

(2002) 02 CAL CK 0002

Calcutta High Court

Case No: S.A. No"s. 601 and 395 of 1999

Narayan Chandra Saha and
Others

APPELLANT

Vs

Dipali Mukherjee and Others

RESPONDENT

Date of Decision: Feb. 19, 2002

Acts Referred:

- Evidence Act, 1872 - Section 115
- Transfer of Property Act, 1882 - Section 43

Citation: 106 CWN 1137

Hon'ble Judges: Pranab Kumar Chattopadhyay, J

Bench: Single Bench

Advocate: Anindya Kumar Mitra, A.K. Konar, Q.F. Rahaman, A.K. Bose and A.K. Hazra, for the Appellant; Pratap Chatterjee, G.S. Pal and Subhasis Pal, for the Respondent

Final Decision: Dismissed

Judgement

Pranab Kumar Chattopadhyay, J.

Both the appeals herein are directed against the common judgment and order dated 6th February, 1999. and Decree dated 25th February, 1999, passed by the Learned Fifth Additional District Judge at Alipore in Title Appeals Nos. 168 and 169 of 1997 confirming the Judgement and Decree dated 26th May, 1997 and 5th June, 1997 respectively passed by the Learned Third Munsif at Alipore in Title suit No. 208 of 1986 and 209 of 1986. One Pradip Kumar Basu inducted the appellants in the Suit property. At the relevant point of time, Pushpamoy Basu, father of Pradip Kumar Basu was the owner of the property. The appellants claimed to be tenants of the suit properties whereas the plaintiff/respondent No. 1 filed both the suits contending that the appellants were trespassers and were liable to be evicted. The Suit Property in Title Suit No. 209 of 1986 is said to be a "goomty" at the side-space in the South-East corner of the premises No. 23/56 Gariahat Road and in Title Suit No. 208 of 1986 the Suit Property is also a "goomty" at the side-space in the North-West

corner of the said premises.

2. Both the Title Suits were disposed of by the common judgment dated 20th May, 1997 but since two separate decrees were passed by the Learned Munsif, two appeals being Title Appeals Nos. 168 of 1997 and 169 of 1997 were preferred which were decided by the Learned Fifth Additional District Judge, Alipore, by the common Judgement and Order dated 6th February, 1999.

3. The Learned Munsif of the trial court as well as the Learned Additional District Judge of the First Appellate Court have held that the appellants were trespassers. The appellants have failed to prove their tenancies. According to the appellants, Pradip Kumar Basu inducted them as monthly tenants in respect of the Suit Properties and issued rent receipts for a period of more than three years during the lifetime of his father, the owner. Pushpamoy Basu died in January, 1983 and the property devolved on his sons and daughters. Accordingly, one of the sons of the said Pushpamoy Basu became a co-owner of the property. Admittedly, the co-owners sold the property to the plaintiff/respondent No. 1 in the month of January, 1984 and the plaintiff/respondent No. 1 filed both the suits in the year 1986.

4. Since the Learned Judge of the First Appellate Court dismissed both the Title Appeals affirming the Judgment and Order passed by the Learned Munsif of the trial Court, defendants/appellants herein filed the aforesaid appeals. Both the appeals were admitted by this court on the following question of law :

Whether the Learned Court below erred in decreeing the Suit filed by the plaintiff/respondent without taking into consideration principle covering Section 43 of the Transfer of Property Act as already the son of the Landlord had accepted the rent ?

5. Mr. Anindya Kumar Mitra, Learned Senior Counsel appearing on behalf of the appellants submitted that the question now requires to be decided is whether Pradip Kumar Basu inducted the defendants in both the suits with oral permission of his father as he has deposed or without authority of his father. Learned Munsif of the trial Court and Learned Additional District Judge of the lower Appellate Court concurrently held that it is not established that Pradip Kumar Basu was duly authorised by his father to induct the defendants and induction of defendants by Pradip Kumar - Basu was not lawful and therefore the appellants/ defendants are trespassers.

6. According to Mr. Mitra, in either view of the matter the appeals should succeed. If the letting out was with permission of father then valid tenancy was created in favour of the defendants/appellants on the date of the induction and the defendant/appellants cannot be called as trespasser. There has been no termination of tenancy.

