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Johri and ors. Vs. Mahila Draupti Alias Dropadi and ors.

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Court : Madhya Pradesh

Decided On : Oct-25-1990

Reported in : AIR1991MP340; 1991(0)MPLJ217

Judge : S.K. Dubey, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 100 - Order 32, Rules 1, 4, 4A(2) and 4 - Order 41, Rule 33; [Transfer of Property Act, 1882](#) - Sections 7 and 43; [Contract Act, 1872](#) - Sections 10, 11 and 23; [Evidence Act, 1872](#) - Sections 115

Appeal No. : Second Appeal No. 177 of 1978

Appellant : Johri and ors.

Respondent : Mahila Draupti Alias Dropadi and ors.

Advocate for Def. : N.K. Jain, Adv.

Advocate for Pet/Ap. : R.D. Jain, Adv.

Disposition : Appeal dismissed

Judgement :

S.K. Dubey, J.

1. The legal representatives of the purchaser/defendant No. 1 in the suit, aggrieved of the judgment and decree passed in Civil Appeal No. 10-A/1976, on 9-3-1978, by District Judge, Morena, whereby the suit of the plaintiff, a lunatic, has been decree reversing the judgment and decree of dismissal of the suit, passed by Civil Judge, Class II, Sabalgarh, in Civil Suit No. 14-A/1970, decided on 31-1-1976.

2. This second appeal was admitted by this Court on 22-2-1980 for final hearing on the following substantial question of law:--

'Whether by applying the principle of 'feeding the estoppel' as contemplated by Section 43 of the Transfer of Property Act, the plaintiff will be entitled to a decree for joint possession in as much as the defendant/ purchaser could claim at least the ownership of the undivided interest of Dropadi?'

At the time of final hearing an application was filed by the appellants on 4-10-1990 under Section 100(5), Civil Procedure Code, for grant of leave to urge four more questions involved in the appeal and leave to that effect was granted.

3. The material facts giving rise to this appeal are thus: The plaintiff Parmanand, a lunatic, owned and possessed agricultural suit-land as Bhumiswami, situated at Survey No. 433, area 3 Bigha 3 Biswa, in village Pathar, Tahsil Sabalgarh, District Morena; Dropadi w/o Parmanand, who was managing the affairs of her husband, transferred the said agricultural land to defendant No. 1 Devilal by executing a sale-deed (Ext. P-I) dated 17-5-1965 for a consideration of Rs. 1000/-; Parmanand through next friend Shyam Sundar Pandey instituted a suit on 25-2-1970 against purchaser Devilal, his wife Dropadi, Kanhaiyalal and Mathura Prasad for declaring the sale as void and for possession and mesne profits at the rate of Rs. 1000/- per year, averring therein that the sale is void and collusive and that a fraud was played upon Dropadi; instead of a usufructuary mortgage, a sale-deed was got executed. The sale was without any consideration. The trial Court took cognizance of the suit instituted by the lunatic plaintiff through his next friend and issued notices of the suit to the defendants; on 20-8-1970 Parmanand died; an application was filed under Order 22 Rule 3, CPC, on 10-9-1970 by Mst. Kokila, the daughter of Parmanand, for substituting her name as the legal representative

of the deceased plaintiff. The defendant No. 1 opposed the application and contended that Dropadi is also a legal representative of the deceased plaintiff and she be impleaded as plaintiffs L.R., but the trial court allowed substitution of Kokila only, as Dropadi was the defendant in the suit and averments in the plaint were also made against her. After trial, the trial Court dismissed the suit as barred by time. Aggrieved of this judgment and decree Kokila preferred appeal. The lower appellate Court allowed the appeal and remitted the case holding that the suit is not barred by limitation. The trial Court then on merits dismissed the suit on 31-1-1976, against which Kokila preferred an appeal. During the pendency of the appeal before the lower appellate Court defendant Devilal died on 11-12-1976 and his L.Rs., the present appellants, were brought on record. The lower appellate Court decreed the suit holding that, admittedly, and as is apparent from sale-deed (Ext. P-I), Parmanand was a lunatic; Dropadi was not authorised to alienate the suit land, as the transaction of sale was in violation of Section 75 of (the Indian) Lunacy Act, 1912 (for short, the 'Lunacy Act'); the contract was void under S. 23 of the Indian [Contract Act, 1872](#) (for short, the 'Contract Act'), as Parmanand was not competent to enter into a contract in view of Section 10 of the Contract Act. It was also held that after the death of Parmanand, the said property devolved on Kokila and Dropadi; though Dropadi remained ex parte nor preferred any appeal, under Order 41, Rule 33, CPC, the lower appellate court granted relief in favour of Dropadi also, holding that the appellant and defendant No. 2 Dropadi are entitled to possession of the land, and also mesne profits after holding an enquiry under Order 20, Rule 12(1), CPC. It is this decree which the appellants have challenged.

