

Parma Nand vs Champa Lal And Ors. on 11 November, 1955

Equivalent citations: AIR1956ALL225, AIR 1956 ALLAHABAD 225, 1956 ALL. L. J. 1 ILR (1956) 1 ALL 313, ILR (1956) 1 ALL 313

JUDGMENT

Agarwala, J.

1. The following question has been referred to this Bench for decision:

"Does Section 43, T. P. Act, require that the transferee who can take advantage of it should be one to, whom not only a fraudulent or erroneous representation about the transferor's authority to transfer the property is made but should also be one who did not have knowledge of the true factual position and had merely acted on the belief of the erroneous or fraudulent representation made to him by the transferor?"

2. The facts of the case briefly stated are as follows: One Bhagwati Prasad sold a shop, No. 89 in the city of Jhansi to Lachhman Hao Telang in the year 1936. The vendee could not obtain possession over the shop and so in 1946 filed a suit for recovery of possession.

During the pendency of the suit he transferred his rights to one Parmanand, who was then substituted as plaintiff for him. The defence to the suit was that Bhagwati Prasad owned only half the shop in 1936, the other half belonging to his brother Bankey Behari Lal.

In 1938 Bankey Behari Lal died and his share also was inherited by Bhagwati Prasad. The plaintiff, therefore, claimed that he was protected by Section 43, Transfer of Property Act. The defence, inter alia, was that the plaintiff could not take advantage of Section 43 as he knew of the true position, namely, that Bhagwati Prasad was owner of only one-half of the shop on the date of the sale deed.

The trial Court held that the plaintiff knew that the vendor owned only a half share in the shop and that, therefore, it could not be said that he had acted upon the fraudulent, or erroneous representation made by the vendor.

The plaintiff appealed to this Court and It was urged on his behalf that the vendor having made an erroneous representation that he was the owner of the entire shop and the transfer having been made of the entire shop, he was entitled to take advantage of Section 43, T. P. Act, and claim that such transfer shall operate on the interest which Bhagwati Prasad acquired by inheritance from Bankey Behari Lal.

It has been held in a number of cases in this Court as well as in other Courts that a vendee, who knew the true facts, could not take advantage of Section 43, T. P. Act. The learned Judges before whom the First Appeal came up for hearing in the first instance were of opinion that these rulings require reconsideration and referred the question already mentioned to a larger Bench.

3. Section 43, T. P. Act, is in these terms:

"Where a person fraudulently or erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during Which, the contract of transfer subsists.

Nothing in this section shall impair the right of transferee in good faith for, consideration without notice of the existence of the said option."

In order that benefit of the section may be taken by a transferee two conditions have to be satisfied, firstly, that there should have been, a fraudulent or erroneous representation by the transferor to the effect that he is authorised to transfer the property which he professes to transfer, and, secondly, that the transfer must be for consideration.

If these two conditions are satisfied then if the transferor, who was not in fact authorised to transfer the whole or part of the property transferred by him, acquires such right thereafter, the transferee has an option to claim that the transfer shall operate on the interest which the transferor subsequently acquired in the property transferred. This option can be exercised at any time during which the contract of transfer subsists.

There is one exception to this rule of law and that is that the option cannot be exercised so as to impair the right of a subsequent transferee from the vendor who has taken his transfer (1) in good faith; (2) for consideration; and (3) without notice of the existence of the said option.

4. It may be noted here that the section contemplates that as soon as the option mentioned in the section is exercised and it is claimed by the transferee that the transfer shall operate on the interest subsequently acquired by the transferor, the interest, is automatically transferred to the transferee without anything further being done by the parties.

As this section stands there is no mention of the state of knowledge of the transferee as to the true facts, but on behalf of the respondent it was urged that the expression "fraudulently or erroneously represents" connotes the idea that, the transferee not only acts on the representation but is also unaware of the true facts, because the transferee cannot be said to have acted on the representation if he was aware of the true facts.