7. If the induction by the son was without the authority of his father, the owner, then the lack of authority was cured when Pushpamoy Basu died and Pradip Kumar Basu became one of the co-owners. A co-owner has authority to let out any part of the property properly.

8. Mr. Mitra further submitted that equitable principle embodied in Section 43 of the Transfer of Property Act comes into operation in the present case. Mr. Mitra cited the following decisions in support of his aforesaid contentions.

1. Surendra Nath Dey vs. Rajendra Chandra, reported in 27 CLJ 282.

2. Jainur Ali vs. Chafina Bibi, reported in AIR 1951 Ass 20

3. [The Jumma Masjid, Mercara Vs. Kodimaniandra Deviah,](#)

4. [Jagat Narain and Another Vs. Laljee and Others,](#)

9. Mr. Mitra specifically submitted that there is no finding of the Courts below that the appellants were aware in respect of the lack of authority of Pradip Kumar Basu to induce the appellants in the Suit Property. According to the Learned Counsel of the appellants Pushpamoy Basu, the father of Pradip Kumar Basu was the owner at the relevant point of time and admittedly the son was putting the appellants into possession. Mr. Mitra, further, submitted that admittedly the appellants remained in possession during the lifetime of the father, Pushpamoy Basu, the owner of the Suit Property at the relevant point of time who died four years after the induction of the appellants in the Suit Property. Mr. Mitra contended that in view of the relationship of father and son, the appellants herein should not be blamed if they did not make any enquiry about the father at the time of entering into the Suit Property and believed that Pradip Kumar Basu being the son had authority of the father to let out.

10. According to Mr. Mitra even an erroneous belief would not render Section 43 of the Transfer of Property Act inapplicable as has been held in the case of [The Jumma Masjid, Mercara Vs. Kodimaniandra Deviah,](#) and thereafter by the Allahabad High Court in the case of [Jagat Narain and Another Vs. Laljee and Others,](#). According to Mr. Mitra, it is not a case of an estoppel u/s 115 of Evidence Act or estoppel by conduct, which involves question of fact and this involves the question whether the law as embodied in Section 43 of Transfer of Property Act is applicable.

11. Mr. Pratap Chatterjee, Learned Senior Counsel appearing on behalf of the plaintiff/respondent No. 1 submitted that when the Courts below have held that the appellants are trespassers and not tenants then the application of Section 43 of the Transfer of Property Act does not arise at all. According to Mr. Chatterjee, in order to seek protection u/s 43 of the Transfer of Property one has to plead and prove the following :

(a) A representation has been made by the transferor that he had the authority to transfer the property in question.

(b) The transferee in fact had been misled by such representation.

(c) The transferee must act on the basis of the representation made by the transferor.

(d) If the transferee knew as a fact that the transferor did not possess the title, which he had represented then the transferee could not be said to have acted on the basis of such representation when taking a transfer and Section 43 would not have any application.

12. Mr. Chatterjee cited the following decisions of the Supreme Court in support of his aforesaid contentions:

(i) [The Jumma Masjid, Mercara Vs. Kodimaniandra Deviah,](#)

(ii) [The Regional Manager and Another Vs. Pawan Kumar Dubey,](#) .

(iii) (1194)4 SCC 730 (Kartar Singh vs. Harbans Kaur). Para 7.

13. Mr. Chatterjee, further, submitted that it is the duty of the appellants as transferee to make a reasonable enquiry as to the Title of the transferor. Referring to the aforesaid decisions of the Supreme Court. Mr. Chatterjee submitted that the Supreme Court has also held that Section 43 embodies rule of estoppel. Referring to the decision reported in (1918) 22 CWN 170, Chandi Charan Nath vs. Samla Bibi. Mr. Chatterjee submitted that since the question of estoppel is involved, the same has to be pleaded specifically.

14. Referring to the judgment of the trial Court as well as the First Appellate Court, Mr. Chatterjee submitted that in this case following facts would emerge :

(a) The written statement filed by the defendants did not have the necessary pleadings at all.

(b) It was not the case of the defendants in their written statement that Pradip Kumar Basu (son of the owner) induced the defendant to believe falsely that he was the owner/landlord or that he had any the requisite authority.

(c) The pleading and evidence show that the defendants/appellants knew very well that Pushpamoy Basu was the original owner and they were induced by Pushpamoy Basu which they failed to prove and in evidence the appellants said that they were induced by Pradip Kumar Basu.