4. Shri R.D. Jain, learned counsel for the appellants; Shri N.K. Jain, learned counsel for respondent No. 3 Kokila, and Shri R. A. Roman, learned Government Advocate for State, were heard. Dropadi remained absent even after service and issuance of SPC.

5. Shri R.D. Jain mainly raised four contentions and placed reliance on a catena of decisions, which I deal with one by one.

6. The first contention of Shri Jain is that the suit was not maintainable, as no order was obtained for appointment of next friend or guardian under Order 32,

Rule 4-A (2), CPC, nor before proceeding with the case any consent of the natural guardian, i.e., Dropadi, was obtained for appointment of next friend or guardian under Order 32, Rule 4-A, nor any notice under Order 32, Rule 4-A(4), CPC, was issued, as added by State Amendment in the Code of Civil Procedure; there was inherent lack of jurisdiction in the Court to pass a decree in absence of proper representation. Reliance, was placed on Smt. Har Saran Kaur v. Iqbal Singh, AIR 1966 Punjab 224 and Nirmal Chandra v. Khandu Ghosh, AIR 1965 Cal 562. The contention has no merit. Under. Order 32, Rule t, CPC, when a suit is instituted on behalf of a minor or a lunatic by a person, such person is called 'next friend.' As the minor or lunatic remains the real plaintiff, in the proper sense of the term 'next friend' only represents the interest of such a plaintiff and acts for him. Under Order 32, Rule 4, any person who is of sound mind may act as next friend of a minor or as a guardian for the suit, provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant or in the case of a guardian for the suit, a plaintiff. Therefore, any person who is of sound mind and is not a minor and his interest is not adverse to that of the minor or lunatic plaintiff and is not an opposite party in the suit can act as next friend. (See Krishna Kant v. Dhanu Lal, AIR 1944 PC 14). Hence, it was not necessary to issue any notice to Dropadi who was a defendant in the suit, and a defendant can in no case be appointed as next friend of the plaintiff. (See Dadich Singh v. Karnal Singh, 1973 MPLJ (Notes) 22). A guardian ad litem is appointed by the court for a minor or lunatic defendant, and before appointing a guardian, a notice is issued to such person, as a guardian cannot be appointed without his consent. Moreover, if a guardian has been appointed and a suit has been allowed to proceed without any formal order of the Court, it merely remains an irregularity which cannot be a ground for setting aside the decree even against the minor defendant without any proof of prejudice to such defendant.

7. The next contention of Shri Jain is that the provisions of the Lunacy Act are not attracted in this case, as no application was moved before the District Judge under Chapter V for inquisition under Section 62 of the Lunacy Act, and after inquisition, under Section 67 the Court did not make any order for management of the estate of the lunatic, nor under Section 71 a manager was appointed, who could have under Section 75 of the Lunacy Act with the permission of the Court transferred

the property. As the provisions were not followed, there could not have been any retrospective declaration, and after the death of Parmanand the provisions of the Lunacy Act became inapplicable in the case; thus, the lower appellate court erred in applying the provisions of Ss. 71 and 75 of the Lunacy Act and illegally and without jurisdiction declared the sale void. Learned counsel pressed into service decisions in cases of *Narasamma v. Rana Naidu*, AIR 1951 Mad 648; *Ranjit Kumar v. Secretary, Indian Psycho-Analytical Society*, AIR 1963 Cal 261 and *Simha-chala v. Bhagirathi*, AIR 1976 Andh Pra 83. Alternatively, it was also submitted that even if the provisions of the Lunacy Act were applicable, Dropadi, the lunatic plaintiff's wife, was looking after the family and managing the affairs of the property and was acting as a de facto guardian, hence, the alienation was valid. Reliance was placed on two decisions of this Court in cases of *Pandurang v. Pandurang Gorla*, AIR 1947 Nag 178 and *Dhujram v. Chandansingh*, 1974 MPLJ 554.

8. In my opinion, this contention has also no merit. A bare look to sale-deed (Ext. P-1) clearly shows that it was executed for the lunatic by Dropadi and it was very well known to purchaser/defendant No. 1 that Parmanand is a lunatic and the land in question is owned and possessed by the lunatic. Section 7 of the [Transfer of Property Act, 1882](#) (for short, the T.P. Act') lays down that every person competent to contract and entitled to transferable property, or authorised to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force. Section 11 of the Contract Act speaks that every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject. A contract made by a Lunatic is void under Section 11 of the Contract Act, and so also, a transfer by him of his property, (See *Mt. Amma Bibi v. Saivid Yusuf*, AIR 1922 All 449). Therefore, Parmanand who was a lunatic was not competent to transfer his property.'