Certainly acting on the fraudulent or erroneous representation is implied in the section because the representation is one of the terms of the transfer, but the transferee has obviously acted on the

representation when he in fact is a party to the contract and takes a transfer of the whole interest and pays full consideration for the same.

The act of the transferee in pursuance of the representation is nothing else but the payment of the consideration and accepting the transfer on the terms which include the representation. This is all that can be said to be implied in the section.

This section does not make it a condition of its operation that the transferee should have acted in ignorance of the true state of facts and must have believed in the truth of the representation made by the transferor.

It is not always true, that if a transferee knows that he is buying a defective title he pays less than the true value of the whole title because he may be willing to take a chance of the property ultimately coming to the transferor in various ways--by survivorship, by partition amongst co-sharers, by compromise of a dispute, by a family settlement, by exchange, by purchase or by a decree of Court in a litigation pending in Court at the time of the transfer.

The transferee may not like the interest to be purchased by a stranger. He may be a neighbour who wishes to acquire the title of the transferor in order to prevent strangers 'from acquiring it; or he may be sure of the property coming to the transferor by one or other of the modes, mentioned above.

5. The notion that the state of knowledge of the person to whom the representation is made is material has been imported from the doctrine of estoppel by representation as embodied in Section 115, Evidence Act. Section 115 runs as follows:

"Where one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

Under this section the knowledge of the person who acts on the representation of the real truth has a bearing on the question of estoppel. If he knew the truth he cannot be said to have been led "to believe a thing to be true" within the meaning of Section 115 and therefore it is that the doctrine of estoppel as embodied in this section is not available to such a person. The same is the English law.

6. The words conveying the sense which is conveyed by the phrase "caused or permitted to believe a thing to be true and to act upon such belief" are not to be found in the wordings of Section 43.

The vital difference between the representation referred to in Section 43, T. P. Act, and the representation mentioned in Section 115, Evidence Act, is that while the representation under Section 43, T. P. Act, is a term, of the contract or the transfer, the same is not necessarily so in the case of a representation mentioned in Section 115, Evidence Act,

7. Where a representation is a term of the contract or of a transfer made for consideration the promisee or transferee need not rely upon the doctrine of representation embodied in Section 115, Evidence Act. He can rely upon two other doctrines--the doctrine of the Common Law called estoppel by deed" coupled with the doctrine of "feeding the estoppel" and the doctrine of Equity, that 'equity treaty that as done which ought to be done'.

Under both these doctrines knowledge on the part of the promisee or transferee that the transferor did not have the authority to transfer the property which he purported to transfer is immaterial and does not deprive of the benefit of the doctrines except when the contract or transfer is illegal or invalid.

8. To take the doctrine of estoppel by deed and the doctrine of feeding the estoppel first. Under the English law, estoppel is of three kinds; estoppel by Judgment, estoppel by deed and estoppel in pais. Estoppel by judgment is embodied in the Indian law in the doctrine of res judicata. We are not concerned with it here.

The doctrine of estoppel 'in pais' is embodied in Section 115, Evidence Act, whereas the doctrine of estoppel by deed coupled with the doctrine of feeding the estoppel where the deed is a transfer for consideration is embodied in Section 43, T. P. Act, with slight modifications.

9. Estoppel by deed is based on the principle that when a person has entered into a solemn engagement by a deed under his hand and seal as to certain facts, he shall not be permitted to deny any matter which he has so asserted. It is a rule of evidence according to which certain evidence is taken to be of so high and conclusive nature as to admit of no contradictory proof (Halsbury's Laws of England, Hailsham Edition, Vol. 13, Para. 513, page 456).

This doctrine being merely a rule of evidence does not perfect the title of the transferee. The title is perfected under the doctrine of feeding the estoppel. This doctrine was explained by their Lordships of the Privy Council in two cases. In-- 'Rajapakse v. Fernando', AIR 1920 PC 216 (A) the Privy Council enunciated the English doctrine thus:

"Where a grantor had purported to grant an interest in land which he did not at the time possess but subsequently obtained, the benefit of his subsequent acquisition goes automatically to the earlier grantee, that is, it feeds the estoppel."

