Toppersnotes
Unleash the topper in you

TELANGANA

Judicial Services Exam

CIVIL JUDGE (Junior Division)

High Court of Telangana

Judgement

Volume - 3

SIERRA INNOVATIONS

TELANGANA JUDICIARY SERVICES

CONTENTS

[Section 43 of Transfer of Property Act, 1882]

Transfer by Erroneous Representation of Title Will Hold Good If Transferor

Acquires title later,

Tanu Ram Bora

Versus

Promod Ch. Das (d) through lrs. And others

Division Bench

Hon'ble L. Nageswara Rao & M. R. Shah JJ.
M. R. Shah, J.
Dated: February 8, 2019

Law Point

After the amended Act 20 of 1929, u/s 43 of TPA, it doesn't matter whether the transferor acted fraudulently or innocently in making the representation and what matters is that the transferor/ vendor makes a representation and the transferee/ vendee has acted on it.

Brief facts

The Appellant (original plaintiff purchased the suit land by a registered sale deed of from Late Pranab Kumar Bora, hushand of original Defendant No.2 and Father of original Defendant Nos. 3 to 8 on 06/01/1990.

The suit property/land was declared as ceiling surplus land in the year of 1988 and consequently, the same was acquired by the Government. However, subsequently on 14/09/1990, the suit land was again declared ceiling free.

Thereafter, the Appellant mutat ' the land in his name and his name was recorded in the Sadar Jambandi. The original Defendant no, 1 jan ex-Police officer) illegally entered into the suit land on 09/04/1995.

The Appellant petitioner immediately filed a suit in the court of Ld. Civil Judge praying:

* for the possession of the suit land by evicting Defendant no. 1
* for a decree of declaration declaring his right, title and interest over the suit land and;

Decision of the trial court

The Ld. Trial Court decreed the suit in favour of the Appellant petitioner and held that the Appellant purchased. The suit land by valid document and has got right, title and interest over suit land.

Assailing the judgment of the Ld. Trial Court, the Defendant no. 1 filed an appeal before the First Appellate Court.

Decision of the first appellate court

The First Appellate Court allowed the appeal of the Defendant no. I and remanded back the matter to the Ld. Trial Court, framing an additional issue to the effect Whether the suit land was declared as a ceiling surplus land and as such it was acquired by the Government in the year 1988 and as such whether the vendor had any saleable right to sell the suit land to the plaintiff on 6/01/1990.

The Trial Court after considering the additional issue dismissed the suit on merits and held that the disputed land was declared as ceiling surplus land by Government and therefore, Late Pranab Kumar Bora, the vendor, had no right to sell the suit land by sale deed and consequently. The Appellant has no right, title and interest over the suit land.

Assailing the judgement of Id. Trial Court an appeal was preferred by the Appellant plaintiff to the First Appellate Court, which was dismissed and the Court further confirmed the judgement of the Ld. Trial Court and also concluded that the Defendants' right over the suit land was not established u/s 50 of TPA. Hence, the right of original Defendant no. 1 over the suit land was also declined,

Decision of the high court

The High Court dismissed the appeal preferred by the Appellant and confirmed the judgement and decree passed by the First Appellate Court inter alia of the Trial Court.

An appeal was then preferred by the aggrieved Appellant in the Hon'ble Supreme Court.

Contention of the Appellant

The counsel for the Appellant vehemently submitted as follow!

* The Courts below have not at all considered Section 43 of TPA.
* It is an admitted position that after the execution of the sale deed the suit land was subsequently made ceiling free and thereby the sale deed became a valid sale deed and in the view of section 43 of TPA, the right of the Appellant in the suit land are protected pursuant to the sale deed. The Counsel heavily relied upon the decision of the Hon ble Supreme Court in Ram Pyare v. Ram Narain and Other (1985) 2 SCC 162 and Jumma Masjid v. Kodimaniandra Deviah, AIR 1962 SC 847.
* The Trial Court as well as the first Appellate Court failed to appreciate the fact that the Appellant approached the court when the original Defendant No. 1 illegally entered into the suit land.
* The First Appellate Court has specifically held against Defendant no. 1, that he also has no right, title and interest on the suit land on the basis of the agreement to sell as none of theingredients of Section 53A of TPA are satisfied and because no appeal is preferred against the order of the first Appellant court then, it had attain finality.
* The Defendant no. 2 to 8, the legal heirs of the original vendor, never challenged the registered sale deed and also never claimed any right. Title or interest in the suit land.

