

Tulsa and Others Vs. Sita and Others

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Court : Mumbai Nagpur

Decided On : Sep-10-2015

Judge : A.P. Bhangale

Appeal No. : Second Appeal No. 72 of 2001

Appellant : Tulsa and Others

Respondent : Sita and Others

Judgement :

1. This appeal was admitted by this Court on 26.2.2004 in view of the law laid down by the Apex Court in the case of **Jumma Masjid Mercard .vs. Kodimaniandra Deviah and Others** reported in AIR 1962 SC 847 on the following substantial question of law:

Did not the First Appellate Court commit a grievous error of law in observing that there was no fraudulent transfer of erroneous representation within the meaning of Section 43 of Transfer of Property Act, when First Appellate Court held that the deceased Narayan, the son of plaintiff Nagubai executed registered sale deed (Exh.57) dated 8-10-1969 on behalf of plaintiff Nagubai and that he was not authorised by Nagubai to execute sale deed?

2. The facts, briefly stated, are as under:

That the original plaintiff deceased Nagubai was resident of Naginabagh Ward, Chandrapur. She had purchased plot no.2/19, admeasuring 900 sq.ft. situated at Jatpura ward, Chandrapur, on which plinth was built. She became owner under the registered sale deed dt.12.4.1961 from one Preraj Tahgde. Said Nagubai had instituted suit in the Court of 5th Joint Civil Judge (Jr.Dn.), Chandrapur for vacant possession of the suit plot and for permanent injunction against defendant Mahadeo Waktuji Nagrale (present appellant) bearing Regular Civil Suit No.143 of 1983. According to Nagubai, the defendant started construction on the suit plot in March, 1983 by encroaching upon the suit plot. While, according to the defendants, the plaintiff had sold the suit plot to him under the registered sale deed dt.8.10.1979, though she showed her ignorance regarding registered sale deed executed by her son Narayan Raghobaji Yenurkar on her behalf for a consideration in the sum of Rs.2,000/-. The defendants pleaded that, on behalf of Nagubai Yenurkar, her son Narayan Yenurkar transferred the suit plot and also delivered possession thereof to the defendant. Thus, the defendant had entered in possession of the suit plot with effect from the date of registered sale deed i.e. 8.10.1969 as owner thereof. Son of Smt. Nagubai had also assured that the suit plot is free from any encumbrance, loan, transfer etc. and undertook the responsibility to reimburse the defendants in case any encumbrance is found. The said sale deed is at Exh.57. Thus, the defendants claimed ownership of the suit plot as also continuous and peaceful possession of the same since 8.10.1969. The trial Court recorded findings of facts that Narayan (son of Nagubai) had no authority to sell the suit plot and held that the registered sale deed executed by Narayan was not binding on Nagubai. The trial Court also negated the plea of open, continuous and peaceful possession of the suit property since 1969 made by the defendants as adverse possessors thereof. The trial Court held that the legal representatives of Nagubai brought on record can claim possession from Nagubai. The first Appellate Court, therefore, dismissed the appeal filed by the appellant.

3. In the trial Court, the issues were framed and it was found that name of the plaintiff was recorded in the Nazul maintenance Khasra till 1978-79 in respect of the suit plot and that the defendants had encroached upon the suit plot as alleged by the plaintiff and further that the defendants never took possession of the suit

plot. However, the trial Court held in favour of the defendants that the plaintiff had sold the suit plot to the defendants by registered sale deed dt.8.10.1969 for Rs.2,000/-, as alleged. But the Court also held that sale of suit plot by the plaintiff's son Narayan was without any authority and not binding upon the plaintiff. Thus, holding that the defendant was in wrongful possession since March, 1983, the plaintiff was held entitled to vacant possession of the suit plot.