In -- 'Tilakdhari Lal v. Khedan Lal', AIR 1921 PC 112 (B) the doctrine was restated as follows; 'If a man who has no title whatever to property grants it by a conveyance which in form would carry the legal estate, and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes. In such a case there is nothing on which the second grant could operate in prejudice to the first.'

10. In none of the two cases, however, the Indian law was considered by their Lordships. Inasmuch as under the English doctrine the subsequently acquired interest "automatically passes to the grantee" it is obvious that the state of knowledge of the grantee is immaterial except in certain

specified cases.

It has, however, been held that where the truth appears by the same instrument there can be no estoppel, unless a clear intention is expressed in the deed to disregard the rule (Halsbury's Laws of England, Hailsham Edition, Vol. 13, Para. 516, page 458).

In -- 'Jolly v. Arbuthnot', (1859) 4 De G & J 224 (C) it was held that where one party executes a deed whereby he attorns tenant to the other so as to give him a right of distress, he is estopped from denying the existence of that right, although the instrument shows on its face that there is no reversion in the other party which would support it. In -- 'Burgis v. Constantine', (1908) 2 KB 484 (D), Gorell Barnes P. laid down the rule that--

"Where a person who knows the truth of the circumstances under which the deed has been executed, whether he has acquired such knowledge personally or through his agent, cannot set up an estoppel in his own favour, if the circumstances were such as to make the deed invalid between the original parties.

If the deed is not invalid between the original parties, there does not appear to be anything in the English doctrine of estoppel by deed to debar a person from pleading estoppel even if he knew the truth of the circumstances under which the deed had been executed.

When the deed is invalid, e.g., if it is prohibited by law, or when the transfer is intended to be a fraud upon third parties, it would be against public policy to allow the transferee to take advantage of the estoppel, but no such public policy is involved in a case where the deed is not invalid & although the transferee knows that the transferor is not empowered to make the transfer he does take the transfer and pays (good) consideration for it in the hope that the transferor is bound to acquire title to the property professed to be transferred at some future date."

11. Thus under the doctrine of estoppel by deed, knowledge of the truth on the part, of the transferee is material only when the transfer is invalid in law and not otherwise.

12. Under Section 43, T. P. Act, the transfer of the subsequently acquired property takes place automatically, as in the English law, but it takes place not at the moment when the interest is acquired but at the moment the transferee exercises the option that the interest, shall stand transferred to him.

This is the first matter in respect of which the Indian law differs from the English law and the second matter in respect of which it differs is that it does not apply the doctrine of feeding the estoppel so as to impair the rights of subsequent transferee in good faith for consideration without notice of the existence of the option in the prior transferee. Both these deviations in the Indian law have no bearing upon the question whether the state of knowledge of the first transferee is material.

13. It is true that Section 43 makes a reference to the fraudulent or erroneous representation by the transferor to the effect that he is authorised to transfer the interest which he professes to transfer. But this is not a deviation from the English law because under that law also such a representation is implied in the doctrine of estoppel by deed upon which the doctrine of feeding the estoppel is based.

14. The same is the position under the doctrine of equity that equity treats that as done which ought to be done. This equity creates a personal obligation which compels the transferor [to perform his contract when he is able to do so on the acquisition of the subsequent interest. The principle underlying it was very fully stated in -- 'Holroyd v. Marshall', (1862) 10 ALC 191 (E) where Lord Westbury L. J. observed:

"It is quite true that a deed which professes to convey property which is not in existence at the time is as a conveyance void at law simply because there is nothing to convey. So in equity a contract which engages to transfer property which is not in existence cannot operate as an immediate alienation because there is nothing to transfer.

But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time and he receives the consideration for the contract and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract and that the contract, would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired.

This of course assumes that the supposed contract is one of that class of which a Court of Equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract."

