

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.11.2018

CORAM :

THE HON'BLE MRS.V.K.TAHILRAMANI, CHIEF JUSTICE

AND

The HON'BLE MR.JUSTICE M.DURAI SWAMY

W.P. No.32871 of 2014 and
M.P.No. 1 of 2014

1 Minor S.Kasilingam
S/o.Mr.A.V.R.Sekhar

2 Minor S.Sundaralingam
S/o.Mr.A.V.R.Sekhar

1 & 2 are Rep. by their mother and
Natural Guardian Mrs.S.Vijayalakshmi
at No.127, Coral Merchant Street,
Chennai-1

... Petitioners

v.

1 The Chair Person
Debts Recovery Appellate Tribunal
Indian Bank Building, 4th Floor
Ethiraj Salai, Chennai

2 The Presiding Officer
Debts Recovery Tribunal II
Deva Towers, 4th Floor
Anna Salai, Chennai-2

3 Bank of India
Rep. by its Authorised Officer
Chennai Main Branch
Star House, First Floor
No.30, Errabalu Street
Chennai- 600 001

4 M/s. Auro Clothing Company
Partnership Firm Rep. by its Partners
No. 126/137, Coral Merchant Street
Mannadi, Chennai- 600 001

5 Mr.A.V.R. Sekar
6 Mr.R.Prasad
7 Mrs.J.Vijayalakshmi
8 Mr.A.V.R.Jambulingam
9 Mrs.A.V.R.Jayakantham
10 Mrs.J.Anbukarasi
11 Mrs.P.Vijaya
12 Mrs.V.Kannaki
13 Mr.A.V.R.Mani
14 Mr.A.V.R.Bharani Kumar

.. Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for issue of Writ of Certiorarified Mandamus, to call for the records and quash the impugned order dated 05.05.2014 passed in RA.No.24/2012 by Debt Recovery Appellate Tribunal, Chennai and consequently confirm the order dated 11.01.2012 passed in O.A.No.180 of 2010 by Debts Recovery Tribunal-II, Chennai.

For Petitioners : Mr.M.L.Ganesh

For Respondents : R1 & R2 - Tribunal
Mr.K.Krishnasamy - for R3

R4 to R14 - Given up vide
order dated 29.11.2018

O R D E R

(Order of the Court made by M.DURAI SWAMY, J.)

The petitioner has filed the above Writ Petition to issue a Writ of Certiorarified Mandamus to call for the records and quash the impugned order dated 05.05.2014, passed in R.A.No.24 of 2012 by the Debt Recovery Appellate Tribunal, Chennai and consequently confirm the order dated 11.01.2012, passed in O.A.No.180 of 2010 by the Debts Recovery Tribunal-II, Chennai.

2. The 3rd respondent-bank filed O.A.No.180 of 2010 on the file of the Debts Recovery Tribunal-II, Chennai for recovery of a sum of Rs.30,28,919/- together with future interest. The 4th respondent-partnership firm, represented by respondents 5 to 7 obtained loan from the 3rd respondent bank. One A.V.Ramalingam, who was the 5th defendant in the Original Application, stood as a guarantor for the said loan. The loan was obtained by the respondents 4 to 7 on 12.03.2003 and the guarantor executed the equitable mortgage in respect of his property on the same day i.e. on 12.03.2003.

3. The Writ Petitioners, who are the defendants 12 and 13 in O.A.No.180 of 2010 and who are the grand sons of A.V.Ramalingam contended that their grand-father had executed a settlement deed in respect of the mortgaged property on 05.03.2013 itself and therefore, a charge cannot be created in respect of the said property.

4. It is pertinent to note that the guarantor A.V.Ramalingam had died on 18.02.2006. It is also brought to the notice of this court that the settlement deed dated 05.03.2003 was cancelled by A.V.Ramalingam on 09.09.2003. The Writ Petitioners also contended that a Will was also executed in their favour on 20.12.2002 by the said A.V.Ramalingam. Therefore, they are the absolute owners of the property. But, this contention cannot be accepted for the reason that the Will executed on 20.12.2002 was came into force only after the death of the testator, viz., A.V.Ramalingam on 18.02.2006, whereas, the mortgage was executed as early as on 12.03.2003 in favour of the 3rd respondent-bank. The execution of the settlement deed on 05.03.2003 by A.V.Ramalingam and thereafter executing the mortgage deed on 12.03.2003 in favour of the 3rd respondent-bank is only to defraud the 3rd respondent bank. The 3rd respondent-bank was made to believe that the said A.V.Ramalingam is the absolute owner of the property and therefore, he was allowed to be the guarantor for the loan sanctioned to the respondents 4 to 7. The provisions of Section 43 of the Transfer of Property Act squarely applies to the facts of the present case. The guarantor A.V.Ramalingam had created the mortgage within 7 days from the date of execution of the settlement deed in favour of the petitioners and their father. The 3rd respondent-bank, who are dealing with the public money, cannot be allowed to go remedy less.

