

**HIGH COURT OF CHHATTISGARH, BILASPUR****Second Appeal No.83 of 2010****Judgment reserved on :04.01.2021****Judgment delivered on :14.01.2021**

Aangan Bai, aged about 50 years, W/o Santarma D/o Kangalu, Resident of Village Mudpara, At Present R/o Murkuta, Post Office – Kura, Tahsil Navagarh, Distt. Durg.

**----- Appellant/Defendant****Versus**

1. Fagu Lal, aged about 50 years, S/o Baniya, R/o Village Mudpaar, P.O. Kheda, Thana Nanghat, Tahsil Navagarh, Distt. Durg

**Respondent/Plaintiff**

2. State of Chhattisgarh through Collector, Durg

**----- Respondents**


---

For Appellant/Defendant: Mr. Parag Kotecha and Ms Bhawna Kotecha, Advocates  
 For Respondent No.1/Plaintiff: Mr. Rajesh Jain, Advocate  
 For Respondent No.2/State: Mr. Ravi Bhagat, Dy.G.A.

---

**Hon'ble Shri Justice Sanjay K. Agrawal****C.A.V. Judgment**

1. The substantial questions of law involved, formulated and to be answered in this second appeal preferred by the defendant are as under:-

- "1. Whether the first appellate court is justified in holding that the sale-deed dated 16/01/1967 executed by Kangalu in favour of plaintiff Fagulal would be valid alienation in view of provision contained in Section 41 of the Transfer of Property Act?
2. Whether the pre-conditions mentioned in

Section 41 of Transfer of Property Act has been complied with or are existing in the present case so as to apply the said provision in favour of the plaintiff ?”

[For the sake of convenience, the parties would be referred hereinafter as per their status shown and nomenclature in the suit before the trial Court].

2. The suit property was originally held by Tihari. Tihari had one daughter Sukhribai. Sukhribai was married with Kangalu and out of her wedlock with Kangalu she had two daughters namely Budharibai and Aaganbai. Kangalu has sold the suit property in favour of plaintiff-Fagu Lal by sale deed dated 16.1.1967 (Ex.P-1) and delivered peaceful possession thereof. Later on, defendant No.1 filed an application for recovery of possession before the Tahsildar, Nawagarh under Section 250 of the Chhattisgarh Land Revenue Code, 1959 (hereinafter called as 'Code'), which was granted by the Tahsildar by order dated 14.5.2004 (Ex.D-2) and affirmed by the Sub-Divisional Officer, Bemetara on appeal preferred by other side and thereafter on 16.6.2004 the plaintiff filed a suit for declaration of title and permanent injunction against defendant No.1 who is granddaughter of Tihari stating inter-alia that

defendant No.1 has no right, title and interest over the suit property.

3. Resisting the suit, defendant No.1 filed her written statement and denied the averments made in the plaint stating inter-alia that she is granddaughter of Tihari and entitled for possession of the property which has rightly been granted by the Tahsildar, Nawagarh and affirmed by the Sub-Divisional Officer, Bemetara and as such, the plaintiff has no right and title over the suit property as Kangalu has no right and title to alienate the suit property in favour of the plaintiff.

4. The trial Court upon appreciation of oral and documentary evidence available on record, by its judgment and decree dated 31.12.2008, dismissed the suit. On appeal being preferred by the plaintiff, the first appellate Court allowed the appeal by invoking Section 41 of the Transfer of Property Act, 1882 (hereinafter called as 'TP Act') and decreed the suit of the plaintiff, against which, this second appeal under Section 100 of the CPC has been preferred by the appellant/defendant, in which substantial questions of law have been formulated by this Court, which have been set-out in the opening paragraph of this judgment.

5. Mr.Parag Kotecha and Ms Bhawna Kotecha, learned counsel for the appellant/defendant, would submit that the first appellate Court is absolutely unjustified in invoking Section 41 of the TP Act as there is no pleading in terms of proviso to Section 41 of the TP Act as the plaintiff has not taken reasonable care to ascertain that Kangalu had the power to make the transfer of the suit property in his favour and has also not pleaded the fact that he has acted in good faith in purchasing the property from Kangalu in view of the fact that Tihari was admittedly the actual owner of the suit property, as such, the judgment and decree of the first appellate Court deserves to be set aside and the suit be dismissed. He would rely upon the judgment of this Court passed in Second Appeal No.79 of 2009 (**Suresh Kumar and others v. State of Chhattisgarh and others**), decided on 20.11.2019.

6. On the other hand, Mr.Rajesh Jain, learned counsel for respondent No.1/plaintiff, would support the impugned judgment & decree and submit that Kangalu was son-in-law of Tihari and said Tihari stood as witness in sale deed dated 16.01.1967 (Ex.P-1), therefore, it was impliedly consented by Tihari in the said sale deed, as such, the provision contained

in Section 41 of the TP Act has rightly been invoked by the first appellate Court, which is strictly in accordance with law and no interference is called for in exercise of second appellate jurisdiction under Section 100 of the CPC and the appeal deserves to be dismissed.

7. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the records with utmost circumspection.

