(1945) 11 BOM CK 0024

Bombay High Court

Case No: None

Khushalchand Bhagchand		APPELLANT
	Vs	
Trimbak Ramchandra and Others		RESPONDENT

Date of Decision: Nov. 22, 1945

Acts Referred:

- Transfer of Property Act, 1882 - Section 41

Citation: AIR 1947 Bom 49

Hon'ble Judges: Lokur, J

Bench: Division Bench

Judgement

Lokur, J.

This second appeal arises out of a suit for recovering possession of Survey No. 802-1 of Sangamner together with mesne profits and costs. The, land belonged to one Chintaman Vinayak and he made a gift of it to the plaintiff''s father Ramchandra by a registered deed dated 17-8-1927. The deed, while giving the land to Ramchandra, provided that the donor Chintaman was to remain in possession and to enjoy the income of the land during his lifetime and that the donee Ramchandra should take possession of it after his death. Ramchandra is dead. Plaintiff 1 is his son, plaintiff 2 is his father and plaintiff 3 is his brother, and on Chintaman''s death on 28-1-1937, they have become entitled to the land in suit. But soon after passing the deed of gift in favour of Ramchandra, Chintaman appears to have changed his mind and executed another registered deed on 18-5-1923 revoking the gift. Thereafter he sold it to defendant l, Laxmibai, on 21-9.1932. Defendant l mortgaged it to defendant 3 on 4-1-1937 and gave the land into his possession. So long as Chintaman was alive, the plaintiffs had no right to seek its possession, and so after his death they filed this suit in March 1939 to recover possession of the land from the three defendants defendant 2 being a tenant cultivating the land. The defence was that the document of 1927 was not a deed of gift but a will and was, therefore, revocable, that in any

event Ramchandra and the plaintiffs having allowed Chintaman to be the ostensible owner of the land and defendant 1 having purchased it in good faith after making reasonable inquiry she had become the owner of the land and that defendant 3 also being a bona fide mortgagee who had taken reasonable care to enquire into the title of the mortgagor, his mortgagee could not be impeached by the plaintiffs. It appears that the contention that Chintaman could revoke the gift was not pressed. In her written statement, defendant 1 admitted that she knew of the deed of gift passed by Chintaman in favour of Ramchandra but was told by him that he had revoked it. The trial Court, therefore, held that she should have known that the gift could not be revoked, and that although she had paid valuable consideration, she must be deemed to have had notice of the plaintiff''s claim and therefore was not entitled to the benefit of Section 41, T.P. Act, 1882. But as regards the mortgage taken by defendant 3, the trial Court held that he had made sufficient enquiry with reasonable care, and as the plaintiffs had allowed defendant l to be the ostensible owner of the land, defendant 3''s mortgage for valuable consideration was binding on the land and the plaintiffs could not recover possession without discharging the burden on it. It was, therefore, declared that the plaintiffs were the owners of the land in suit subject to the encumbrance created by defendant 1 in favour of defendant 3. The plaintiffs appealed against that decree and the lower appellate Court, while agreeing with all the other findings of the trial Court, held that defendant 3 had not exercised reasonable care in making an enquiry into the power of defendant 1 to mortgage the land, and therefore was not entitled to the benefit of Section 41, T.P. Act. The decree of the trial Court, was, therefore, modified and the plaintiffs were declared to be the owners of the land in suit free from the mortgage of defendant 3. Defendant 38 has now appealed to this Court and all the contentions in the written statement are urged on his behalf.

2. It is obvious that if the deed of gift passed by Chintaman in favour of Rarnchandra in 1927 be held to be a will, he could revoke it, and as he did revoke it, the plaintiffs would have no title to the land and their suit must be entirely thrown out. Defendant 1 did not appeal against the decree of the trial Court and has thereby tacitly given up her claim under the sale.deed passed to her by Chintaman. It is still open to the appellant to rely upon the revocation of gift and if it is found to be valid, then his mortgage would necessarily be binding on the land in suit.