9. Dropadi could not have also been appointed as a guardian for him by Parmanand, being a lunatic. Dropadi as a de facto guardian was also not

authorised to transfer the property, as the provisions of the Lunacy Act are applicable, as amended by M.P. Amendment Act, 1952 (M.P. Act No. 23 of 1952); Dropadi was not a natural guardian and because of the provisions of Section 49 of the Lunacy Act even a natural Guardian cannot > transfer the property of a lunatic after the enforcement of the Act. (See State of M.P. v. F.R. Qureshi, 1973 Jab LJ 533). Even if the argument of Shri Jain is accepted that Section 49 is not applicable, as it is under Chapter IV of Part III, which applies to Presidency Towns, Chapter V deals with proceedings in lunacy outside Presidency Towns. The District Court is competent under Section 62 in a proceeding, upon application, by order direct an inquisition, who under Section 65 determines whether the alleged lunatic is of unsound mind and incapable of managing himself and his affairs, and if that is found, then under Section 67 the Court passes an order for the custody of the lunatic and management of his estate either to the Court of Wards under Section 68, or under Section 69 to the Collector. In other cases, under Section 71 the District Court appoints a manager of the estate of the lunatic and guardian of his person, but Section 72 puts a restriction on appointment of legal heir of a lunatic to be the guardian, unless the Court or the Collector, as the case may be, for the reasons to be recorded in writing, considers that such an appointment is for the benefit of the lunatic. Section 75 deals with the powers of manager, and the property belonging to the lunatic, because of the embargo contained in the proviso to Section 75(1), cannot be transferred without the permission of the Court, which the court may grant subject to any condition or restriction which the Court thinks fit to impose, and for that a procedure has to be followed as laid down in Section 75(2). Section 75 applies to managers appointed under the lunacy Act, although such manager may have been de facto manager of the lunatic's property, but a valid alienation can only be made in accordance with the provisions of the lunacy Act. Therefore, even if the property was to be transferred, before sale the permission was essential, as neither Parmanand nor his wife was competent to transfer the same, and the contract was void from its inception in view of Ss. 10 and 23 of the Contract Act.

10. Coming to the next contention that the sale was saved by Section 43 of the T. P. Act, as Dropadi subsequently acquired estate and was bound to perform her contract, the principle of 'feeds the estoppel' wholly applies in the case, and for that

Shri Jain pressed into service decisions in cases of *Ganeshdas v. Kamlabai*, AIR 1952 Nag 29 and *Jagat Narain v. Laljee*, AIR 1965 All 504. Section 43 of the T.P. Act embodies 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, common law rule of estoppel by deed known as 'feeding the estoppel,' comes into play, inasmuch as the subsequent estate passes to the transferee without any further act of the transferor. Under the common law doctrine a man who sells property which does not belong to him and afterwards acquires such title as enables -him either wholly or partially to perform his contract, he is bound to do so and the subsequently acquired estate 'feeds the estoppel' which arises out of the vendor's covenant for title express or implied. In other words, Section 43 enables a transferee to whom a transferor has made a fraudulent or erroneous representation, the transferor is bound to make good his representation to the extent of his share which has come to him, provided by doing so it does not adversely affect the right of any subsequent purchaser for value without notice.

11. For applying this principle it is necessary that there must be a fraudulent or erroneous representation by the transferor in relation to his title and the transferee must have acted on it, and subsequently a title is acquired by such transferor, in that case the transferor cannot be heard to allege anything contrary as against the person who acts on that representation. But before this principle is applied it has to be found out whether, in fact, the transferee has been misled and whether there was any erroneous or fraudulent representation and the transferee has acted on it. The apex Court in case of *Jumma Masjid v. Kodimaniandra Deviah*, AIR 1962 SC 847, has laid down that where the transferee knows as a fact that the transferor does not possess the title which he represents he has, then he cannot be said to have acted on it when taking a transfer, and in such asituations. 43 of the T.P. Act would have no application. The same view was reiterated-by the apex Court in case of *Ram Pyare v. Ram Narain*, AIR 1985 SC 694. (See also *Ganesh Das's* case, AIR 1952 Nag 29, relied by Shri R.D. Jain.

12. If we see the facts of this case, the fact that Parmanand is a lunatic was well known to the defendant/purchaser and that the property is owned and possessed by him and is his estate. This itself is stated in the sale-deed. In view of the facts and the knowledge which the defendant admitted in his deposition also that Parmanand was a lunatic, the appellant cannot get any relief by applying the principle laid down under Section 43 of the T.P. Act, as the sale was void from its inception. Besides, it is also settled that no estoppel can be pleaded against a statute so as to prejudice a minor or a lunatic who enjoys the protection of law. (See Full Bench decision of Allahabad High Court in case of Ajudhia Prasad v. 'Chandanlal, AIR 1937 All 610).

