthu Wappa and Mohammed Ali had already alienated their share in the property as per Exs.B.1 and

B.2. According to them, as per Ex.B.2, Muthu Wappa has already sold the entire property which he was capable of alienating, and therefore, the

plaintiff cannot get the mother's share on the basis of Ex.A.3. It is said that when Muthu Wappa sold the property as per Ex.B.2, he was already a

decree of his mother and, therefore, he was capable of alienating that item also to the defendants. Hence, in so far as the mother's share is

concerned, i.e., 9/72 shares, plaintiff is not entitled to any right.

4. Both the Courts below held that Exs.B.1 and B.2 do not cover mother's share and, therefore, plaintiff is entitled to a decree for partition as

prayed for. It came to the conclusion on interpretation of the document that the intention of Muthu Wappa was only to convey his right to the

appellants, and not what he obtained from his mother.

5. Both the Courts below rejected the contention of the appellants. It is against the concurrent findings of the Courts below, defendants have

preferred this second appeal.

6. At the time of admission of the second appeal, the following substantial question of law was framed for consideration :-

Whether the Courts below erred in holding that the sale in favour of the appellants by the vendor of the first respondent would be operative only

to the extent inherited by him from his father, notwithstanding the fact that the vendor had much more share when he conveyed the property.

7. The main contention raised by learned counsel for the appellants is that u/s 43 of the Transfer of Property Act, whatever right Muthu Wappa

obtained, goes to the appellants as per Ex.B.1 and B.2. The said contention cannot be accepted for the simple reason that u/s 43 of the Transfer of

Property Act, if a person sells any property on the representation that he had a particular right, but in fact on the date of sale he did not have that

right and subsequently acquires that right, the same will automatically go to the purchaser. This principle is known as "feeding the grant by

estoppel". In this case, Muthu Wappa did not acquire any subsequent interest after Ex.B. 1 and B.2. Again, there is no case for the appellants that

Muthu Wappa or Mohammed Ali erroneously represented that they were authorised to transfer the said immovable property and professed to

transfer such property for consideration. So, Section 43 of the Transfer of Property Act may not have any application to the facts of this case. The

said contention is, therefore, rejected.

8. Learned counsel thereafter submitted that u/s 8 of the Transfer of Property Act, Muthu Wappa was capable of transferring not only his

individual share, but also the share of his mother, and that is why himself and Mohammed Ali declared that they were entitled to 2/3rd share. I will

consider whether such a contention can be sustained.

9. While considering Section 8 of the Transfer of Property Act, the intention of the parties is the matter to be taken into consideration for

interpreting the document. Section 8 of the Transfer of Property Act reads thus:-

Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the

transferor is then capable of passing in the property, and in the legal incidents thereof.

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all

things attached to the earth:

and, where the property is machinery attached to the earth, the movable parts thereof;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors,

windows, and all other things provided for permanent use therewith;

and where the property is debt or other actionable claim, the securities therefore (except where they are also for other debts or claims not

transferred to the transferee), but not arrears of interest accrued before the transfer;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect"".

We should also find out a different intention has been expressed in the documents, i.e., Ex.B.1 and B.2.

10. Admittedly, on the date when Ex.B-1 and B.2 were executed, Muthu Wappa was owner of not only his individual share, but also the owner of

that share gifted to him by his mother. But, when he executed the document, he did not say anything about the gift taken by him. He only said mat

the property was inherited from his predecessor. The relevant portion of the documents reads thus:-

The original acquirer had three sons, and at that time, the vendees thought that all the three sons will be entitled to equal share, i.e., one-third, and

that is when they executed Ex.B.1 and B.2, they said "2/3rd in the property". That also shows that the parties intended to sell only the individual

share obtained by them. May be within their one-third share, the share of the mother may also include, when we consider the extent. But when he

sells the property, the intention was only to convey his share, which he inherited in his own right. If that be so, it will not be one-third share, but

only a share which he inherited in accordance with Muslim Law.

11. In AIR 1933 83 (Privy Council) a case coming u/s 8 of the Transfer of Property Act, a Muslim executed a sale in respect of his properties to

his mother with instructions to spend the purchases money for charitable purposes. After his death, she executed a wakf-nama by which she

created a wakf in respect of the property conveyed by the same. But the sale executed by the son was found to be invalid since it was in fraud of

creditors. When the entire transaction was held invalid, the wakf put forward a contention that on the date when the mother created the wakf, she

had already inherited 1/8th share from the son, and atleast to that extent, the wakf was valid. The question was, whether the mother intended to

create a wakf in so far as the share which she inherited from her son, who originally executed the sale. It was held by Privy Council thus:-

.....The sale and the execution of the wakfnama must be regarded as integral parts of one transaction, that the sale being held to be void the

wakfhama was not valid even to the extent of mother's share as the heir of the son, and it was doubtful whether Section 8 of the Transfer of

Property Act had any application to the case".

Further down, it has also been held as follows:

... but in any event they are of opinion that in order to ascertain the intention of the lady in executing the wakfnama, the whole transaction must be

looked at, and upon this they think that her intention to settle only what she thought had been entrusted to her by her son is clear.

12. A similar question came for consideration in the decision reported in Koduri Venkata Subbaiah and Another Vs. Abburi Rangaiah and

Another, . In that case, a Hindu widow executed a settlement of property in her capacity as a legatee. But, in fact, she was only the heir of her son

entitled to woman's estate as her husband's will was found to be invalid, and her son died shortly after her husband. The question was whether the

transfer by her was in any way valid to the extent as heir of the son. While construing the same, it was held thus:-

In Ex.B-2, there is no recital that the donor is conveyning all interest or whatever interest she had in the property. On the other hand, it is stated that

she conveyed the property which passed to her through a will executed by her husband. It cannot therefore, be argued that she conveyed also her

interest which she got as heir of Punniyah. Section 8 of the Transfer of Property Act starts with the words ""unless a different intention is expressed

or necessarily implied"", In this case it appears to us that the intention was not to transfer all the interest whatever the transferor was capable of

passing, but only the interest which she acquired under the will of her husband. As she did not acquire any such interest, Ex,B.2 did not operate to

pass any interest. Reliance was placed upon the following recitals in the settlement deed; ""From now onwards you and your heirs alone shall enjoy

the said property with absolute powers of disposition by way of gift and sale, etc. But I and my heirs shall have no right or liability at any time"". We

do not think that these words will have the effect of passing whatever interest the donor had in the property"".

13. In this case, I have already stated that nothing prevented the parties from stating the gift of the mother while executing Ex.B.1 and B.2. The

same is conspicuously absent. At the same time, in both the documents, the statement is clear, i.e., they intend to sell that share of the property

which they inherited individually. According to me, even though Muthu Wappa was capable of alienating the entire right which he had in the

property which included his individual share and the share of the mother. In the date when he executed Ex.B.1 and B.2, a contrary intention was

expressed in the document, Parties intended to alienate only the share which he inherited from his father.

14. In this case, Muthu Wappa was also examined as one of the witnesses and he also speaks to the transaction. The bargain was only in respect

of his individual share. Under the above circumstances, I do not find that there is any merit in the second appeal. The question of law, is therefore,

found against the appellants, and the second appeal is accordingly dismissed. There will be no order as to costs.