

Shankar and Another Vs. Daooji Misir and Others

Shankar and Another Vs. Daooji Misir and Others

SooperKanoon Citation : sooperkanoon.com/946113

Court : Privy Council

Decided On : Mar-10-1931

Judge : Lords Blamesburgh, Atkin & Sir Lancelot Sanderson

Appeal No. : Privy Council Appeal No. 126 of 1929 (From Allahabad) Allahabad Appeal No. 3 of 1923)

Appellant : Shankar and Another

Respondent : Daooji Misir and Others

Advocate for Pet/Ap. : W. Wallach, for Appellants; E.B. Raikes and E. Dube, for Respondents. Solicitors for Appellants, Hy. S.L. Polak; Solicitors for Respondents, The Solicitor, India Office.

Judgement :

Sir Lancelot Sanderson:

This is an appeal by two of the plaintiffs in the suit, viz. Shankar and Ramnath, against a decree of the High Court of Judicature at Allahabad dated 14th May 1928, which reversed a decree of the District Judge of Benares dated 10th November 1925. The last mentioned decree had affirmed a decree of the Additional Subordinate Judge of Benares dated 6th August 1925.

Paltu, respondent 7 and plaintiff 1 in the suit, is the father of the plaintiffs-appellants. Munnu Lal was the father of Paltu ; Munnu Lal, Paltu and the plaintiffs

appellants were members of a joint Hindu family governed by the Mitakshira law, and the house, which was the subject-matter of the suit, was part of the ancestral property of the said joint family. The suit was instituted on 8th November 1924; at that time Ramnath was a minor, and sued through Shankar as his next friend. The material facts are as follows:

On 8th May 1915, Munnu Lal executed a deed conveying the said house to his son-in-law, Phalgu, with the ostensible object of paying off debts. At the date of the above mentioned deed both the plaintiffs-appellants were minors. Munnu Lal died in 1919, and after his death Phalgu executed and obtained the registration of a deed of sale of the said house in favour of Mt. Ganga Dei, the wife of Parsotam Misir. The last-mentioned sale deed for which there was consideration was dated 9th October 1919. Parsotam Misir and his wife were the defendants in the suit.

The first five respondents to this appeal are the heirs and legal representatives of Parsotam, who died after the institution of the suit, and the defendant, Mt. Ganga Dei is respondent 6. The suit was brought to recover possession of the said house, of which the plaintiffs-appellants had been dispossessed in November 1921, together with mesne profits.

The Subordinate Judge made a decree in favour of the plaintiffs for possession of the said house on condition that they should pay the sum of Rs. 1,046 to the defendants within six months of the decree. The Subordinate Judge directed that, on payment of the said amount, the plaintiffs should get their costs of the suit from the defendants. It appears that the defendants had paid off a mortgage on the said house of Rs. 1,000 and Rs. 46 interest thereon, and the learned Judge was of opinion that in equity the plaintiffs ought to pay the said sums to the defendants before they could be allowed to obtain unencumbered possession of the said house.

No question has been raised in this appeal with regard to the condition imposed by the Subordinate Judge; and rightly so. In substance it was justified. The defendants as against the plaintiffs were entitled to stand in the shoes of the mortgagees in respect of the incumbrance upon the property which they had discharged out of their own moneys. The defendants appealed to the District

Judge against the above mentioned decree, and the plaintiffs filed a cross-objection alleging that the Subordinate Judge should have decreed the plaintiffs' suit without the payment of any amount. The District Judge dismissed both the appeal and the cross objection with costs. The heirs and legal representatives of Parsotam Misir appealed from the District Judge to the High Court, which allowed the appeal, set aside the decrees of the District Judge and of the Subordinate Judge, and dismissed the plaintiffs' suit : the plaintiffs were ordered to pay the costs in all Courts.

The Subordinate Judge held that the deed of 8th May 1915, executed by Munnu Lal was without consideration, and without any legal or family necessity, and that really it was a sham transaction: he held further that Paltu was not a consenting party to the said deed. These two findings were affirmed by the District Judge. Consequently they were accepted by the High Court, and this appeal must be decided on the assumption that these two findings are correct.

The learned Judges of the High Court held that Paltu was clearly barred by the provisions of S. 41, T. P. Act (Act 4 of 1882), and that his sons, viz., the plaintiffs-appellants, also were barred by that section. They based their decision on the conclusion that Phalgu was the ostensible owner of the house, that the defendants took reasonable care to ascertain that Phalgu had power to make the sale dated 9th October 1919, and that they acted in good faith; that Paltu, who was in prison at the time of the execution of the deed, dated 8th May 1915, by his conduct after coming out of prison, and when he knew of the deed, consented to Phalgu being the ostensible owner.