15. In -- 'Collyer v. Isaacs', (1881) 19 Ch D 342 (F) Jessel M.R., observed: -

"The creditor had a mortgage security on existing chattels and also the benefit of what was in form an assignment of non-existing chattels which might be afterwards brought on to the premises. That assignment in fact constituted only a contract to give him the after acquired chattels.

A man cannot in equity, no more than at law, assign what has no existence. A man can contract to assign a property which is to come into existence in the future, and when it has come into existence equity treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment."

16. In the application of this doctrine of equity it is immaterial that the promisee or transferee knew the truth namely that the promisor or the transferor had no authority to transfer the interest which

he purported to transfer.

17. In -- 'Kabul Chand v. Badri Das', AIR 1938 All 22 (G) the equity was applied although the truth was known to the transferee.

18. In -- 'Viraya v. Hanumanta', 14 Mad 459 (H) a Hindu coparcener agreed to sell family property as if he was the owner. The purchaser sued to enforce the transfer and pending the suit one of the two other coparceners died. The purchaser was held entitled to half the property.

In -- 'Gaya Din v. Kashi' 29 All 163 (I) the plaintiff was suing for pre-emption, and in order to raise money for the litigation, in anticipation of a decree, mortgaged the property in suit. After he obtained a decree and got possession, equity treating that as done which ought to be done, gave the mortgagee a charge on the property and placed him in the position of a mortgagee.

In -- 'Deb Nath v. Sashi Bhusan', AIR 1934 Cal 82 (J), a landlord made a settlement of a non-transferable holding. The settlement was invalid at the time it was made because the raiyat had not abandoned the holding. But the subsequent abandonment of the holding by the raiyat validated the settlement.

In -- 'Loot Narain v. Showkee LaP, 2 Cal LR 382 (K) a ghatwal mortgaged his ghatwal land by zuripeshgi lease and shortly after the mortgage the zamindar got a decree by which the ghatwal tenure was extinguished and evicted the mortgagee.

Some years later the zamindar granted the; ghatwal a permanent lease of the same land. The ghatwal was held liable to make good the zuripeshgi lease out of his new estate. In -- 'Surendera v. Rajendra', AIR 1918 Cal 419 (L) a ghatwal mortgaged property which he held on restrictive tenure.

The restriction was subsequently removed and as to the enlarged interest Mookerjee J. said that the deed was operative as an executory agreement which attaches to the property the moment the restriction is removed and is transferred by equity to the mortgagee (extracted from Mulla's Transfer of Property Act, 3rd Edition, pp. 212-213).

19. In the application of this equity it has been sometimes said that this equity applies when there is no representation and if there is a representation then Section 43 will apply. Mulla, for example, has expressed this view at pages 212 and 213. With great respect, this view is erroneous.

Even where there is no representation by the transferor that he had authority to transfer the interest which he purported to transfer, such a representation is implied when nothing is said to the contrary in the deed of transfer. For instance, Section 55(2), T. P. Act, raises such a presumption in the case of a sale:

"The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same."

20. Thus, unless the contrary is stated in the deed of sale, it will be presumed that there is a representation by the seller that he has, power to transfer the interest which he purports to sell. The knowledge of the buyer in such a case is immaterial.

Even if the buyer knew that the seller has no power to transfer the interest, he is entitled to the benefit of the contract and to enforce the sale according to its terms and may hold the seller responsible in damages, vide -- 'Ram Chunder Dutt v. Dwarka Nath', 16 Cal 330 (M); -- 'Basa-ruddi Sheik v. Enajaddi', 25 Cal 298 (N); --Mahomed All v. Venkatapathl', AIR. 1920 Mad 634 (O); -- 'Mt. Lakhpat Kuer v. Durga Prasad', AIR 1929 Pat 388 (P); --- 'Risa Ansa v. Mohan-lal', AIR 1938 Nag 257 (Q); -- 'Avadesh Kumar v. Zakaul Husnain', AIR 1944 All 243 (R), or claim a return of the purchase-money if he is dispossessed toy reason of a defect in title, vide -- 'Veliayapa Rowthen v. Bava Rowthen', AIR 1916 Mad 633 (1) (8); -- 'Subbaraya Reddiar v. Rajagopala', AIR 1915 Mad 708 (T); -- 'Muham-mad Ibrahim v. Nakched', 7 All LJ 752 (IT).