5. It is also pertinent to note that the settlement deed was executed by the guarantor A.V.Ramalingam in favour of his son, the 5th respondent and the Writ Petitioners, without receiving any consideration, that too, just 7 days prior to the creation of the mortgage. The contention of the guarantor would clearly establish that the execution of the settlement deed is only to circumvent the creation of mortgage in favour of the 3rd respondent-bank, which was executed within 7 days from the date of execution of the settlement deed.

6. As already stated, Section 43 of the Transfer of Property Act protect the rights of the 3rd respondent-bank.

7.1 In the judgment reported in AIR 1962 SC 847 [Jumma Masjid, Mercara v. Kodimaniandra Deviah and others], the Apex Court held as follows:-

" 6. The sole point for determination in this appeal is, whether a transfer of property for consideration made by a person who represents that he has a present and transferable interest therein, while he possesses, in fact, only a spes successionis, is within the protection of s. 43 of the Transfer of Property Act. If it is, then on the facts found by the courts below, the title of the respondents under Ex. III and Ex. IV must prevail over that of the appellant under Ex. A. If it is not, then the appellant succeeds on the basis of Ex A.

7.1 Section 43 of the Transfer of Property Act runs as follows:-

"Where a person fraudulently or erroneously represents that he is authorised to transfer certain immovable 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 contact 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."

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. There is an exception in favour of transferees for consideration in good faith and without notice of the rights under the prior transfer. But apart from that, the section is absolute and unqualified in its operation. It applies to all transfers which fulfil the conditions prescribed therein, and it makes no difference in its application, whether the defect of title in the transferor arises by reason of his having no interest whatsoever in the property, or of his interest therein being that of an expectant heir.

.....

18. The preponderance of judicial opinion is in favour of the view taken by the Madras High Court in 1915(29) MLJ 733 [Alamanaya Kunigari Nabi Sab v. Murukuti Papiah] and approved by the Full Bench in the decision now under appeal. In our judgment, the interpretation placed on s.43 in those decisions correct and the contrary opinion is erroneous. 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. In the present case, Santhappa, the vendor in Ex. III, represented that he was entitled to the property in praesenti, and it has been found that the purchaser entered into the transaction acting on that representation. He therefore acquired title to the properties under s. 44 of the Transfer of Property Act, when Santhappa became in titulo on the death of Gangamma on February 17, 1933, and the subsequent dealing with them by Santhappa by way of release under Ex. A did not operate to vest any title in the appellant."

7.2 In the judgment reported in 2003(10) SCC 200 [Renu Devi vs Mahendra Singh] the Apex Court held as follows:-

"12. There is yet another aspect of the matter. Assuming it for a moment that on 22.3.1979 the donors had not actually acquired title to the property and yet they had gifted this property to their daughter-in-law and grandsons it cannot be denied that they had a pre-existing interest in the suit property by virtue of their being members of the Joint Hindu Family and their interest and right to partition having been upheld by the so-called preliminary decree dated 13.2.1978. By the subsequent decree dated 24.5.1979 they did acquire a clear and complete title in the same property which they had gifted on 22.3.1979. On the principle of the feeding the grant by estoppel the subsequent acquisition of title under the decree dated 24.5.1979 shall ensure to the benefit of the donee under the deed of gift dated 22.3.1979 for whatever infirmity there was (though we have held that there was none) in the title of Rameshwar Singh and Dhaneshwari Devi stood cured by the final decree 24.5.1979. The doctrine of feeding the grant by estoppel which is in essence a principle of equity stands statutorily recognised in India by Section 43 of the Transfer of Property Act. Section 43 of the T.P. Act

does not in terms apply to the facts of the present case, inasmuch as the deed dated 22.3.1979 is not a transfer for consideration: we are referring to Section 43 above said as illustrative of the doctrine and its statutory recognition in India Law.

13 The rule of feeding the estoppel, as recognized in English law and set out in Rajapakse v. Fernando, (1920) AC 892, 897 is, '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.' Mulla states in the work on Transfer of Property Act (Ninth Edition, 2000, at p. 310).

"The Principle is based partly on the common law doctrine of estoppel by deed and partly on the equitable doctrine that a man who has promised more than he can perform must make good his contract when he acquires the power of performance."

In the judgment reported in 1920(47) IA 239 Tilakdhari Lal v. Khedan Lal, Lord Buckmaster stated the rule of estoppel by deed 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, the instantly passes".