(d) In evidence the defendants did not say that Pradip Kumar Basu induced them to think that he was the owner of the suit premises.

(e) The defendants also knew that Pradip Kumar Basu was not the owner and further that he had no authority to let out the suit premises.

(f) The defendants neither pleaded nor led any evidence contending that any representation was made by Pradip Kumar Basu (son of owner). The First Appellate

Court has elaborately discussed the doctrine of estoppel in the judgment.

15. In view of the aforesaid facts. Mr. Chatterjee submitted that no protection can be sought for by the appellants u/s 43 of the Transfer of Property Act. The Learned Counsel of the plaintiff/respondent No. 1 also painted out that in the grounds of appeal, appellants have not contended that the Learned Judge of the Courts below should have held that Pradip Kumar Basu had made representation that he had the authority to transfer the Suit premises and the defendants were induced thereby and acted on the basis of such representation. Mr. Chatterjee therefore submitted that the defendants/ appellants should not be allowed to urge that Section 43 of Transfer of Property act should come into play.

16. Referring to the judgments cited by the Learned Counsel of the appellants. Mr. Chatterjee submitted that those judgments have not emphasized the requirement of representation by the transferor and the transferee's acting on such representation. Mr. Chatterjee, however, placed strong reliance on the judgment reported in [The Jumma Masjid, Mercara Vs. Kodimaniandra Deviah](#), in support of his contention as already mentioned hereinbefore.

17. Now, the only point arises for determination in both the appeals is whether protection of Section 43 of the Transfer of Property Act is available to the appellants in view of the fact that the second son of the landlord, Pradip Kumar Basu, who induced the appellants in the property at the relevant point of time became a co-owner of the property on the death of his landlord father.

18. Section 43 of the Transfer of Property Act provides thus :

Section 43. Transfer of unauthorised person who subsequently acquires interest in property transferred - Where a person fraudulently or erroneously represents that he is authorised to transfer certain immovable 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.

19. The appellants herein are claiming protection u/s 43 of the Transfer of Property Act. The essential conditions for applicability of Section 43 of the Transfer of Property Act have been clearly mentioned by the Supreme Court in the case of [Kartar Singh \(Dead\) by Lrs. and Others Vs. Harbans Kaur \(Smt\)](#), Paragraph 4 of the said judgment is quoted hereunder:

4. A reading clearly shows that for application of Section 43 of the Act, two conditions must be satisfied. Firstly, that there is a fraudulent or erroneous representation made by the transferor to the transferee that he is authorised to transfer certain immovable property and in the purported exercise of authority,

professed to transfer such property for consideration. Subsequently, when it is discovered that the transferor acquired an interest in the transferred property, at the option of the transferee, he is entitled to get the restitution of interest in, property got by the transferor, provided the transferor acquires such interest in the property during which contract of transfer must subsist.

20. So, for the purpose of application of Section 43 fraudulent or erroneous representation by the transferor to the transferee is a must. In the present case, nowhere it has been pleaded that Pradip Kumar Basu {son of owner) made any representation that he was the owner/landlord or that he had the requisite authority to induct the appellants in the suit property. The finding of the First Appellate Court in this regard is hereunder :

It is not the case of the defendants. Their written statement that Prabir Kumar Basu inducted the defendants to believe falsely that he was the landlord and being induced by such belief, they came to the suit premises as tenants under Pradip Kumar Basu. On the other hand, both pleading and the evidence show that the defendants knew very well that Pushpamoy Basu was the original owner of the suit premises and that is why they pleaded in their written statements that/they were induced by Pushpamoy Basu. This plea they failed to prove.

21. From the aforesaid finding of the First Appellate Court, it appears that the appellants knew that Pradip Kumar Basu was not the owner of the. suit Premises and from the pleadings and the evidence, Learned Judge of the First Appellate Court came to the finding that the appellants herein knew very well that Pradip Kumar Basu was the owner.

22. Accordingly, the appellants knew very well that Pradip Kumar Basu did not possess the title in respect of the suit property and in the written statements also the appellants clearly mentioned that they were induced by Pushpamoy Basu, the father of Pradip Kumar Basu which they failed to prove before the courts below. The appellants admittedly pleaded In the written statements that they were induced by Pushpamoy Basu, the father of Pradip Kumar Basu and as such subsequent stand taken by Mr. Mitra that the appellants were induced by Pradip Kumar Basu is not based on correct appreciation of facts.

