
(1947) 09 MAD CK 0042
In the Madras High Court

The Catholic Mission Presentation Convent by Mother
Superior, Coimbatore, and Another

APPELLANT

Vs

Subbanna Goundan and Others

RESPONDENT

Date of Decision : 22-09-1947

Acts Referred:

Citation : (1948) 1 MLJ 11

Hon'ble Judges : Patanjali Sastri, J

Bench : Division Bench

Judgement

Patanjali Sastri, J.—This is a second appeal preferred by defendants 6 and 7 from a decree of the District Judge of Coimbatore affirming the decree of the Subordinate Judge of the same place whereby the title of the respondents 1 to 4 to certain Immovable properties was declared, and the appellants were directed to deliver possession of them to the said respondents with mesne profits.

2. One Nanjappa Goundan was the original owner of the properties, and on his death many years ago his widow Palaniammal inherited the properties and was in enjoyment thereof till the 10th January, 1931, when she died. Thereupon disputes arose regarding succession to the properties of Nanjappa between the fifth respondent, who was the first defendant in the suit who claimed title to be the nearest sapinda and reversioner of Nanjappa on the one hand and defendants 8 and 9 who are the grandsons of Palaniammal's sister and set up title as devisees under her will on the other. The first respondent's father, Palani Goundan, who, it has been found below, and the finding has not been questioned before us, was Nanjappa's step-sister's son and as such his true reversionary heir under the Hindu Law of Inheritance (Amendment) Act (II of 1929) as interpreted by the Privy Council (vide Mst. Sahodra v. Ram Babu (1943) 1 M.L.J. 180 : L.R. 69 IndAp 145 : ILR (1943) Kar. did not put forward any claim of succession to Nanjappa when his widow died in 1931. On the other hand, according to the defendants, he took an active part as one of the arbitrators in effecting a settlement of the disputes between the first defendant and

defendants 8 and 9. Though Palani Goundan's participation in the settlement has been found against, the disputes between the other claimants appear to have been settled by the defendants 8 and 9 acknowledging the validity of the first defendant's claim to Nanjappa's properties and the first defendant delivering to them, in consideration of such acknowledgment, some of those properties. In pursuance of that settlement the first defendant made statements on the 26th January, 1931, before the Revenue-Inspector of Vaniputhur consenting to patta being transferred in the name of defendants 8 and 9 in respect of the lands given to them as aforesaid.

3. Thereafter the first defendant continued in undisturbed possession and enjoyment of the remaining properties of Nanjappa till he sold some of them to the first appellant (6th defendant) for Rs. 11,000 on the nth January, 1940, and some-others to the second appellant (7th defendant) for Rs. 33,000 on the 21st May, 1942, under sale deeds marked as Exs. D-5 and D-6 respectively. During all these years, neither Palani Goundan till he died in 1934, nor his sons, the first respondent and the deceased father of respondents 2 to 4, set up any rival claim to Nanjappa's properties in the hands of the first defendant or of defendants 8 and 9 until they brought the present suit on the 11th January, 1943, the last day of limitation prescribed for the suit, for a declaration of their title to all the properties left by Nanjappa and for recovery of such of those properties as were respectively in the possession of the first defendant and his alienees including the appellants.

4. Various pleas were raised in answer to the suit including a plea of estoppel based on the part alleged to have been played by Palani Goundan in bringing about the settlement of 1931 and his subsequent acquiescence in the enjoyment of the properties by the first defendant as the ostensible owner. All the pleas were overruled by the Courts below which upheld the plaintiff's right to the properties claimed, and the suit was accordingly decreed so far as the appellants were concerned, the other defendants having entered into a compromise with the plaintiffs. The only question raised in this appeal is whether the appellants are entitled, as bona fide transferees for value from an ostensible owner, to seek the protection of Section 41 of the Transfer of Property Act.