4. Learned Counsel appearing for the appellants invited my attention to the substantial question of law, upon which this Court had admitted the Second Appeal and contended that the registered sale deed in favour of defendant (Exh.57) was executed by Narayan Raghobaji Yenurkar on behalf of Smt. Nagubai Yenurkar for a consideration in the sum of Rs.2,000/-. The sale deed also averred clearly that the immovable property in possession of transferor and owned by the transferor is transferred with all rights including rights as to inheritance etc. and possession was handed over on the same day. Thus, ownership and possession of the defendant was acknowledged in writing by registered sale deed. The registered document also assured defendant Mahadeo that he became owner of the suit plot with all rights as to ownership and possession and he shall continue to hold the possession. The defendant was also assured that there is no any prior transfer or loan or any encumbrance upon the suit plot and it is so found in future responsibility was undertaken by Narayan Yenurkar on behalf of his mother that reimbursement would be made to the defendant in that case. Thus, the suit plot with its full description including boundaries thereof was transferred in favour of defendant Mahadeo Watkuji Nagrale. Averments in the document, on plain reading would indicate that, on behalf of Nagubai Yenurkar, aged about 65 years, her son Narayan Yenurkar, aged about 40 years, both residents of Chanda, Tq. and Distt. Chanda transferred the suit plot for a consideration in the sum of Rs.2000/- on 8.10.1969. The sale deed recitals indicated that the suit plot was transferred with possession thereof as argued by the learned Counsel Mr.Khajanchi on behalf of the appellants.

5. Mr.M.P.Khajanchi, learned Counsel for the appellants made reference to the four Judges Bench ruling of Hon'ble Supreme Court of India in the case reported in **AIR 1962 SC 847, Jumma Masjid, Mercara .vs. Kodimaniandra Deviah and**

Others wherein in case of a transfer by a person having spes successionis in selling property representing that he is person interested in the property, the transferee is entitled to benefit of Section 43 of the Transfer of Property Act as such transferee had acted on the faith of the representation made by the transferor and paid consideration in respect of sale of immovable property (plot in this case). In para 15, the rule of estoppel contained in Section 43 of the Transfer of Property Act is observed thus:

This reasoning is open to the criticism that it ignores the principle underlying S.43. That section embodies, as already stated, a rule of estoppel and enacts that a person who makes a representation shall not be heard to allege the contrary as against a person who acts on that representation. It is immaterial whether the transferor acts bona fide or fraudulently in making the representation. It is only material to find out whether in fact the transferee has been misled. It is to be noted that when the decision under consideration was given, the relevant word of S.43 were, "where a person erroneously represents", and now, as amended by Act 20 of 1929, they are "where a person fraudulently or erroneously represents", and that emphasises that for the purpose of the section it matters not whether the transferor acted fraudulently or innocently in making the representation, and that what is material is that he did make representation and the transferee has acted on it. Where the transferee knew as a fact that the transferor did not possess the title which he represents he has, then he cannot be said to have acted on it when taking a transfer. Section 43 would then have no application, and the transfer will fail under S.6(a). But where the transferee does act on the representation, there is no reason why he should not have the benefit of the equitable doctrine embodied in S.43, however fraudulent the act of the transferor might have been.?

6. In view of the above observations by four Judges Bench in the ruling of Hon'ble Supreme Court of India, it was open for the defendant as a transferee under the registered sale deed to have the option of claiming benefit of equitable doctrine hiding the grant as estoppel as embodied in Section 43 of the Transfer of Property Act. Thus, the Hon'ble Supreme Court held that when a person transfers property representing that he is a person interested therein whereas he is infact only a spes successionis, the transferee is entitled to benefit of Section 43 if he has share

transferred on the faith of that representation and for consideration. In the present case, the transferor was clearly mentioned as Smt. Nagubai w/o. Yenurkar, aged about 65 years, Occ. Household through her son Narayan Yenurkar, aged about 10 years, Occ. Agriculturist, r/o. Chanda, Tq. and Distt. Chanda. Mahadeo Nagrale, purchaser of immovable property paid consideration in the sum of Rs.2,000/- for the said transaction. The document also recites that the transferor had represented that the plot owned and possessed by them is transferred with all rights including right of inheritance and possession thereof has been delivered to the transferee. The transferee was assured ownership and possession free from encumbrances and the transferor had undertaken responsibility to reimburse the damages, if any, caused to the transferee pursuant to transfer of the suit plot. It is in these circumstances that the defendant had claimed of having acquired title to the suit plot u/s.43 of the Transfer of Property Act and according to him, after death of transferor, sale transaction i.e. transfer of the property made in favour of the defendant was and is binding upon the legal representatives brought on record substituting Nagubai.