3. The question whether a certain document is a gift or a will depends not merely upon the form of the document, but upon the intention gathered from the words used in the document itself. The usual tests are the name by which the document is styled, the registration of it, the reservation of the power of revocation and the use of the present or future tense. All these are indications to find out the intention, taken singly or cumulatively. The mere reservation of a life-estate does not necessarily indicate that the document is testamentary and that, there, fore, the grant is revocable. Nor does the fact that the donor revoked it within a few months indicate that his intention was to make a will and not a gift. In construing a

document the conduct of the parties subsequent to its execution should not be taken into consideration when there is no ambiguity in the words and expressions used in the document. In the present case the document is styled "a deed of gift" and was executed and registered as such. It conferred on the donee, Ramchandra a complete and immediate title to the property subject to the right of the donor Chintaman to enjoy it during his lifetime. No power of revocation was expressly reserved. The very fact that Chintaman preferred to execute a deed of gift rather than a will, which would have been easier and less expensive, indicates that his intention was to debar himself from revoking it in case he were to change his mind in future. He did not want to postpone the ownership of Ramchandra till his death, though he wanted to provide for his own maintenance during his lifetime. Thus his obvious intention was to transfer to Ramchandra immediate ownership of the entire property subject to his own life estate. Thus the document clearly, to use the words of Lord Moulton in 40 I.A. 1611 :

speaks from the date at which it was written, and not from a future date, namely, the death of the writer.

4. Mr. Pradhan for the appellant relied upon the ruling in AIR 1924 Mad. 6052 where a document styled as a deed of gift was held to be a will. In that case the document contained no words purporting to convey the property to the donee. All that it said was that the donor would enjoy it during his lifetime and that the donee should enjoy it thereafter. Schwabe C.J. did observe in that case (page 606):

The fact that the document purports to reserve a life interest in the property to the donor is an argument against its being a will.

Yet he held it to be a will and not a gift because (p. 606):

There is no disposal of any immediate rights of possession or any immediate interest in the property.

5. If the ownership is intended to be forthwith transferred, then the reservation of a life estate does not prevent the passing of the title immediately. Hence the ownership of the land vested in Ramchandra immediately on the execution of the deed, though he could get possession of it only on Chintaman''s death. Having regard to all the circumstances I hold that the document was a deed of gift and not a will and that u/s 126, T.P. Act, it could not be revoked by Chintaman. It follows that the revocation of the gift by Chintaman in 1928 was ultra vires and ineffectual and his sale of the land to defendant 1 in 1932 could not enure for her benefit after his death. She mortgaged it to defendant 3 on 4-1-1937, when Chintaman was still alive, but after Chintaman''s death his life estate, which alone she could legally mortgage, came to an end and the land mortgaged ceased to be a security for the amount advanced by defendant 3 to defendant 1. But it is contended on his behalf that he being a bona fide mortgagee he is entitled to the benefit of Section 41, T.P. Act.

6. Section 41 is an exception to the general rule that a person cannot convey a better title than what he himself has in the property, and hence the conditions set forth in that section must be strictly fulfilled before its benefit can be available to the transferee. Those conditions are: (1) that with the consent, express or implied, of the person claiming title that another person is held out as the ostensible owner of such property, (2) that such ostensible owner transfers it for valuable consideration, and (3) that the transferee has acted in good faith and has taken reasonable care to ascertain that the transferor has power to make the transfer.

