

Hardev Singh vs Gurmail Singh (Dead) By Lrs on 2 February, 2007

Equivalent citations: AIR 2007 SUPREME COURT 1058, 2007 (2) SCC 404, 2007 AIR SCW 948, (2007) 51 ALLINDCAS 19 (SC), 2007 (2) SCALE 466, 2007 (1) HRR 459, (2007) 2 JCR 310 (SC), (2007) 3 CALLT 37, 2007 HRR 1 459, (2007) 1 ALL RENTCAS 685, (2007) 1 HINDULR 488, (2007) 3 MAD LJ 44, (2007) 4 MAD LW 29, (2007) 3 PAT LJR 157, (2007) 2 PUN LR 813, (2007) 1 RECCIVR 877, (2007) 2 ICC 385, (2007) 2 SCALE 466, (2007) 1 WLC(SC)CVL 735, (2007) 3 JLJR 155, (2007) 66 ALL LR 814, (2007) 4 ANDH LT 24, (2007) 1 CAL HN 165, (2007) 1 ALL WC 907

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Bench: S.B. Sinha, Markandey Katju

CASE NO.:

Appeal (civil) 6222 of 2000

PETITIONER:

Hardev Singh

RESPONDENT:

Gurmail Singh (Dead) by LRs

DATE OF JUDGMENT: 02/02/2007

BENCH:

S.B. Sinha & Markandey Katju

JUDGMENT:

J U D G M E N T S.B. Sinha, J.

This appeal raises an interesting question of law in regard to interpretation of Section 43 of the Transfer of Property Act, 1882 ("the Act", for short).

Harcharan Singh, the original Defendant No.1, allegedly transferred some properties in favour of his wife Udham Kaur in lieu of maintenance pursuant to a compromise entered into by and between them. She claimed herself to be the absolute owner thereof in terms of Section 14(1) of the Hindu Succession Act, 1956. She filed a suit against her husband Harcharan Singh for a declaration that she was the owner in possession of the suit land. The learned Trial Judge was of the opinion that as she had been in possession of the property in lieu of maintenance, she was 'entitled to enjoy the fruits thereof only during her life time'. An appeal was preferred thereagainst and the Appellate

Court declared her to be the full owner in possession of the suit land. Indisputably, during pendency of the said suit, Harcharan Singh sold the said land to the respondent herein by a deed of sale dated 17.3.1982 and he had been given possession thereof. Another suit was filed by Udham Kaur.

The appellant, in the suit, inter alia, raised a plea that he was a bonafide purchaser for value, whereas the case of Udham Kaur was that as the properties were purchased during pendency of the suit, the same was hit by the 'doctrine of lis pendens', as envisaged under Section 52 of the Act. The said contention of the respondent was not accepted by the learned Trial Judge as also by the First Appellate Court holding that the transaction was hit by the doctrine of lis pendens. In the Second Appeal, one additional ground was taken by him, viz., having regard to the death of Udham Kaur, the properties devolved upon the appellant herein as also on Harcharan Singh in equal shares; and, thus, he should be declared to be the owner of the lands in terms of Sections 41 and 43 of the Act.

The High Court, although, rejected the contention of the respondent herein that Section 41 of the Act would be attracted, but opined that Section 43 would. Appellant is, thus, before us.

Mr. A. Mariarputham, learned counsel appearing on behalf of the appellant took us through the judgment of the High Court and contend that as the bonafide of the respondent was not proved and furthermore in view of the fact that the High Court itself opined that he was not entitled to the benefit of Section 41 of the Act, the judgment of the High Court upholding his claim in terms of the Section 43 thereof cannot be sustained.

Mr. R.K. Kapoor, learned counsel appearing on behalf of the respondent, on the other hand, supported the judgment.

Although, in this appeal we are not concerned with the applicability of Section 41 of the Act, with a view to appreciate the rival contentions raised by the parties we may notice the provision of both Sections 41 and 43 of the Act, which are as under :

"41. Transfer by ostensible owner. Where, with the consent, express or implied, of the persons interested in immoveable 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."

"43. Transfer by unauthorized person who subsequently acquires interest in property transferred. 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 transferees in good faith for consideration without notice of the existence of the said option."

The distinction between the said two provisions is apparent.