5. That section reads thus:

Where with the consent, express or implied, of the persons interested in Immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it; provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

6. It is manifest that, in order to invoke successfully the protection of the section, the transferee must establish that (1) the transferor was the ostensible owner of the properties, (2) with the consent express or implied of the real

owner and (3) that the transferee paid consideration, and (4) acted in good faith, (5) after taking reasonable care to ascertain that the transferor had power to transfer. The Courts below have held that the appellants are not entitled to the protection of the section as they failed to satisfy conditions (2) and (5) though they have established the other conditions. The lower appellate Court appears, however, to have proceeded on the assumption that the " consent express or implied " of the real owner was necessary not only to the transferor holding the property as ostensible owner but also to the transfer sought to be protected under the section. Though, as a matter of grammatical construction, the collocation of the words makes such inter-pretation possible, it is now generally accepted as the better view that those words have reference only to the transferor holding the property as ostensible owner. This is because, as pointed out in *Fazl Hussain v. Muhammad Khazim* I.L.R.(1933) All. 582 the consent of the true owner to the transfer would by itself estop him u/s 115 of the Evidence Act, and the other requirement of Section 41 as to the transferee taking reasonable care to ascertain that the transferor had power to make the transfer will be rendered nugatory. See also *Satyanarayanamurthi v. Pydayya* (1943)M.L.J. 219 and *Fakruddin Sahib v. Ramayya Setti* (1944) 1 M.L.J. 125. The learned Judge's error is, however, of no consequence, as he has found that it was not satisfactorily proved that Palaniappa took any part in the 1931 settlement the only conduct relied on as showing his consent, apart from inaction and silence. The questions that arise for consideration are, accord-inly, first, whether Palani Goundan or his sons, the plaintiffs, consented expressly or impliedly to the first defendant holding the property as the ostensible owner, and, secondly, whether the appellants took reasonable care to ascertain that the first defendant had the power of transfer.

7. On the first question, apart from the alleged arbitration by Palani Goundan in the settlement of 1931 which, as already stated, has been found against, no express consent by him till his death in 1934, or thereafter by the plaintiffs, to the first defendant's enjoyment of the property as the heir and successor of Nanjappa was suggested. The question therefore reduces itself to whether mere non-assertion of their claim as the rightful owners of the property after Nanjappa's death could be taken to imply their consent to the first defendant, who is no more than a tres-passer in the eye of the law, taking possession of the property and holding the same as the ostensible owner. Both the lower Courts have laid stress in this connection on the doubtful state of the law as to a step-sister's son's right of succession under the Hindu Law of Inheritance (Amendment) Act (II of 1929), until the matter was; cleared up by the decisions of the Privy Council in *Mst. Sahodra v. Ram Babu* (1943) 1 M.L.J. 180 : 1943 L.R. 69 IndAp145 : ILR (1943) Kar. 12 (P.C.) and of a Full Bench of this Court, given more or less at the same time in *Pappammal alias Muthu Karuppayyee Ammal Vs. Meenammal and Others*, in both of which the words " sister " and " sister's son " as used in the Act were held to include a half sister and a half sister's son respectively. Earlier, this Court had held in *Angamuthu Muthirian v.*

Sinnapennammal (1937) 47 L.W. 286 following the view taken by the Allahabad High Court in *Ram Adhar v. Sudesra* I.L.R.(1933) All. 725 that "sister" would not include a half sister, although the Nagpur High Court had expressed a different opinion (*Amrut and Ors. v. Mst. Thagan* ILR (1938) Nag. 155). In that state of the law, Palaniappa and the plaintiffs, could not have been sure of their true rights even if they had taken legal advice. But probably they took no steps to assert them because they were not aware of the change effected by the statute in the Hindu Law of Inheritance. However that may be, if they did nothing by way of holding out the first defendant as the owner, can it be said that, by their mere inaction and silence, they impliedly consented to the first defendant holding the property as "ostensible owner"? We think not. We asked the learned Advocate-General who argued the case for the appellants, how long the quiescence of the real owner should continue to give rise to an implication of consent--to the ostensible owner holding the property, and we waited in vain for an answer. The expression "with the consent, express or implied" must, we apprehend, import, in the context of the section, that the real owner is in some manner privy to the creation of the ostensible ownership. It has to be remembered in this connection that the law of limitation allows the plaintiffs a period of 12 years from the death of Nanjappa's widow for suing to recover their property, and the plaintiffs have brought their suit within the time limited. If, in the meantime a squatter settled on the property and purported to sell it, caveat emptor, Section 41 is not intended, in our judgment, to afford protection in such cases. A similar view has been expressed in a recent decision of the Lahore High Court in *Shamsher Chand v. Bakshi Mehr Chand* AIR 1947 Lah. 147.