They held further that the plaintiffs-appellants, then minors, had not such a separate interest from that of the manager and the other adult members of the joint family as would enable them to avoid the estoppel employed by the said section of the Transfer of Property Act, and consequently that they were estopped in common with the rest of the family. The learned counsel who appeared for respondents 1 to 6 in this appeal, confined his argument to this point, and endeavoured to uphold the High Court's judgment by relying on the provisions of S. 41, T. P. Act.

Their Lordships do not think it necessary to consider or decide the question whether Paltu's conduct, after his release from prison, amounted to an implied consent on his part to Phalgu being the ostensible owner, for, even if it did, such consent, in their Lordships' opinion, in view of the facts of this case, would not affect the rights of his minor sons, viz. the plaintiffs - appellants. Their Lordships however must not be taken to affirm the finding of the High Court in this respect. Before considering the application of S. 41, T. P. Act, to the case of the plaintiffs-appellants it is desirable to refer to S. 7 of the same Act:

" Every person competent to contract and entitled to transferable property, or authorized 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."

It is to be noted that the power to transfer described in the section is qualified by the concluding words, viz. to the extent and in the manner allowed and prescribed by any law for the time being in force.

Now Munnu Lal was the head of the joint Hindu family which was governed by the Mitakshara law at the time of the execution by him of the deed dated 8th May 1915. His power under such law to alienate the immovable ancestral property of the joint family was limited, and he could not make any alienation of the ancestral house, the subject-matter of the suit, unless he obtained the consent of the other members of the joint family, if they could give it, or unless there was some established necessity to justify the transaction.

In this case, neither of the two conditions was fulfilled. The plaintiffs-appellants were minors, and they did not and could not give their consent, and there was no established necessity for the transaction, inasmuch as it has been decided that the deed was a sham transaction. Consequently, no property passed by the said deed to Phalgu.

The question then arises whether the plaintiffs appellants are prevented by the terms of S. 41, T. P. Act, from recovering possession of the said house. The terms

of the section are as follows:

" 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 authorized 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."

There is no doubt that the plaintiffs, appellants were persons interested in the said house within the meaning of the section, at the time of the said deed, dated 8th May 1915. The house was immovable ancestral property, and the family being governed by Mitakshara law, each of the plaintiffs- appellants acquired a proprietary interest in such ancestral property by his birth.

There is no suggestion that they gave any express consent to the transaction or to Phalgu being treated as the ostensible owner of the said house. Nor can any such consent be implied, for the plaintiffs-appellants were minors at the date of the said deed of sale and at all material times. By reason of such minority they were not competent to enter into any contract, or to authorize any contract with relation the said immovable ancestral property.

The learned Judges of the High Court however, as already stated, thought that if the manager and the adult members of the family consented to Phalgu being the ostensible owner of the said house, the plaintiffs-appellants being then minors had no such separate interest " as would enable them to avoid the estoppel employed by S. 41."

Their Lordships cannot accept that conclusion. The proprietary interest of each of the plaintiffs-appellants in the said joint ancestral house was acquired by birth, and was equal to the proprietary interest of the adult members of the joint family. In their Lordships' opinion, there is no reason why full effect should not be given to the plain language of S. 41, T. P. Act, and if that be so, it is clear that Phalgu was not the ostensible owner of the said ancestral family house with the consent express or implied of the persons interested in the said ancestral house, inasmuch

as the plaintiffs appellants, who had an interest in the said house, did not and could not by reason of the disability of infancy give their consent.

In their Lordships' opinion therefore the plaintiffs-appellants are not prevented by the terms of S. 41, T. P. Act, from alleging that the deed of 8th May 1915 was merely a sham transaction and that Phalgu had no authority to transfer the said house to the defendants.

In view of the abovementioned conclusion it is not necessary for their Lordships to consider the question as to which the Courts in India arrived at different conclusions, namely, whether the defendants took reasonable care to ascertain that Phalgu had power to make the sale and whether they acted in good faith. For even if they did, S. 41, T. P. Act, will not avail them, inasmuch as Phalgu was not the ostensible owner of the said house with the consent express or implied of the plaintiff appellants who had an interest therein.

In view of the fact that Phalgu had no title in the said house which he could transfer to the defendants, and inasmuch as the defendants were not protected by the provisions of S. 41, T. P. Act, the defendants must be held to have obtained no title to the said house. Consequently, the decree of the Subordinate Judge that the plaintiffs should recover possession of the said house was correct, and inasmuch as no objection is now raised to the condition, which the learned Judge attached thereto, his decree should be restored.

Their Lordships therefore will humbly advise His Majesty that the appeal should be allowed, the decree of the High Court set aside, and the decree of the Subordinate Judge dated 6th August 1925, and the decree of the District Judge, dated 10th November 1925, should be restored. Respondents 1 to 6 must pay the plaintiff-appellants' costs in this appeal and in the High Court.

Appeal allowed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com