Application of Section 41 of the Act is based on the law of estoppel to the effect that if a man has represented that the transferor consents to an act which has been done and that he would not offer any opposition thereto, although the same could not have been lawfully done without his consent and he thereby induces others to do that from which they might have abstained he could not question the legality of the act he had so sanctioned to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct.

The ingredients of Section 41 of the Act are :

- 1) the transferor is the ostensible owner;
- 2) he is so by the consent, express or implied, of the real owner;
- 3) the transfer is for consideration;
- 4) the transferee has acted in good faith, taking reasonable care to ascertain that the transferor had power to transfer.

Section 43, on the other hand, embodies a 'rule of feeding the estoppel' and enacts that a person who makes a representation shall not be heard to allege the contrary as against a person who acts thereupon and it is immaterial whether the transferor acts bona fide or fraudulently in making the representation. [See *Jumma Masjid, Mercara v. Kodimaniandra Deviah*, AIR 1962 SC 847 : 1962 Supp.2 SCR 554.] In order to get the benefit of the said provision, the conditions which must be satisfied are :

- (1) the contract of transfer was made by a person who was competent to contract; and
- (2) the contract would be subsisting at the time when a claim for recovery of the property is made.

However, the provisions would have no application if the transfer was invalid as being forbidden by law or contrary to public policy, as envisaged under Section 23 of the Indian Contract Act. Thus, no estoppel can be pleaded contrary to the provisions of a statute. The 'rule of feeding the estoppel' shall apply in absence thereof.

The doctrine of feeding the estoppel envisages that 'where a grantor has purported to grant an interest in land which he did not at the time possess, but subsequently acquires, the benefit of his subsequent acquisition, goes automatically to the earlier grantee, or as it is usually expressed, feeds the estoppel'.

The principle is based on an equitable doctrine that a person who promised to perform more than he can perform must make good his contract when he acquires the power of performance. The difference between the ambit of Section 41 and 43 of the Act is apparent. Whereas Section 41 provides that a transfer by an ostensible owner cannot be avoided on the ground that the transferor was not authorised therefor, subject to the condition that the transferee should take reasonable care to ascertain that the transferor had power to make the transfer and to act in good faith before a benefit thereof is claimed by him. Section 43, on the other hand, enables the transferee to whom a transferor has made a fraudulent or erroneous representation to lay hold, at his option, of any interest which the transferor may subsequently acquire in the property, unless the right of any subsequent purchaser for value without notice is in effect.

With the aforementioned proposition in mind, we may notice that the High Court has declined to grant any relief to the respondent herein in terms of Section 41 of the Act, inter alia, on the premise (1) that Harcharan admitted that he had sold the property to the respondent in order to frustrate the claim of Udham Kaur; (2) a public notice was not given; and (3) that the respondent knew regarding the pending litigation, and it was for the respondent to show that he had no knowledge about the litigation.

In applying the provisions of Section 43 of the Transfer of Property Act, the High Court, however, held :

- i) It was Harcharan Singh who had pleaded the mischief;
- ii) After the death of Udham Kaur, Harcharan Singh would be the natural heir of the half share of her property.

The learned Trial Judge and the First Appellate Court had decreed the suit of Udham Kaur only on the basis that she acquired the suit property during the pendency of the earlier litigation. Section 52 of the Act merely prohibits a transfer. It does not state that the same would result in an illegality. Only the purchaser during the pendency of a suit would be bound by the result of the litigation. The transaction, therefore, was not rendered void and/or of no effect.

In *Jumma Masjid, Mercara* (supra), speaking for a four Judge, Bench, Aiyar, J. opined :

"Considering the scope of the section on its terms, it clearly applies whenever a person transfers property to which he has no title on a representation that he has a present and transferable interest therein, and acting on that representation, the transferee takes a transfer for consideration. When these conditions are satisfied, the section enacts that if the transferor subsequently acquires the property, the transferee becomes entitled to it, if the transfer has not meantime been thrown up or cancelled and is subsisting "

Referring to the illustration appended to Section 43 of the Act, it was held :

"...But far from being restricted in its scope as contended for by the appellant, the section is, in our view, general in its terms and of sufficient amplitude to take in the class of transfers now in question. It is not to be readily assumed that an illustration to a section is repugnant to it and rejected "

It was concluded :

"...We accordingly hold that when a person transfers property representing that he has a present interest therein, whereas he has, in fact, only a spes successionis, the transferee is entitled to the benefit of s.43, if he has taken the transfer on the faith of that representation and for consideration "

It is one thing to say that the respondent was aware of the litigation, but it is another thing to say that he did not purchase the property on representation of Harcharan Singh. In fact, from the judgment of the courts below, it does not appear that any finding has been arrived at to the effect that the respondent herein was aware that the said Harcharan Singh had no title over the property.