7. Learned Counsel for the appellants also made reference to the ruling in the case of **Ganeshdas and Other vs. Kamlabai** reported in AIR (39) 1952 Nagpur 29 to argue that representation made by the transferor need not be in any particular form. It can be by word of mouth or by a document. A statement in a sale deed that the vendor has not transferred the property to anybody in any manner whatsoever, nor has anybody any rights interest or share therein is quite enough to show that there was a fraudulent representation when in fact the vendor had sold it already to a third party.

8. Learned Counsel appearing on behalf of the respondents made a reference to the ruling in **Jharu Ram Roy .vs. Kamjit Roy and Others** reported in AIR 2009 SC (Supp) 2112 to argue that Section 32 could not be applicable in a case where no fraud was committed by the transferor. He made reference to para no.13 of the ruling wherein it is held by the Apex Court as under:

In this case, as the appellant averred that although in the deeds of sale, a stipulation was made by Rajiv Lochan that his father had expired, it cannot be said

to be a case where he fraudulently or erroneously represented that he was authorized to transfer the said immovable property. As noticed hereinbefore, a finding of fact had been arrived at by the First Appellate Court that the appellant was a party to the fraud and that he was not victim thereof.?

9. Reference is also made to the ruling in the case of **Agricultural Produce Marketing Committee .vs. Bannama (D) by L.Rs.** reported in AIR 2014 SC 3000. The two Judges Bench of the Supreme Court held that doctrine u/s.43 of the Transfer of Property Act is based upon the principle of law of estoppel. It simply provides that when a person by fraudulent or erroneous representation transfers certain immovable property, claiming himself to be the owner of such property, then such transfer will subsequently operate on any interest which the transferor may acquire in such property during the contract of transfer subsists. Thus, according to the learned Counsel in the present case, the transferor Narayan who was son of the plaintiff expired in the year 1978 while alleged registered sale is dt.8.10.1969 prior to death of plaintiff Nagubai. According to the learned Counsel, when Nagubai died her, son Narayan has predeceased here already. Therefore, since the transfer was made by her son without any authority from her and fraudulently without informing her, benefit of such transaction cannot be taken by the defendant (appellant) as, according to the learned Counsel, Narayan had never acquired any interest during his life time in the suit plot and therefore, he could have transferred the same in favour of the defendant.

10. In the ruling cited on behalf of the respondents, no reference is made to four Judges ruling in the case of Jumma Masjid (cited supra) which appears binding judicial precedent in the light of provisions contained in Section 43 of the Transfer of Property Act. Later, rulings which were per incuriam of the said ruling would, in my humble submission, are not attracted in the facts and circumstances of the case.

11. In the fact and circumstances of the present case, document (Exh.57) a registered sale deed clearly averred that name of Smt. Nagubai was mentioned as a transferor through her son Narayan Yenurkar, ownership as well as possession was transferred on 8.10.1969 in favour of the defendant free from encumbrance

charges etc. over the suit plot. That being so, when property was transferred to the defendant upon representation, signatory of the document Narayan acted on behalf of his mother Nagubai Yenurkar and the defendant had taken transfer on the faith of that representation and for valuable consideration; hence, Section 43 of the Transfer of Property Act is attracted to the suit transaction upon equitable principle of estoppels contained in the provision and the transferee (defendant Mahadeo) was entitled to the benefit of said equitable doctrine known as the doctrine of feeding the grant by estoppel. Even otherwise, the defendant was openly and continuously in possession of the suit plot since 8.10.1969 until the suit for possession was instituted against him on 6.6.1984 for more than 12 years. Even on the date of institution of the suit, the title of the transferee appears to have been perfected even on the plea of adverse possession of the suit property. Looking at the suit controversy from any of the angle, therefore, the Court below committed grievous error of law to observe that there was no fraudulent transfer or erroneous representation within the meaning of Section 43 of the Transfer of Property Act by Narayan s/o Nagubai, who executed registered sale deed (Exh.57) on 8.10.1969 on behalf of the plaintiff Nagubai. In the facts and circumstances, therefore, when valuable consideration was already paid in the sum of Rs.2,000/- in the year 1969 and possession was also taken pursuant to registered sale deed as owner of the suit plot by the defendant, the defendant was entitled to the benefit of Section 43 in view of the ruling in the case of Jumma Masjid (cited supra). Therefore, the appeal succeeds. The impugned Judgment and Order is set aside. The suit instituted by the plaintiff Nagubai is hereby dismissed with costs. Appeal is allowed by answering the substantial question of law in the affirmative accordingly.

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