21. The same presumption is implied in a mortgage (see Section 63(a), T. P. Act), and the knowledge of the mortgagee about the true facts is immaterial, vide -- 'T. Raman v. K. P. Manakkal Karraven', AIR 1915 Mad 1215 at p, 1218 (V). The contrary view expressed in -- 'Tulsiram v. Tukaram', AIR 1924 Nag 363 (W) was merely obiter and not necessary for the decision of the same.

The decision in -- 'Gangabai v. Baswant Ballappa', 34 Bom 175 (X) is not contrary to the above statement of the law for in that case the transfer was invalid in law, being of property which could not have been transferred on the date of the transfer.

22. So also the representation mentioned in Section 43 may be either express or implied, vide --'Basava Saiikaran v. G. Narasimhalu', AIR 1927 Mad 1 (FB) (Y) and -- Muthiah Chettiar v. Doraiswami Pillai', AIR 192V Mad 1091 (Z). It will be implied when the law makes it an implied term of the transfer. There is no reason why if knowledge of the transferee is immaterial when applying the doctrine of equity it should be necessary when applying the doctrine of Section 43.

23. Turning now be the cases decided in India under 8. 43, T. P. Act it has to be conceded that a vast majority of them do lay down the proposition contended for on behalf of the respondent and the reasoning underlying most of those cases is that because Section 43 makes a mention of an "erroneous or fraudulent representation" there is an implication that the representation must be believed to be true and the transferee must have acted in that belief and that this could not be the case if he knew the truth.

24. In some cases, e.g., -- 'Mulraj v. Inder Singh', AIR 1926 All 102 (Z1), an additional reason has been given namely that Sections 6 and 43, T. P. Act, would otherwise conflict but this reason can hardly support the conclusion drawn in those cases, for the conflict between the two sections can be avoided by holding that Section 43 applied where property is transferred on the basis that it is a transfer of an existing property, whereas Section 6(a) applies to cases where ostensibly the right of inheritance is transferred, and that where both parties know that the transfer is being made not of an existing property but of a future right of inheritance, the transaction is a fraud upon the Statute and void (see also --'Bindeshwari Singh v. Har Narain Singh', AIR 1929 Oudh 185 (Z2); -- 'Ram

Bharosey v. Bhagwandin', AIR 1943 Oudh 196 (23); -- 'Shyam.

Narain v. Mangal Prasad', AIR 1935 All 244 (Z4) and -- 'Dwarka Prasad v. Nasir Ahmad', AIR 1925 Oudh 16 (Z5), These cases, therefore, are a class apart and are, with respect, perfectly good decisions on facts.

25. Some of the other decided cases are distinguishable on facts. For instance, in some cases there was no bargain for the transfer of the interest which was subsequently acquired, e.g. -- 'P. Bengaram v. K. Subbaraju', 34 Mad 159 (Z6).

26. In some there were circumstances apparent from the deed of transfer itself showing that the transferor had no right to transfer at all or no right to transfer beyond his lifetime, vide 34 Bom 175 (X); -- 'Bijleshwari Bakhsh Singh v. Gajadnar', AIR 1941 Oudh 123 (Z7); -- 'Mt. Maina v. Bhagwati Prasad', AIR 1936 All 557 (Z8); -- 'Jagernath Prasad v. Mt. Dhan-patr, AIR 1934 All 969 (Z9) and -- 'Rashmoni Dasi v. Surja Kanta Roy', 32 Cal 832 (Z10).

