
(1927) 08 MAD CK 0053
In the Madras High Court

Sethumadhava Ayyar

APPELLANT

Vs

Bacha Bibi and Others

RESPONDENT

Date of Decision : 09-08-1927

Acts Referred:

Transfer of Property Act, 1882 — Section 41

Citation : AIR 1928 Mad 778

Hon'ble Judges : Srinivasa Ayyangar, J;Srinivasa Aiyanger, J;Reilly, J

Bench : Full Bench

Judgement

Srinivasa Ayyangar, J.—The suit from which this second appeal arises was instituted by the present appellant as plaintiff for redemption of a mortgage of the suit property which, according to the plaintiff, was made by two instruments marked as Exs. A and B in this case. Both the lower Courts have held against the contention of the plaintiff, and, holding that the agreement constituted merely a sale and an agreement to re-sell, and finding that the term limited by Ex. B for re-purchase of the property had long ago expired, dismissed the plaintiff's action.

2. On appeal here it has been strenuously contended by Mr. Seetharama Rao that, on a proper construction of Exs. A and B with a consideration of the surrounding circumstances, the proper conclusion to arrive at is that together they constituted but a mortgage by conditional sale and that the lower Courts were wrong in construing them in the manner they have construed. It must be said that there are many features in these instruments which would rather go to show that what was really intended by the parties was a mortgage; and if it were necessary for us for the ultimate decision of this case to find one way or the other, we should be disposed to find that the transaction was really a mortgage. But in the view we have taken of this case on another point it has not become necessary to find finally with regard to that question. However, the points, having regard to which we are inclined to find that the documents constituted a mortgage, may be briefly referred to. Both the documents are proved to have been part of one transaction; both of them bear the same date, 8th day of April

1878. Ex. B is in terms a counterpart of Ex. A.

3. The expression used for sale by the purchaser is "reconvey." The time within which such reconveyance should be obtained the vendor is ten years. The mere fact that such a long period was fixed for the purpose of obtaining reconveyance would to some extent be a strong indication that what was intended by and between the parties was not a mere resale, because in that case the price of the property may undoubtedly vary in the course of ten years; but what was in the minds of the parties was that the property should be merely security for the amount and that in lieu of interest the profits of the property should be enjoyed by the transferee. There is as against this no doubt the strong circumstance that the property has been found by the lower appellate Court to have been on the date of this conveyance to be worth only about the amount of the consideration specified in the deed. It may be that, though the property was not worth substantially more than the amount of the price, still it might have been intended merely as security having regard to the relationship between the parties and there is nothing untoward in a brother agreeing to accommodate his brother when he is in difficulty by advancing the necessary amount and agreeing to reconvey the property on receipt of the money advanced. But, as already observed, it is unnecessary for us definitely to come to any conclusion on this point. In this connexion it must be observed that, even under the terms of this document which was made in 1878, the ten years that were fixed for the repurchase of the property expired in 1888 and that for nearly 44 years nothing more was said or done by the plaintiff in respect of this land. No claim was made in the interval. In the meantime, about 22 years after the time fixed for repurchase, the original transferee -himself sells the property to the present defendants.

4. The question then is whether, in view of the fact that the defendants purchased the property from the original transferee under Ex. A and, as is found by the lower Courts, without any notice of Ex. B or any rights or obligations thereunder, the defendants can be regarded as having acquired a title indefeasible at the instance of the plaintiff. No doubt, if the documents Exs. A and B were regarded or construed to be a mere sale and an agreement to resell, then there can be no doubt that a bona fide purchaser for value without notice of any agreement to resell, would acquire an indefeasible title. But Mr. Sitarama Rao argued and properly that, if on a proper construction the deeds constituted a mortgage, the mortgagor's interest cannot be defeated by anything that the mortgagee does. Any transferee from the mortgagee can take it only subject to the equity of redemption which continues to be vested in the mortgagor. Though the question whether the defendants were bona fide purchasers of the property for consideration, without notice from a person who was the ostensible owner appears to have been argued in the Court of first instance it appears to have been abandoned at any rate in the Court of appeal, in which also the plaintiff was himself the appellant.