7. There is no dispute that the second of these conditions is fulfilled and it is held proved that defendant 3 did pay Rs. 500 to defendant 1 in consideration of the mortgage. Defendant 1 herself claimed to be a bona fide purchaser for value from Chintaman, but both the Courts have rightly held that she was aware of the deed of gift in favour of Ramchandra and that she should have known that the gift was irrevocable and after the death of Chintaman, Ramchandra and the plaintiffs would be the exclusive owners of the property. Having thus purchased the land with open eyes, she could not acquire any right higher than what was possessed by the vendor Chintaman and her interest in the land came to an end on his death. But although she may not be entitled to the benefit of Section 41, T.P. Act, yet if she is held to be the ostensible owner, with the express or implied consent of Ramchandra or the plaintiffs, any transferee for valuable consideration from her would be entitled to the benefit of Section 41, T.P. Act, provided he acted in good faith having made ''reasonable inquiry regarding her power to transfer the property. It is, therefore, necessary first to consider whether defendant 1 was the ostensible owner of the land with the express or implied consent of Ramchandra or the plaintiffs. Admittedly Ramchandra was never in possession of the land, as, under the terms of the deed of gift itself, Chintaman was to remain in possession during his lifetime. Hence even\\after the deed of gift was executed, Chintaman''s name appeared in the Record of Rights as the occupant and the name of Ramchandra was shown as a person having "other rights". On the death of Ramchandra the name of his father, plaintiff l, was substituted on 10-7-1929, but when Chintaman revoked the gift in May 1928, he applied to the Mamlatdar and had the name of plaintiff 1 deleted. When the plaintiffs came to know about this they made an application and after an enquiry the order deleting the name of plaintiff 1 was upheld in June 1930. Since then the name of Chintaman alone appeared in the Record of Rights as the owner of the land and the names of the plaintiffs were not shown as persons having any rights in the land. Although Chintaman lived for seven years thereafter, no attempt was made by the plaintiffs to have their rights established or to have their names entered in the Record of Eights. In the deed of gift there was an express clause, prohibiting Chintaman from mortgaging or selling the property, and although he sold it to 1 defendant 1 in 1932, the plaintiffs did not challenge the sale and allowed the name of defendant 1 to be entered in the Record of Eights as the sole owner of the land. Chintaman immediately gave possession of the land to defendant land

since then she enjoyed the land as its absolute owner. Five years later she mortgaged it to defendant 3. All these documents were registered and entered in the Record of Rights and were not repudiated by the plaintiffs either by taking any action in a Court of law or by means of a public notice. It may, there, fore, be safely held that defendant l was allowed to be the ostensible owner of the land with the implied consent of the plaintiffs and thus the first two conditions laid down in Section 41, T.P. Act, may be regarded as fulfilled.

8. As regards the third condition there is nothing to show that defendant 3 did not take the mortgage in good faith, and the only question is whether he took reasonable care to ascertain that defendant 1 had power to mortgage the land, The lower appellate Court has recorded a definite finding that he did not and it is urged that this being a finding of fact it should be accepted in second appeal. This contention finds some support in the ruling in 36 All. 3083. There it was held that whether the transferor was the ostensible owner of immovable property with the consent, express or implied, of the real owners and whether the transferee bona fide took the transfer after taking reasonable care to ascertain the title of his transfer, were questions of fact to be decided by the lower appellate Court, whose findings were binding in second appeal. Referring to this observation, Walsh and Ryves JJ., observed in 45 ALL. 520 as follows (p. 523):

If the learned Judges meant to hold that the question whether Section 41, T.P. Act, applies to a given set of facts is a question of fact, we cannot agree with them, but WE do not think really that is what they meant. We think that case really means this, that, on the facts as found by the lower appellate Court, which facts could not be questioned in second appeal, it was not open to this Court to say that Section 41 applied.

9. In other words, the question whether a particular section of an Act does or does not apply to the facts as found is a question of law. The finding as to what the transferee did or did not do to ascertain the power of the transferor to effect the transfer is one of fact, but whether from that finding it can be said that reasonable and sufficient inquiry was made by the transferee as to attract the application of Section 41, T.P. Act, is a question of law. It is, therefore, open to this Court to accept the finding of the lower appellate Court as to what defendant 3 did to enquire into the title of defendant 1 and then proceed to see whether that enquiry in sufficient to attract the application of Section 41.