27. In some others, the transferor, who subsequently acquired the interest, had joined along with the then owner of the property merely for the satisfaction of the transferee both parties knowing that he had no present interest (vide -- 'Ladu Narain Singh v. Goberdhan Das', AIR 1925 Pat 470 (Z11).

28. In AIR 1938 All 22 (G), already cited, Niamatulla, J. speaking about the construction of Section 43 stated that much could be said on either side.

29. In -- 'Narain Rao y. Abbas Sahib', AIR 1915 Mad 1085 (Z12), Sadasiva Iyer J. expressed grave doubts about the correctness of the current view.

30. In -- 'Ram Lal v. Shiama, Lal', AIR 1931 All 275 (Z13), although Section 43 was not applied the equitable doctrine of feeding the grant was applied and in effect the benefit of Section 43 was given, and in -- 'Jagmohan Singh v. Sitaram Singh', AIR 1917 Oudh 50 (Z14),- Stuart, Judicial Commissioner, definitely held that belief in the erroneous representation and acting upon it were not necessary for the purpose of taking the benefit under Section 43.

31. I am clearly of opinion that the correct view is that Section 43, T. P. Act, does not require that the transferee who can take advantage of it should be one to whom not only a fraudulent or erroneous representation about the transferor's authority to transfer the property is made but should also be one who did not have knowledge of the true factual position and had merely acted on the belief of the erroneous or fraudulent representation made to him by the transferor.

If, however, both the transferor and the transferee knew of the true position, and colluded to enter into a transaction which is invalid in law, the state of knowledge of the transferee becomes material and Section 43 cannot be availed of by him.

V.D. Bhaegava, J.

32. I agree with my brother Agarwala J.

Desai, J.

33. I have had the advantage of reading the judgment of my brother Agarwala and I agree with the answer proposed by him. It was contended before us that there is no evidence to prove that the transferee knew that the transferor had no title to the property sold and did not act merely on the representation made to him by the transferor. This is a contention that should be advanced before the Bench hearing the appeal; we have been asked to answer only a specific question.

34. We must accept the authority of --'Rajapakse v. Fernando (A) and 'Tilakdhari Lal v. Khedan Lal (B)', referred to by my learned brother, it is true that their Lordships decided the cases on the basis of the common law prevailing in England and not the provisions of Section 43, T. P. Act, which were - not discussed in the lower Courts.

Their Lordships were not sure how far the common law doctrine was altered by the statutory provisions in Section 43, T. P. Act. Section 43 embodies the common law doctrine as it prevails in England without modifying it in any manner.

If according to the common law doctrine a, transferee is entitled to its benefit even if he knew the facts and had not been misled by the transferor's fraudulent or erroneous representation, there is nothing in the language used in Section 43 to suggest that the statutory law has made any departure from the common law doctrine. Therefore, the law prevailing in India is the same as the common law of England.

35. 'Mulraj v. Inder Singh (Z1)'; 'Bijle-shwari Bakhsh Singh v. Gajadhar (Z7)'; 'Kabul Chand v. Badri Das (G)'; 'Ram Bharosey v. Bhagwandin (Z3) and 'Jagarnath Prasad v. Mt. Dhanpati (Z9)', do not lay down correct law and should be overruled. 'P. Bangaram v. K. Subbaraju (Z6)', also does not lay down correct law. The observation in the case of 'Mulraj (Z1)', that it is only when the transferee has been led into belief that the transferor had title and acted on the representation, that he is entitled to the property, is not based on any statutory provision. There are no words in Section 43 suggesting that this is the law.

It seems to be a qualification added by the learned Judges. The most important, - reason given by the learned Judges is that otherwise there would be a conflict between the provisions Of Sections 43 and 6, T. P. Act.

I regret I do not appreciate the reason; I do not see how any conflict would arise between the two provisions merely because of the transferee's being in possession of all the facts. If there is any conflict between the provisions of the two sections, it would be there even if the transferee did not know all the facts and was misled into acting on the fraudulent or erroneous representation of the transferor.