Contention of defendants

Shri Harisharan Ld. Counsel appearing for Defendant (i.e. Defendant No. IS LR's (1 and 6)) submitted that:

* There are concurrent findings of facts by all the courts below that the sale deed was executed in favour of the Appellant but the land in question was a government land and the original owner had no right, title or interest

in the suit land and consequently, the Appellant, also, will not have any right.

* For getting protection u/s 43 of TPA, the vendor has to prove that the transferor acted fraudulently or erroneously represented, but in the present case, these ingredients are not satisfied

Issue

Whether the Appellant can take protection us. 43 of 1882 Act, claiming his right, title and interest in the suit land.

Observation of the Hon'ble supreme court

The Hon'ble Supreme Court Blade following observations:

1. The heirs of the original vendor are not contesting the proceeding and they have never disputed the right title and interest of the Appellant.
2. There is no record to show that the Appellant was informed specifically at the time of execution of the sale deed that the land in question in ceiling surplus land. In these circumstances, Section 43 of1 882 Act, is highly relied upon.
3. In Ram Poare (Supra), it was observed and held by the Hon'ble Supreme Court that as the sale deed in favour of the vendee was result of an erroneous representation of the vendor, thereafter the son of the vendor cannot claim to be transferees in good faith and therefore their suit for cancellation of the sale deed would not be maintainable.
4. In the case of Jumma Masjid (Supra), the following observation are made by the Hon'ble Supreme Court:
   (i) Section 43 of TPA embodies rule of estoppel and enacts that a person who makes a representation shall not be heard to allege the contrary as against the person who act on the representation.
   (ii) It is immaterial whether the transferor acts bonafide or fraudulently in making representation.
   (iii) The only material to find out whether in fact the transferce has been misled.
   (iv) After the amended Act 20 of 1929, it doesn't matter whether the transferor acted fraudulently or innocently in making the representation and what matters is that the transferor/vendor makes a representation and the transferce/ vendee has acted on it.

Decision of the Hon'ble Supreme Court

Under the facts and circumstances of the case, the Hon'ble Supreme Court held that the rights of the Appellant in the suit land by a sale deed would be protected by the operation section $3 of TPA.

Therefore, the findings recorded by all the courts below that the Appellant plaintiff has no right, title and interest in the suit land' cannot be sustained and deserves to be quashed and set aside.

Further, other reliefs ie decree for return of possession and for permanent injunction are deserve to be granted, as the First Appellate Court has specifically held that the defendant no.1 has no right, title and interest in the suit land and the said finding attained, finality. Thus, defendant no. I cannot be permitted to be continuing in possession.
For reason stated above, the present appeal is allowed and the judgment and decree passed by the Ld Trial Court, confirmed by the first Appellate Court are hereby quashed and set aside.

Not always necessary that attesting witnesses should actually see the testator sign the will

Ganesan (d) through lrs

Versus

Kazanjian and others

(Supreme court order)

Coram: Hon'ble Mr. Ashok Bhushan j.

Hon'ble Mr. Navin Sinha j.

Delivered on: 11 July, 2019

Law Point

Section 63 (C) of the Indian Succession Act, 1925 reads as follows.

"63 (c/ The Will sholl be attested by two or more Witnesses, cach of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the restator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but if shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

Brief facts

The appellant filed a suit claiming share in the suit properties asserting them to be joint family properties.