8. Turning to the other ground on which the appellants have been denied the protection of Section 41, viz., that they made no reasonable enquiries to ascertain that the first defendant had power to transfer, Mr. Muthukrishna Aiyar for respondents 1 to 4 has urged that it is a finding of fact which is not open to review in second appeal. This view is no doubt supported by *Jamnadas v. Umashankar* I.L.R.(1914) All. 308 and *Bansidhar Seth Vs. Gopi Lal Seth and Others*, . The former decision was however explained and distinguished by the same Court in *Mulraj v. Fazl Imam* I.L.R.(1923) All. 520 where it was held that the question whether Section 41 applied to a given set of facts was not a question of fact. Whether a transferee from an ostensible owner took reasonable care to ascertain that the transferor had power to make the transfer has no doubt to be determined with reference to the circumstances of the particular case, the test being whether he acted like a reasonable man of business and with ordinary prudence. (*Fatal Husain v. Muhammad Kazim* I.L.R.(1933) All. 582). But the question whether that test has or has not been properly applied in any particular case cannot be regarded as one of pure fact not open to review in a second appeal.

9. It has also been argued, by Mr. Muthukrishna Aiyar that Section 41 postulates two distinct lines of inquiry being made by the transferee, first, to satisfy himself that the transferor is ostensibly the owner of the property proposed to be trans-

ferred and, secondly, to ascertain that the transferor has power to make the transfer, and that, inasmuch as the appellants are found not to have made any inquiry directed to the latter purpose, they are not entitled to the protection of the section. Learned Counsel insisted that, after ascertaining that the transferor is the ostensible owner, the transferee must, in every case, make some further inquiry to ascertain that the ostensible owner was also the real owner. On the other hand, the learned Advocate-General broadly contended that the transferee, after satisfying himself as to the transferor's ostensible ownership, need not make any further inquiry unless he had reason to suspect that the ostensible title was not the real title, or, in other words, unless there was something in the circumstances of the case to put him upon further inquiry, and it was for the real owner to show that there was. Reliance was placed in support of this contention on the well-known passage in *Ram Coomar's case* (1872) L.R. 1 IndAp Supp.40 : 18 W.R. 166 which has been codified in a statutory form in Section 41:

It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something which amounts to constructive notice, of the real title, or that there existed circumstances which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it.

10. We are unable to accept either of these extreme suggestions. The respondent's construction of the section would tend to reduce the requirement of the proviso to a hard and fast rule applicable in every case irrespective of its circumstances. Cases are readily conceivable where the apparent ownership may be so complete in all its indicia that no reasonable man of ordinary prudence would pursue the inquiry any further to ascertain that the transferor had power to make the transfer. On the other hand, the appellant's contention would, if accepted, relieve the transferee of the burden of proof which the proviso obviously casts upon him in the ordinary case. Ostensible title, where it is not the real title, must, generally speaking, be defective in some respects and the section accordingly assume the necessity for an inquiry to ascertain with reasonable care whether the apparent owner is also the real owner and places on the transferee the burden of proving that such inquiry was made. This may, at first sight, seem inconsistent with the passage quoted above which throws on the real owner the burden of showing that "there existed circumstances which ought to have put the transferee upon an enquiry that if prosecuted would have led to discovery of the real title." But there will be found to be no inconsistency if it is borne in mind that the passage states the position as it would arise when the transferee has shown that he has purchased the property "for value from the apparent owner in the belief that he is the real owner." Having regard to the fact that the principle is one of "natural equity" designed to protect a purchaser for

value against the real owner in the circumstances stated, it is obviously necessary that the purchaser should act in good faith and with reasonable care in forming the "belief" that the apparent owner is the real owner though these conditions are not expressly stated in the passage. In other words, the transferee must first show that he purchased the property from the apparent owner for consideration believing in good faith, after taking reasonable care, that the apparent owner was the real owner. It is only then that the onus is laid on the real owner to show that there were circumstances which ought to have put the transferee upon further inquiry. There is thus no difference in regard to the incidence of the burden of proof between Section 41 and the statement of the principle by their Lordships in *Ram Coomar's case* (1872) L.R. 1 IndAp Supp. 40 : 18 W.R. 166 .