14. Though there is some doubt expressed by Indian scholars and authorities if the common law doctrine of 'the estate instantly passes' is applicable in India but there is no doubt that the doctrine of feeding the estoppel applies in India. The rule is that if a man, who has no title whatever to the property, grants it by a conveyance which in form carries the legal estate, and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes. (See Mulla, *ibid.* p. 312). Equity treats that as done which ought to be done. The doctrine may not apply if the deed of transfer itself was invalid or if the third party has acquired title bona fide, for consideration and without notice. In the present case the execution and registration of deed of gift dated 22.3.1979 is not disputed. Nor is there any illegality or invalidity attaching with the deed. The rule of estoppel by deed would clearly apply. Could Rameshwar Singh and

Dhaneswari Devi have denied there own title in the gifted property qua the donees or could they have disputed their title vesting in the donees by the deed of gift? The answer is 'no'. That being so, the third parties, i.e. the respondents herein who have no title, muchless a pre-existing title in the suit property cannot question the title of donors vesting in the donee. The defect, if any, in the decree dated 13.2.1978 which was nothing except of not being engrossed on requisite stamp papers, was cured on 24.5.1979. The contents of decree came to be engrossed on requisite stamp papers. The decree dated 24.5.1979 would in the facts and circumstances of the case, relate back to the date 13.2.1978."

8. The ratio laid down by the Apex Court squarely applies to the facts of the present case.

9. The Debts Recovery Tribunal erroneously held that the mortgage created by A.V.Ramalingam is not valid. However, the Debt Recovery Appellate Tribunal has rightly reversed the order of the Debts Recovery Tribunal with regard to the mortgage dated 12.03.2003.

10. In view of Section 43 of the Transfer of Property Act, we are of the considered view that the mortgage created by A.V.Ramalingam on 12.03.2003 is valid and the 3rd respondent-bank shall have charge over the property to secure the loan availed by the respondents 4 to 7.

11. In these circumstances, we find no ground to interfere with the order passed by the Debt Recovery Appellate Tribunal. The Writ Petition is dismissed. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

Rj

To

1 The Chair Person
Debts Recovery Appellate Tribunal
Indian Bank Building, 4th Floor
Ethiraj Salai, Chennai

2 The Presiding Officer
Debts Recovery Tribunal II
Deva Towers, 4th Floor
Anna Salai, Chennai-2

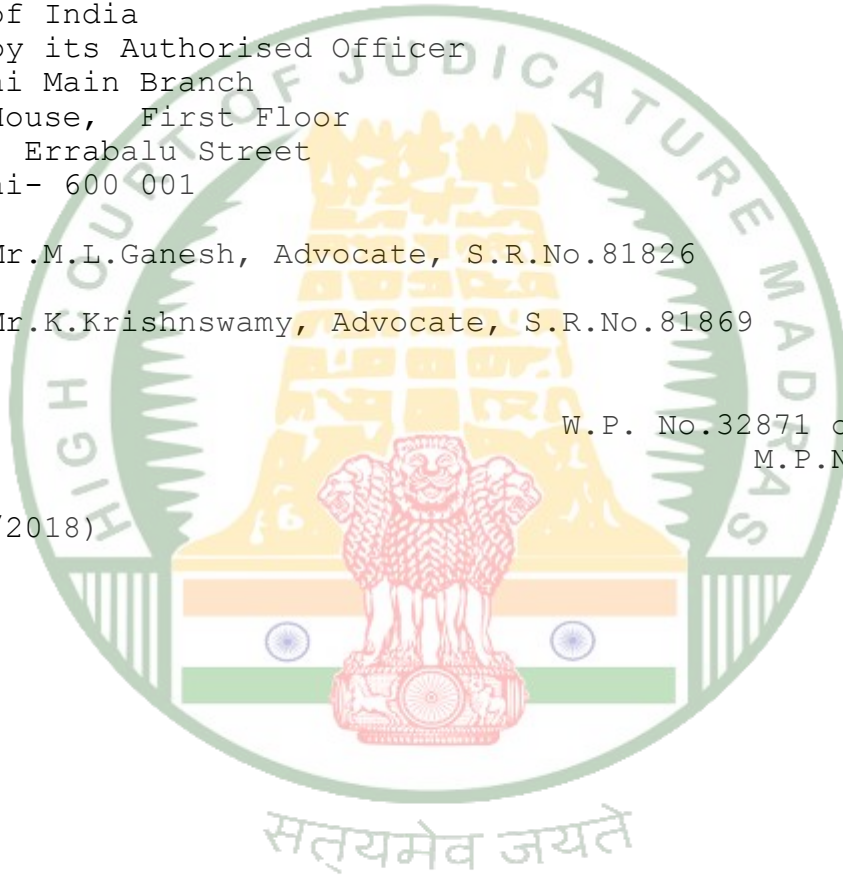
3 Bank of India
Rep. by its Authorised Officer
Chennai Main Branch
Star House, First Floor
No.30, Errabalu Street
Chennai- 600 001

+1 cc to Mr.M.L.Ganesh, Advocate, S.R.No.81826

+1 cc to Mr.K.Krishnswamy, Advocate, S.R.No.81869

W.P. No.32871 of 2014 and
M.P.No.1 of 2014

JP (CO)
SSM(11/12/2018)



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