5. As regards this it was argued by Mr. Sitarama Rao that the terms of Section 41, T. P. Act, could not possibly apply to such a case as this. He put it on two grounds. The first ground argued by him was that he took reasonable care to ascertain that the transferrer had power to make the transfer. Assuming, but without deciding, that the burden of proving it lies on the defendants who invoke the provisions of that section for the protection of their title, in this case there can be no question at all of their not having satisfactorily established it. There is of course the finding of the lower appellate Court which has not been even attempted to be assailed. Mr. Sitarama Rao contended that, unless the transferee in such a "case showed that he made a search in the records of the registration department for the purpose of finding out whether there were any other documents relating to the property and duly registered, he cannot be said to have acted with reasonable care. He said that, though an omission to search the records of the registration department might no by itself constitute notice of the terms of any document which might be found registered, and even though such failure might not constitute gross negligence on his part, still it would at any rate amount to absence of reasonable care. But what the section requires is reasonable care, not generally, not with regard to every aspect of the transaction, but merely for the purpose of ascertaining that the transferrer had power to make the transfer. We must assume in this case that Ex. A, which alone was in the possession of the transferrer of the defendants, Ex. B, being admittedly in the possession of his vendor, was shown to the transferee and that the transferee also ascertained that his transferrer had been in possession of the property for 32 years, at any rate for 22 years after the expiry of 1888. What is the degree of reasonable care requisite for ascertaining whether the transferrer has power to transfer? We must take it that the ordinary standard of diligence required for that purpose is calling for the title under which he claims and inspecting the title-deeds. If in the document itself that was produced as the title-deed for the inspection of the transferee there was any indication, anything to put the transferee on notice or enquiry, with regard to the existence of some other document having regard to which any infirmity in the title of the transferrer may be regarded as indicated, then the matter might conceivably be otherwise. But it is not argued that, having regard to the clear terms of Ex. A, there is such an indication.

6. No doubt a further question may arise whether the same result might be held to follow if, as a matter of fact, it be found that the transferee in this case had notice also of the terms of Ex. B. It is possible even in such a case to hold that, if after inspecting a document worded like Ex. B a person should come to the conclusion that it was merely an agreement of resale, and acting in that belief and finding that his vendor had been in uninterrupted possession of the property for 22 years before the dates obtain a transfer, such a case may also be covered by the terms of Section 41. But Mr. Sitarama Rao has argued that the construction of documents must be regarded only as a question of law and not as a question of fact and, therefore, the mere representation of the transferrer that

he had absolute interest in the property, when he produced both the documents cannot be relied upon and there can be no question of ostensible ownership when the documents are produced for inspection which on a proper construction make it clear that there is no such ostensible ownership. There is considerable force in such an argument as that; but having regard to the special facts of this case, there is no such complication, and it cannot possibly be contended, having regard to the finding already referred to, that the defendants had any such notice of the terms of Ex. B. Mr. Sitarama Rao observed that before a person can be said to have reasonably ascertained that his transferrer had power to transfer, a person must necessarily inspect or search for all the documents that are registered because unless that is done no man can be certain that some documents have not been made by the transferrer which take away such power. But, on a fair and proper construction of the terms of the section, that is not the power that is referred to, but the power to transfer under the guise of ostensible ownership in virtue of which the transferrer professes to transfer that would have reference only to the document under which the ostensible ownership itself is created and, therefore, the reasonable care which is prescribed by that section should have reference only to the reasonable care to see whether by the terms under which the ostensible ownership itself is constituted the power to transfer is given or possessed.

7. The other part of the argument of Mr. Sitarama Rao with regard to Section 41 was that the principle underlying the section cannot apply to a case where by reason of the transfer which is in question, some right, title or interest passes from the transferrer to the transferee; or, in other words, that the section applies only where according to, the true title the transferrer has no right, title or interest in the property whatsoever and the transaction is entirely voidable at the option of the real owner. Though Mr. Sitarama Rao strenuously contended for such a position he has not been able to refer us to any authority in support of it. His contention was really based on analogical reasoning with reference to the terms of Section 43. He said that under the principle underlying Section 43, T.P. Act, when a person purports to transfer a certain interest in property and on such transfer some interest passes to the transferee, there will be no room for the application of the doctrine or principle of that section and it can be applied only in a case where on the transfer, nothing at all passes and it is only subsequently that the transferrer obtains some interest in the property. Again there is nothing in the terms of Section 43 or in the principle underlying it to warrant such a contention.

8. The equitable principle embodied in that section is stated in simple terms as merely that a man must make good his word and deed as far as he could, and all that the section says is that the Court of equity will compel a man to do that. Therefore it seems inconceivable that, if, on a sale of valuable property as freehold, the transferrer should have obtained a large consideration, the mere fact that he is found to have been entitled to the remainder of a small term should be regarded as excluding the application of the section and giving him