8. In order to answer the aforesaid two substantial questions of law, it would be appropriate to notice Section 41 of the TP Act, which states as under:-

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

9. From a careful perusal of the aforesaid provision, it is evident that to avail protection available under Section 41 of the TP Act, the following requirements need to be established:-

a. The transferor is the ostensible owner of the property. Ostensible as per the Black's

Law Dictionary is a word used to describe something that is apparent or obvious. Meaning thereby, ostensible owner is one who is not the real owner but an apparent or obvious owner of the property, discernible from the facts and circumstances of each case.

b. There should be consent of the real owner for the transaction, implied or express.

c. Sale is for a consideration.

d. The transferee has acted in good faith, taking reasonable care to ascertain that the transferor had power to transfer and an ostensible owner is one who has all indicia of ownership without being the real owner. It must be shown that with the consent of the true owner, the ostensible owner was able to represent himself as the owner of the property to the purchaser for value without notice.

**10.** In the matter of Gurbaksh Singh v. Nikka Singh and another<sup>1</sup> the Supreme Court has held that Section 41 is an exception to the general rule that a person cannot confer a better title than what he has. Being an exception the onus certainly is on the transferee to show that the transferor was the ostensible owner of the property and that the transferee had, after taking reasonable care to ascertain that the transferor had power to make the transfer, acted in good-faith.

**11.** Similarly, in the matter of Crystal Developers v. Asha Lata Ghosh and others<sup>2</sup>, it has been held by the Supreme Court that where a transferee for valuable

---

<sup>1</sup> AIR 1963 SC 1917

<sup>2</sup> (2005) 9 SCC 375

consideration seeks protection under section 41 of the T.P. Act, the transferee must show that the real owner had permitted the apparent owner either by express words, consent or conduct to transfer the property in favour of the transferee.

12. In the matter of Anatula Sudhakar v. P. Buchi Reddy (Dead) by LRs and Ors.<sup>3</sup>, the Supreme Court has held that the party has to make specific pleadings to attract the benefit of Section 41 of the Transfer of Property Act, 1882.

13. Similarly, the Supreme Court in the matter of Suraj Rattan Thirani and others v. Azamabad Tea Co. Ltd. and others<sup>4</sup> has clearly held as under:-

"16. In order that S. 41 of the Transfer of Property Act could be attracted, the respondents should prove that Ismail was the ostensible owner of the property with the consent of his co-sharers and besides that they took reasonable care to ascertain whether Ismail had the power to make a transfer of the full 16 as. Interest. Now, the facts however were that except the property being entered in the revenue records in Ismail's name, and that the management of the property was left by the co-sharers with Ismail, there is not an iota of evidence to establish that Ismail was put forward by them as the ostensible owner of the property. ..."

14. In the light of legal position noticed hereinabove, it has to be seen as to whether there is specific pleading to attract the benefit of the

---

3 (2008) 4 SCC 594

4 AIR 1965 SC 295

provisions contained in Section 41 of the TP Act is available in the case particularly in the plaint.

15. A careful perusal of the plaint would show that the plaintiff [purchaser from Kangalu] has averred in the plaint that Kangalu was bhumiswami and title-holder of the suit land and he was also in possession of the suit land and from Kangalu, he has purchased the suit land and thereby became title-holder of the suit land, as such, there is no pleading that though Tihari was the actual owner and Kangalu was the ostensible owner or having title of ostensible owner and the plaintiff after taking reasonable care to ascertain that Kangalu, transferor, has the power to make the transfer of the suit property acted in good faith. The plaint is blissfully silent with regard to the requirement of Section 41 of the TP Act. It was incumbent on the part of the plaintiff to make the specific pleading to invoke Section 41 of the TP Act as held by the Supreme Court in Anatula Sudhakar (supra). In absence of pleading, no evidence can be allowed to let in or if the evidence has been let in, it cannot be taken for the purpose of invoking Section 41 of the TP Act. Though there was no such pleading to invoke Section 41 of the TP Act, the first appellate Court has held that since Tihari was

admittedly title-holder of the suit land, but Kangalu, seller, was his son-in-law and sale deed dated 16.1.1967 (Ex.P-1) by which Kangalu has transferred the suit land in favour of plaintiff, said Tihari stood as witness, therefore, the requirements of Section 41 of the TP Act are satisfied. Such a finding recorded by the first appellate Court is clearly erroneous and runs contrary to the provisions contained in Section 41 of the TP Act. The plaintiff did not make the specific pleading to invoke Section 41 of the TP Act and did not claim that Kangalu was the ostensible owner of the property and there was consent of Tihari in the said transfer, it was for consideration and the plaintiff has acted in good faith and has also taken reasonable care to ascertain that Kangalu has power to transfer the suit land. Thus, finding recorded by the first appellate Court that since Tihari, original owner, stood as witness to sale deed executed by Kangalu in favour of the plaintiff and Kangalu was son-in-law of Tihari, real owner, is clearly contrary to Section 41 of TP Act and liable to be set aside.

16. Accordingly, it is held that the plaintiff has failed to plead and establish the requirements of Section 41 of the TP Act and thereby the first

appellate Court committed legal error in holding that pre-conditions for invocation of Section 41 of the TP Act are available, as such, the judgment and decree of the first appellate Court is set-aside and that of the trial Court is restored. The substantial questions of law are answered in favour of the defendants and against the plaintiff.

17. The second appeal is allowed to the extent indicated hereinabove leaving the parties to bear their own cost(s).

18. Appellate decree be drawn up accordingly.

Sd/-

(Sanjay K.Agrawal)  
Judge

B/-