13. The next contention of the learned counsel for the appellant is that under Section 65 of the Contract Act, the appellants deserve to be restored the advantage which the transferor has received, because Dropadi and her husband have taken advantage under the sale. Reliance was placed on two decisions of this Court in cases of Gulabchand v. Kudilal, AIR 1959 Madh Pra 151 (FB), and Jankibai v. Ratan Melu, AIR 1962 Madh Pra 117 (FB). True. Section 65 contains the principle of restitution, after benefit has been received and agreement is later discovered to be void. The basis of this section is the doctrine of restitio in integrum. The Supreme Court had an occasion to explain the scope of Section 65 of the Contract Act in Kuju Collieries v. Jharkhand Mines, AIR 1974 SC 1892, wherein it has been observed (para 6):

'The section makes a distinction between an agreement and a contract. According to Section 2 of the Contract Act an agreement which is enforceable by law is a contract and an agreement which is not enforceable by law is said to be void. Therefore, when the earlier part of the section speaks of an agreement being discovered to be void it means that the agreement is not enforceable and it, therefore, is not a contract. It means that it was void. It may be that the parties or one of the parties to the agreement may not have, when they entered into the agreement known that the agreement was in law not enforceable. They might have come to know later that the agreement was not enforceable. The second part of the section refers to a contract becoming void. That refers to a case where an agreement which was originally enforceable and was, therefore, a contract,

becomes void due to subsequent happenings. In both these cases any person who has received any advantage under such agreement or contract is bound to restore such advantage, or to make compensation for it to the person from whom he received it. But where even at the time when the agreement is entered into both the parties know that it was not lawful and therefore, void, there was no contract but only an agreement and it is not a case where it is discovered to be void subsequently. Nor is it a case of the contract becoming void due to subsequent happenings. Therefore, Section 65 of the Contract Act did not apply.'

14. As is evident from facts, it is not a case where the agreement or sale was discovered to be void subsequently, nor it is a case of a contract becoming void due to a subsequent happening, but it is a case known to the parties was entered into the contract that the sale was not enforceable by law and is void, as the suit land could not have been transferred by sale because of the protection given by law to a lunatic.

15. It was also contended that as the lower appellate Court under Order 41, Rule 33, CPC, has given relief and held that Dropadi is also entitled to equal share in the property and, thus, one-half share of the land has devolved on her; therefore, to the extent of the share of Dropadi either under Section 43 of the T.P. Act or under Section 65 of the Contract Act, relief be granted to the appellants. As found that the sale was void; therefore, even on devolution the appellants cannot get any relief under Section 43 of the T.P. Act, as rightly pointed out by Shri N.K. Jain, learned counsel for respondent Kokila, placing reliance on a decision in case of *Rattanmal v. Budhalshah*, AIR 1946 Sing 99.

16. Before parting with the case, the contention of Shri N.K. Jain, learned counsel for respondent Kokila, has also to be dealt with. Admittedly, against the decree of the share in favour of Dropadi, Kokila has not preferred any appeal, which now has become final. Therefore, Shri Jain cannot contend that as Dropadi executed the sale-deed and acted against the interest of Parmanand, she is not entitled to any relief in this appeal, and that she neither contested the suit nor preferred any appeal, and if she has got any right she can claim by instituting a fresh suit. This contention, in my opinion, has no merit for two reasons: Order 41, Rule 33, CPC,

gives power to appellate Court to grant relief in favour of a respondent, if an appellate Court is of the view that any decree which in law ought to have been passed was not in fact passed by the court below, it may pass or rake such further or other decree or order as the justice of the case may require. (See Koksingh v. Deokabai, AIR 1976 SC 634). The other reason is that the litigation is pending since 1970 and it would now be wholly inappropriate and inequitable to direct Dropadi to institute a fresh suit against her daughter Kokila for claiming her share. After all, there must be an end to litigation, and it is not the end here; still an enquiry will be made by the trial Court for grant of mesne profits under Order 20, Rule 12(1), CPC. In view of all these facts and looking to the relationship of the plaintiff and defendant Dropadi, the lower appellate Court rightly granted the decree in favour of Dropadi of her share which devolved on her after the death of her husband Parmanand.

17. In the result, the appeal has no merit and is dismissed. Stay order passed by this Court on 29-3-1978 is vacated. Let the record of the case go immediately to the concerned trial Court for holding the enquiry under Order 20, Rule 12, CPC, where panics shall appear on 30-11-1990, for which no fresh notices need be issued by the trial Court.

18. Parties to bear their own costs of this appeal.

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