immunity from making good his original conveyance even if he should shortly after be in a position by reason of a subsequent acquisition to be able to do so. Now, going back to Section 41, the section speaks; only that " the transfer shall not be voidable on the ground that the transferrer was not authorized to make it." The expression is, " to make it," that is to. say, to make the particular transfer, and that must include the entirety of the true interest purported to be transferred by the transaction. The authority to make the transfer might fail not only with regard to the entirety of the estate or the whole extent of the estate, but it has often failed with regard to some fractional interest and we have not been referred to any decision or true legal principle on which it can be said that the broad equitable principle on which the rule is based is not applicable to such a case. Again if on a transfer of property which can be avoided at the option of a third person the real owner. it is found that some interest possessed by the transferrer had been transferred to the transferee, it was not because the transferrer purported to transfer that, but only because as the result of the deed the law regards that even though the transferrer possessed only a lesser interest in the property such a lesser interest should at any rate be regarded as duly transferred to the transferee. There is, therefore, no reason to accept the contention that the expression " voidable " must be construed as voidable in its entirety and that the section is not applicable to cases where the whole transaction is not so voidable. After all, the section is merely a statutory enactment of a well known equitable principle, and it cannot be said that, even if the section is so worded as not to comprehend all possible cases that can arise, the well-accepted principle of equity should not be applied to any new case that may arise.

9. In this case it is not merely possible but quite probable that any person, who even knew of the transaction as it originally was, including knowledge of the terms of both documents Exs. A and B might easily have come to the conclusion after 1888, at any rate some time after the expiry of reasonable time thereafter, that what the parties had originally intended was merely sale and resale and that in 1888, the original transferrer, finding himself unable to pay money and take the property, had allowed his rights so be entirely extinguished or at any rate abandoned those rights. Though there is no evidence in this case, one would not be surprised if the fact should turn out to be that after the expiry of 1888, and on the strength of the term of 10 years having expired, the transferee had held the property under a claim of full and absolute ownership. In any case it is perfectly clear that in the year 1910, when he endeavoured to sell the property he was unquestionably in the position of an ostensible owner authorized to all appearances to effect the transfer of property because there was Ex. A, and he had been in possession for such a long time and there was no reasonable room to doubt the powers of transferrer. It was in those circumstances that he came to transfer the property to the defendants. If so, if the plaintiff had by bringing two instruments into existence and by lying by for such a long time enabled the tranfferrer to represent himself to others as an absolute owner ostensibly and

put it into the power of the ostensible owner to take in other people, the doctrine underlying Section 41 clearly applies and it must be held that the transferee-defendants in this case are entitled to the protection of that section. In this view, therefore, we must hold that whatever the rights may have been and may be of the plaintiff, the defendants' title cannot now be assailed by him, and the second appeal therefore fails and must be dismissed with costs.

Reilly, J.

10. Like my learned brother I am inclined to the opinion that there are indications, that the transaction of 1878. when the plaintiff's father, Venkataramana Iyer, executed Ex. A, and his " brother, Krishna Iyer, executed Ex. B, was a mortgage by conditional sale. But, even assuming that to be so, I agree that the sale to defendant 7 and his brothers by Krishnan Iyer in 1910 under Ex. 2 is protected by Section 41, T. P, Act. I think there can be no doubt that, when Venkataramana Iyer executed Ex. A, which in itself is a plain and straightforward sale-deed, and put his brother, Krishna Iyer, into possession of the property and left him there for 32 years with" the patta, as we are now told, in his name, the position was that he made Krishna Iyer the ostensible owner of the property. The fact that Venkataramana Iyer had Ex. B in his pocket, where no one else was likely to know anything about it unless search had been made in the registrar's office, does not in my opinion make Krishna Iyer any the less an ostensible owner within the meaning of Section 41; and this ostensible owner in 1910 executed a sale-deed in favour of defendant 7 and his brothers. The District Munsif found that defendant 7 and his brothers, by their guardian, purchased this property for value in good faith without notice. Mr. Sitarama Rao contended that that is not enough to protect them and that u/s 41 of the Act, they must also show that they exercised reasonable care to ascertain that Krishna Iyer had power to make the transfer. If that contention is correct, in my opinion the fact that the guardian of defendant 7 and his brothers took the precaution of obtaining Krishna Iyer's sale-deed, Ex. A, from him in the circumstances of his long-continued possession as ostensible owner and the patta being in his name is enough to show affirmatively that reasonable care was exercised. There is nothing, as my learned brother has pointed out, in Ex. A, to put any ordinary person upon the track of Ex. B or any other document of that kind. I am unable to accept Mr. Sitarama Rao's contention that, assuming Krishna Iyer, the ostensible owner, was really a mortgagee by conditional sale, then the transfer to defendant 7 and his brothers is only protected by Section 41 to the extent of the mortgage right. That contention appears to me to give Section 41 of the Act far less than its full and proper effect. I agree that this second appeal should be dismissed with costs.