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**(1923) 01 CAL CK 0018**

**Calcutta High Court**

**Case No:** None

Rustam Ali Mia

APPELLANT

Vs

Abdul Jabbar and Others

RESPONDENT

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**Date of Decision:** Jan. 4, 1923

**Acts Referred:**

- Transfer of Property Act, 1882 - Section 43

**Citation:** AIR 1923 Cal 535 : 76 Ind. Cas. 499

**Hon'ble Judges:** Panton, J; C.C. Ghose, J

**Bench:** Division Bench

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### **Judgement**

1. The facts which have given rise to this appeal, shortly stated, are as follows: A person of the name of Asgar Ali died leaving him surviving two widows one of whom was a lady of the name of Munjumarnessa, two cousins, who are defendants Nos. 1 and 4, and a sister, who is, defendant No. 3. Asgar Ali, at the time when he married Munjumarnessa, executed a kabilnama in her favour in which the dower was fixed at Rs. 250. He did not pay the amount of the dower, and it appears that he misappropriated a considerable portion of the ornaments which belonged to the lady. The lady, therefore, had to receive from Asgar Ali the amount of the dower mentioned in the kabilnama and also the amount of the price of the ornaments misappropriated by Asgar Ali. To Satisfy the debt which Asgar Ali owed to the lady he executed a hibanama in respect of the disputed plots Nos. 1 to 3 and some other lands. It appears that in respect of one of these plots, at the time when Asgar Ali executed the hibanama, he was the owner thereof to the extent of a two-thirds share, the remaining one-third share being owned by his sister, defendant No. 3. The date of the hibanama, which purported to deal with the entirety of the plot in question was the 24th Magh 1320, corresponding with the 6th February 1914. Subsequently, it appears that the share which defendant No. 3 had in the property was sold by her to defendant No. 2 who in his turn sold it to Asgar Ali. The question that has now arisen is whether, by reason of the events which happened after the

execution of the hibanama, the donor became entitled to the share which the sister of Asgar Ali had at the time of the execution of the hibanama and which share afterwards passed to Asgar Ali. It is urged by Dr. BaSak that, in the circumstances of this case, Section 43 of the Transfer of Property Act did not apply and that, in the second place, assuming that Section 43 was applicable, the lower Appellate Court has not found as a fact that there was an erroneous representation by Asgar Ali at the time of the execution of the hibanama as regards the share which his sister had in the property in question. It is further urged that, in any event, this matter should be remitted to the lower Appellate Court for a specific finding on the question whether or not there was any erroneous representation by Asgar Ali at the time of the execution of the hibanama. With reference to the first point, the argument is presented by Dr. BaSak in this manner. He urges that, having regard to the language of Section 43 of the Transfer of Property Act, the hibanama could not operate to the extent of any share which was not in the donor at the time when it was executed under the Muhammadan Law and that, therefore, there not having been any conveyance of the share which the sister of Asgar Ali had by virtue of the hibanama, Section 43 could not be invoked. Now, with reference to this point it is sufficient to observe that the point, as formulated before us by Dr. Basak, does not find any place in the grounds of appeal presented to this Court, although they are eleven in number. We must, therefore rule out this point from consideration.

2. With reference to the second point, namely, that in the absence of a specific finding on the question as to whether or not there was an erroneous representation on the part of the donor as regards the interest in the property which was possessed by his sister, Dr. Basak is undoubtedly right in his contention that the lower Appellate Court's judgment does not contain any such finding. From that point of view, it became necessary for us to consider whether we ought not to send this case back to the lower Appellate Court for a specific finding on that point. We have come to the conclusion that we need not do so, because, in our opinion, the decree of the lower Appellate Court can be supported on another ground independently of the provisions of Section 43. We think the decree of the lower Appellate Court can be supported on the ground that the conveyance of a nonexistent property, though inoperative as a conveyance, is operative as an executory agreement which would attach to the property the moment it is acquired by the grantor and which in equity would transfer the beneficial interest to the vendee without any new act being done by the vendor to confirm the conveyance. This doctrine is elaborated at length in the cases reported as *Khobhari Singh v. Ram Prosad Roy* 7 C.L.J. 387 and in *Surendranath Dey v. Rajindra Chandra* 43 Ind. Cas. 740 : 27 C.L.J. 289. It is urged, however, by Dr. Basak that this is entirely a new point which the respondent has taken in this Court for the purpose of supporting the decree of the lower Appellate Court and that this point has not been discussed in any of the Courts below, nor had the facts been investigated from the point of view of the application of this doctrine. To that it may be replied that the facts are

apparent from the judgment of the two Courts below In our opinion, there was sufficient consideration for the hibinama. There being, therefore, consideration for the contract and the grantor having subsequently become possessed of the property not only referred to in the hibinama but answering to the description of the property set out therein, there cannot be any doubt that, on those facts, a Court of Equity would compel the grantor to perform the contract, and that the contract would in equity transfer the beneficial interest to the vendee at the moment of the subsequent acquisition of the property by the grantor. On this short ground we think it is unnecessary, having regard to the facts already found, to remand this case for a finding whether or not there was an erroneous representation within the meaning of Section 43 of the Transfer of Property Act.

3. The appeal, therefore, fails and must be dismissed with costs.