11. The position then is this. There is no hard and fast rule that the transferee, after satisfying himself as to the apparent ownership of the transferor, should, in every case, make some further inquiry as regards his power to make the transfer. Nor is it correct to say broadly that once the transferee proves that he has taken the transfer from an ostensible owner in good faith and for consideration, he need go no further and prove that he made inquiries in regard to the title of his transferor such as a reasonable man of ordinary prudence would make, unless the real owner is able to point to something in the circumstances of the case which should lead an ordinarily prudent person to make further inquiry about the transferor's title. Whether any and what inquiry should be made to ascertain that the ostensible owner was the true owner in any particular case depends on the circumstances of that case.

12. In the present case as already stated it has been found that the appellants made no inquiry about the title of the first defendant beyond what the recitals in their sale deeds disclosed. They did not go into the box to give evidence on the point. It is, however, urged on their behalf that this was sufficient to satisfy the standard of ordinary prudence in the circumstances of the case. We are unable to agree with that view. The sale deed, Ex. D-5, dated the nth January, 1940, executed in favour of the first appellant shows nothing beyond the fact that the first defendant had been in possession and enjoyment of the properties paying the Kist due to the Government in respect thereof and that the first defendant got the properties sold thereunder as the "anantaravars (nearest reversioner) after the death of my dayadi Palaniammal." It does not even state that the pattas for the lands stood in the name of the first defendant, though it has been found that he had pattas in his name since 1931. It refers to an encumbrance certificate for three years prior to the sale having been handed over to the first appellant "as title. The other sale deed Ex. D-6, dated the 21st May, 1942, executed in favour of the second appellant, discloses a few more particulars; that the first defendant had hypothecated some of the properties in 1935, and usufructually mortgaged some others in 1941; and that pattas for the lands stood in his name, for he undertakes to "get the patta in my name transferred to your name." It was pointed out for the respondents 1 to 4 that it was by no

means clear that the hypothecation of 1935 related to the properties which the first defendant got as reversioner, for the sale deed comprised also ancestral family properties. No evidence was directed to this point as no reliance was placed on the hypothecation in this connection. However that may be, the deed shows that the first defendant dealt with the property as the absolute owner by granting a usufructuary mortgage in 1941. This deed, like Ex. D-5, also recites that the first defendant got the properties in suit by reversion (anantaravars). These particulars regarding the properties, while they may be sufficient to establish the first defendant's ostensible ownership, could have hardly satisfied a reasonable man of ordinary prudence about the first defendant's title to the properties he was purporting to sell. No doubt there was no question here of examining the transferor's title deeds, for he got the properties by inheritance. But, as observed by the learned District Judge, it is always risky--to purchase property from a reversioner and that circumstance should have put the appellants upon inquiry as to whether the first defendant was in fact the nearest reversioner and there were not nearer reversioners to Nanjappa who died long ago. It is true that, if such inquiry had been made, it would have disclosed that according to the view then prevailing in Madras the plaintiff as the step sister's son were not the nearest reversioners of Nanjappa (*Angamuthu Muthurian v. Sinnapennammal* (1937) 47 L.W. 286 . But, on the other hand, a Full Bench of the Nagpur High Court after an exhaustive examination of the subject had expressed a view favourable to the plaintiffs' right of succession to Nanjappa (*Amrut and Ors. v. Mst. Thagan* ILR (1938) Nag. 115 . As the learned District Judge remarks, if the appellants had made enquiries and ascertained this, they might have refrained from buying the properties, or it may also be that if, after making such enquiries they took the risk and purchased the properties relying on the Madras view, they would be protected u/s 41. However that may be, the appellants, having failed to make inquiry as to whether the first defendant was in fact the nearest reversioner of the last male holder who died long ago are not, in our judgment, entitled to claim the protection of Section 41.

13. The appeal fails and is dismissed with costs.