Observation of the trial court

The Trial Court held that the suit property was the self-acquired property of the deceased who died intestate and genuineness of the Will had not been established in accordance with the law, entitling the appellant to 1/5" share. The appeal of the defendant was allowed holding that the signature of the testator was not in dispute and the testator was of sound mind. The Will was executed in accordance with Section 53 (c] of the Indian Succession Act, 1925 (hereinafter called "the Act") and proved by the attesting witnesses DW 3 and DW 4. The second appeal by the appellant was dismissed.

Contentions of the Appellant

The appellant submitted that the Will was not signed by the testator in presence of the two attesting witnesses. Neither had the attesting witnesses signed together in presence of the testator. Therefore, the genuineness of the Will cannot be said to have been established in accordance with the provisions of Section 63 (c) of the Indian Succession Act, 1925.

Contention of the defendant

The defendant contended that the attesting witnesses had received from the testator a personal acknowledgement of his signature on the Will. The Will was duly registered and the attesting witnesses had signed simultaneously in presence of the Sub- Registrar after the testator had signed

Observation of the apex court

The appeals raise a pure question of law with regard to the interpretation of Section 63 (c) of the Act The signature of the testator on the will was undisputed. Section 63 (c) of the Succession Act requires an acknowledgement of execution by the testator followed by the attestation of the Will in his presence. The provision gave certain alternatives and it was sufficient if conformity to one of the alternatives was proved. The acknowledgement might assume the form of express words or conduct or both, provided they unequivocally prove an or asked a person to attest his Will, acknowledgement on part of the testator. Where a testator asked a person to attest his will, it was a reasonable inference that he was admitting that the Will had been executed by him.

There was no express prescription in the statute that the testator must necessarily sign the will in presence of the attesting witnesses only or that the two attesting witnesses must put their signatures on the will simultaneously at the same time in presence of each other and the testator. Both the attesting witnesses deposed that the testator came to them individually with his own signed Will, read it out to them after which they attested the Will.

1. In H. Venkata CHALA Iyengar us. B.N. Thimma Jamma And others, AIR 1959 SC 443. It was observed as under-
   Ordinarily when the evidence adduced in support of the will is disinterested, suits factory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of the propounded. In other words, the onus on the propounded can be taken to be discharged on proof of the essential facts just indicated."
2. In Pachigotta Venkata RAO and others us. Palepu Venkateswar ARAO And others, AIR 1956 Andhra], it was observed as under –
   "There is nothing wrong, as was thought by the learned Subordinate Judge, for a testator to get the attestation of witness after acknowledging before them that he had executed and signed the Will. It is not always necessary that the attesting witness should actually see the testator signing the Will. Even an acknowledgement by him would be sufficient."

Decision of the court

The appeals lack merit and were dismissed
Sale with a Mere Condition of Re-transfer Is Not a Mortgage

Sopan (dead) through his l. R.

Versus

Syed Nabi

JULY 16, 2019 Supreme Court
Coram: R. Banumathi, A.S. Bopanna JJ.
Delivered by: A.S Bopanna J

Law point

1. A sale with a mere condition of re-transfer is not a mortgage
2. If the sale and agreement to repurchase are embodied in separate documents then the transactions cannot be a mortgage by conditional sale irrespective of whether the documents are the contemporaneously executed.

Brief Facts

The respondent (plaintiff) and the appellant (defendant) were known to each other and due to such acquaintance, the respondent (plaintiff) had taken money from the respondent (defendant) as and when such financial assistance was required. At a stage when the respondent (plaintiff) received a sum of Rs.5, 000/-, the same was construed as the consideration for the land owned by the respondent (plaintiff) bearing Survey No.2/A measuring 6 acres 2 guntas and the appellant (defendant) already being put in possession of the said property. A registered sale deed dated 10 December, 1968 was executed in favour of the appellant (defendant). A separate agreement dated 10 December, 1968 was also entered into between the parties whereby the respondent (plaintiff) had agreed to repay the said amount and secure re-conveyance of the property.