Our attention has, however, been drawn to a decision of this Court in Kartar Singh (Dead) by LRs. & Ors. v. Harbans Kaur [(1994) 4 SCC 730], wherein this Court held :

"Section 43 feeds its estoppel. The rule of estoppel by deed by the transferor would apply only when the transferee has been misled. The transferee must know or put on notice that the transferor does not possess the title which he represents that he has. When note in the sale deed had put the appellant on notice of limited right of the mother as guardian, as a reasonable prudent man the appellant is expected to enquire whether on her own the mother as guardian of minor son is competent to alienate the estate of the minor. When such acts were not done the first limb of Section 43 is not satisfied. It is obvious that it may be an erroneous representation and may not be fraudulent one made by the mother that she is entitled to alienate the estate of the minor. For the purpose of Section 43 it is not strong material for consideration. But on declaration that the sale is void, in the eye of law the contract is non est to the extent of the share of the minor from its inception. The second limb of Section 43 is that the contract must be a subsisting one at the time of the claim. A void contract is no contract in the eye of law and was never in existence so the second limb of Section 43 is not satisfied."

The said finding was arrived at, inter alia, on the premise that Kulwant Singh was a minor on the date on which the property was transferred and in the marginal note of the sale deed specifically mentioned :

"...that the land had been acquired by her and by her minor son by exercising the right of pre-emption and that she was executing the sale deed in respect of her own share and acting as guardian of her minor son so far as his share was concerned."

It was held that under the Guardian and Wards Act, the estate of the minor could not have been alienated unless a specific permission in that behalf is obtained from the district court and admittedly, no such permission had been obtained. In that view of the matter, the sale of the half share of the interest of the minor son made by his mother was void.

We have noticed hereinbefore that the transaction was not void. It was not contrary to any provision of law. It was not hit by Section 23 of the Indian Contract Act. We, therefore, do not accept the submission of the learned counsel that the ingredients of Section 41 would also be applicable in a case falling under Section 43 of the Act. We may notice that in *Jote Singh (dead) by LRs. v. Ram Das Mahto & Ors.* [AIR 1996 SC 2773], it was held that the provisions of Sections 41 and 43 would not be available where the properties have been sold in auction.

In *N. Srinivasa Rao v. Special Court under the A.P. Land Grabbing (Prohibition) Act & Ors.* [(2006) 4 SCC 214], to which our attention has been drawn by learned counsel appearing on behalf of the appellant, it was held that the transfer must be a valid one. Therein, the property in question was transferred in violation of the provisions of Section 47 of the Andhra Pradesh (Telangana Area) Tenancy and Agricultural Lands Act, 1950. It was, in the factual matrix obtaining therein, opined :

"Even on the question of the applicability of Section 43 of the Transfer of Property Act, we agree with the view taken by the High Court that when the initial transfer itself between Uppari Ramaiah and Mir Riyasat Ali was invalid, the question of application of Section 43 of the Transfer of Property Act to such a transaction on account of subsequent acquisition of title by Uppari Ramaiah would not be available."

The said decision, therefore, has no application to the facts of the present case.

There is another aspect of the matter which cannot be lost sight of. Appellant claimed absolute interest in the property on the premise that his mother has executed a Will in his favour on 3.10.1995. The said Will has not been proved. If the title claimed is on the basis of the Will, the same was required to be proved in the light of the provisions contained in Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act. If the Will has not been proved, in the absence of such proof the general law of succession and inheritance shall apply.

The plea of inapplicability of Section 43 of the Transfer of Property Act could have been taken by Harcharan Singh and not by the appellant, who has based his claim on the basis of the Will.

The principle of feeding the estoppel will apply against Harcharan Singh and not against the appellant. He could not have, in our opinion, therefore, raised the said plea.

For the reasons aforementioned, we do not find any merit in this appeal, which is accordingly dismissed with costs. Counsel's fee is assessed at Rs.5,000/-.