23. On the basis of the evidence on record, Learned Judge of the First Appellate Court specifically held that Prabir Kumar Basu never induced the appellants to think that he was the owner in respect of the suit premises. From the aforesaid findings of the First Appellate Court, this Court holds that the appellants knew that Pradip Kumar Basu did not possess the title in respect of the suit property at the relevant point of time and as such the appellants had no scope to be misled. However, the appellants also never claimed that they were misled in view of any representation of Pradip Kumar Basu.

24. The provision of Section 43 would be applicable only when the transferor makes a representation and the transferee acts on such representation. In the present case nowhere it has been pleaded by the appellants that Pradip Kumar Basu made any representation regarding his ownership in respect of the suit property or about his authority to induct anyone in the suit property and as such it cannot be said that the petitioners were misled in any way. Section 43 embodies a rule of estoppel and u/s 43 estoppel rests on the representation made by a transfer. In the present case, the appellants knew that Pradip Kumar Basu was not the landlord at the time of induction and it was also never alleged that the appellants were misled by any representation of said Pradip Kumar Basu. In the aforesaid circumstances. I fail to understand how the appellants are entitled to get protection u/s 43 of the Transfer of Property Act.

25. The scope and applicability of Section 43 has been lucidly explained by the Supreme Court in the case of [The Jumma Masjid, Mercara Vs. Kodimaniandra Deviah](#), The relevant portion from the said judgment is mentioned hereunder :

15... 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, words of Section 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 emphasizes 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 a 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 ...

26. The principle of "feeding the estoppel" was considered by the Supreme Court in the case of [Kartar Singh \(Dead\) by Lrs. and Others Vs. Harbans Kaur \(Smt\)](#), . The relevant portion of the said judgment is set out hereunder :

7. 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.

27. Mr. Mitra though urged that no question of estoppel arises in the present case and a consequence of law u/s 43 of the Transfer of Property Act is only to be considered in the facts and circumstances of the aforesaid submissions in my opinion are contrary to the pronouncements of the Supreme Court as laid down in the cases reported in [The Jumma Masjid, Mercara Vs. Kodimaniandra Deviah](#), ([Kartar Singh \(Dead\) by Lrs. and Others Vs. Harbans Kaur \(Smt\)](#)),

28. In the written statements, it was never stated by the defendants that the Pradip Kumar Basu, the son, inducted the appellants herein on behalf of the father or that is to say under authority of his father. Any liberal construction of the pleadings cannot lead to the conclusion that Pradip Kumar Basu made any fraudulent or erroneous representation to the defendants when there is no specific pleading in this regard.

29. Mr. Mitra, Learned Senior Counsel appearing on behalf of the appellants though submitted that if the induction by Pradip Kumar Basu, the owner, was without authority of his father then the lacuna was automatically cured upon Pradip Kumar Basu becoming a co-owner of the property.

30. In my view, the aforesaid stand of Mitra is totally erroneous. There is no automatic feeding the estoppel. Section 43 of the Transfer of Property Act does not come into operation unless there was specific representation by the transferor and unless the transferee acts thereupon.

31. Even in the grounds of appeal, the appellants have not contended that the Learned Court should have held that Prabir Kumar Basu had made any representation about his authority to transfer the suit premises and the defendants were induced thereby and acted on the basis of such representation. Accordingly, the defendants/appellants cannot be allowed to urge that Section 43 of the transfer of Property Act should come into play in the present case or any protection can be available to the defendants/appellants u/s 43 of the Transfer of Property Act.

32. For the reasons mentioned hereinabove, I find no infirmity and/ or irregularity in the findings of the Courts below. Thus, in my opinion, the instant second appeals are devoid of merit. Accordingly, both the second appeals fail and the same are dismissed.

33. There will be, however, no order as to costs.

34. Let urgent xerox certified copy of this judgment be given to the learned Advocate for the parties.

LATER :

After pronouncement of the judgment, the learned Advocate appearing on behalf of the appellant prays for stay of the operation of this judgment. I find no reason to grant such stay. Accordingly, prayer for stay is refused.