10. According to the finding of the lower appellate Court on this point, defendant 3 looked into the Record of Rights and was satisfied that the name of defendant 1 alone was entered as the owner and occupant of the land and that the rights of none else were shown there and that after making inquiry with the village officers he was satisfied that she had power to mortgage the land. But he did not inquire from whom defendant 1 had purchased the land. He did not take a search of the record in the Sub-Registrar''s office nor did he make any inquiry as to what rights

Chintaman possessed when he sold the land to defendant 1. Although he stated that the Patil and the talati told him that Chintaman had no interest in the land, the Patil and the talati were not examined.

11. "Reasonable care" means such care as a man of business or a man of ordinary prudence would take, and if defendant 3 had notice of the execution of the deed of gift by Chintaman in favour of Ramchandra, it was his duty to see whether the gift could be revoked by him and whether after his death any interest in the land was left to defendant 1 who had purchased it from him. Defendant 3 says that he had no knowledge of the gift or its revocation by Chintaman. Explanation (1) which was added to the definition of "notice" in Section 3, T.P. Act, by Act 20 [xx] of 1929, provides that where any transaction relating to Immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part thereof, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration. Before this amendment, the Privy Council had laid down in 47 I.A. 2395 that notice should not in all cases be imputed from the mere fact that a document had been registered and that it should be determined in each case whether the omission to search the Register of deeds in the Sub-Registrar''s office amounted to gross negligence on the part of the transferee so as to attract the consequences resulting from notice. But now by the addition of Explanation (1), every person acquiring any Immovable property must be deemed to have notice of other previous transactions relating to the property evidenced by a registered document. The trial Court thought that as the deed of gift was registered in 1927, Explanation (1) which came into force on 1.4 1930, was not applicable. But, in this case, we are concerned with the date of registration of the mortgage deed taken by defendant 3, and as the mortgage deed was registered after Explanation (1) came into force, the mortgagee must be deemed to have had notice of the registered deed of gift and the registered deed of its revocation executed by Chintaman. If he had that notice, it was his duty to make a further inquiry as to whether the gift could be revoked. But admittedly defendant 3 not only made no inquiry in the Sub-Registrar''s office, but he did not even care to see what entries had been made in the mutation register. It may be that under certain circumstances an examination of the revenue records, coupled with the fact of the possession of the transferor, would amount to a sufficient inquiry. But it does not dispense with the duty to make an inquiry in the Sub-Registrar''s office which has now been imposed upon everyone taking a transfer of Immovable property by Expl. (1) of Section 3, T.P. Act. In 35 Bom. 342 Scott C.J., quoted with approval the following passage from the judgment in (1894) 1 Ch. 257 :

A purchaser of property is under no legal obligation to investigate his vendor''s title. But in dealing with real property, as in other matters of business, regard is had to the usual course of business; and a purchaser who wilfully departs from it in order to avoid acquiring a knowledge of his vendor''s title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his

knowledge if he had transacted his business in the ordinary way,

12. Mr. Pradhan argues that Section 41 does not use the expression "without notice", and therefore the question whether defendant 3 had notice of the gift and its revocation is immaterial. It is true that''s. 41, T.P. Act, does not say that the transferee must have taken the transfer "without notice" of the want of title of the transferor, But the question of notice has to be considered in deciding whether the transferee had taken reasonable care to ascertain that the transferor had power to make the transfer. Explanation (1) to Section 3, T.P. Act, fixes every transferee with the possession of the knowledge of all the pre-existing transactions regarding the property effected by registered deeds. This imposes on every one taking a transfer of Immovable property the duty of making a search in the index maintained in the Sub-Registrar''s office, and if he omits to make such a search, he is to be deemed to be guilty of gross negligence in making inquiry into the transferor''s power to make the transfer. As defendant 3 did not take such a search, it cannot be said that he took reasonable care to ascertain the power of defendant 1 to mortgage the land to him. He is, therefore, not entitled to the benefit of Section 41, T.P. Act. The appeal is, therefore, dismissed and the appellant shall pay ''the costs of respondents 2 and 3 in one set.