What is forbidden by Section 6 is transfer of the chance of an heir-apparent succeeding to an estate; what has been transferred within the meaning of Section 43 is not just chance but property itself.

The chance of an heir-apparent succeeding to an estate is one property and the estate itself is another property; transfer of the former property is forbidden but not of the latter property. I may refer to AIR 1935 All 244 (Z4). If a transferor does not own the property that he transfers, the transferee will acquire no title to it; but the transfer itself cannot be said to be forbidden by law.

There is no prohibition against a person's, transferring property not owned by him; there is no necessity for such a prohibition because even in the absence of it the transferee would acquire no title over the property. The properties mentioned in Section 6 are the only properties which cannot be transferred; property that exists but belongs to another is not mentioned among the properties which cannot be transferred; it can be transferred.

A conflict between the provisions of the two sections is possible, if at all only in respect of property which may be Inherited by the transferor either as an heir or under a will; it cannot arise in respect of any other property.

If a person transfers property belonging to an absolute stranger which he has absolutely no hope of inheriting as an heir or under a will, it cannot be urged that he evades, or that the transfer is in contravention of, the provisions of Section 6; such evasion or contravention cannot be said to exist merely because the property belongs to some relation and the transferor has some hope of inheriting it.

In 'Kabul Chand v. Badrl Das (G)'; the learned Judges felt bound to follow 'Mulraj v. Inder Singh (Z1)', though they themselves conceded that much could be said for the other view. The view taken in 'Ram Bharosey v. Bhagwandin (Z3)', was that if the transferee knew the facts the representation of the transferor cannot be said to be erroneous.

Whether, a representation is erroneous depends simply upon whether it is true or false; a false representation does not cease to be erroneous merely because the person to whom it is made knows that it is false. It may not deceive the person to whom it is made but erroneous it is.

Similarly, whether it is fraudulent or not also does not depend upon whether the other person, knows it to be false or not; if it is made with an intention to deceive the other it is fraudulent even if the other, on account of his knowing the facts, is not deceived by it. In 'Jagarnath v. Dhanpati (Z9)', Banerji J. simply followed. 'Mulraj v. Inder Singh (Z1)'.

In 'Pandiri Bengaram's case (ZG)', the Court unnecessarily and irrelevantly went into the question whether the benefit of Section 43 can be claimed by a person who does not believe in and act upon, the transferor's representation. The facts in that case did not attract the doctrine embodied in Section 43 at all; the transferor sold one-sixth share which was not owned by him but the transferee paid no consideration for it because he knew that the transferor did not own the property. There was, therefore, no transfer of the share for consideration and the transferee could not possibly claim

the benefit of Section 43.

36. The facts in 'Jagarnath v. Dhanpati (29)'; 'P. Bengaram v. K. Subbaraju (Z6)'; 'Gangabai v. Baswant (X)'; 'Bijleshwari Bakhsh Singh v. Gajadhar (Z7)' and 'Mst. Maina v. Bhagwati Prasad (Z8)', were different and those cases are to be distinguished from the instant case. In 'Jagarnath v. Dhanpati (Z9)' and 'Mst. Maina v. Bhagwati Prasad (Z8)', there was no evidence of any representation at all by the transferor to the transferee. In 'Gangabai v. Baswant (X)' and 'Bijleshwari Bakhsh Singh v. Gajadhar (Z7)', there was no fraudulent or erroneous representation.

37. Collusion is a variety of fraud and since fraud vitiates the whole transaction, if there is collusion between the transferor and the transferee the sale may be held to be invalid on that ground and the transferee may be held to be disentitled to enforce the provisions of Section 43 as against the transferor.

The Court would not help either party to the fraud and would let the matter rest-where it is. Therefore, it will not help the transferee who was *pari delicto*, to recover the property sold by the transferor. This illegibility of the transferee to enforce the provisions of Section 43 arises out of the general law and not by virtue of any thing contained in the section itself.