Another agreement was entered into on 29 August 1969 between the parties under which the respondent (plaintiff) agreed that he had taken Rs.5, 000/- from the appellant (defendant) and the possession of the land was given.

In addition, respondent (plaintiff) had received a sum of Rs.2, 224/- without any interest, in all Rs.7, 224/-, the respondent (plaintiff] agrees) if the amount was not repaid on "Velamavasya" the deed would be considered as sale deed.

The respondent (plaintiff) claimed that he was prepared to repay the amount so as to secure back the property and, in that regard, construed the transaction as a mortgage, and got issued a demand notice dated 10 September, 1980 through his Advocate. The appellant (defendant) got replied the said notice on 23 September, 1980 and disputed the claim put forth by the respondent (plaintiff).

The respondent (plaintiff), therefore, filed the suit. The suit in question was filed seeking a judgment and decree for redemption of mortgage and recovery of the possession of the suit Scheduled land. The appellant (defendant) entered appearance and filed the written statement disputing the claim. The trial court though had framed several issues. The entire consideration rested on the construction of the sale deed dated 10 December, 1968 and the contemporaneous documents, so as to consider whether the same amounts to a mortgage by conditional sale or as to whether it was a sale transaction.

Decision of Civil Court

The Civil Court by its judgment dated 20 September, 1984 decreed the suit whereby the redemption of the suit land was ordered treating the transaction to be a mortgage.

The appellant (defendant) in the above said suit claiming him to be aggrieved by the said judgment passed by the civil judge filed an appeal before the lower appellate court i.e. the Additional District Judge.

Decision of Lower Appellate Court

The Lower Appellate Court on re appreciation of the evidence on record and consideration of the legal position had through its judgment dated 29 June, 1990 allowed the appeal and set aside the judgment and decree of the Civil Court.

Thereafter, the plaintiff (respondent) filed the Second Appeal before the High Court of Bombay.

Decision of High Court

The High Court on answering the substantial question of law in favour of the plaintiff (respondent) had allowed the appeal and consequently decreed the suit.

Thereafter, the appellant (defendant] in the suit was, filed before Supreme Court.

Contention of the Appellant (Defendant)

1. The contention on behalf of the appellant (defendant) was that in addition to the sum of Rs.5, 000/- which was taken by the respondent (plaintiff) earlier and was treated as the sale consideration.
2. A further sum of Rs.2, 224/ was taken by the plaintiff (respondent) and accordingly a total amount of Rs.7, 224/- was agreed to be repaid without interest on the "Velamavasya" and the said understanding was reached on 29 August, 1969.
3. The case, therefore, set up by the appellant (defendant) was that notwithstanding the agreement dated 10 December, 1968 and the document dated 29 August, 1969 where under re-conveyance was agreed, since the amount was not repaid within one year, though the (appellant] defendant had agreed to re-convey the property, the sale deed had become absolute since the respondent plaintiff) had failed to repay the amount and secure the re-conveyance.

Contention of the Respondent (Plaintiff)

1. The respondent (plaintiff) contended that when the documents was admitted by the defendant (appellant) and since it referred to the relationship of debtor and creditor, the sale deed dated 10 December, 1968 was to be construed as a mortgage by conditional sale.
2. The respondent (plaintiff) referred the decision of Supreme Court in the case of P.L. Bapuswami us. N. Pattay Gounder (1966) 2 SCR 918 to contend that it should be construed as mortgage and in that context would also refer to the decision in the case of Pandit Chunchun Jha us. Sheikh Ebadat All (1955) 1 SCR 174 to contend that the subsequent document would rebut the presumption.

3. The respondent (plaintiff) relied upon the decision in the case of Shimabai Mahadeo Kambekar vs. Arthur Import and Export Co., (2019) 3 SCC 191 to contend that the mutation of land in the revenue records did not create of extinguished the title for such land, nor had it any presumptive value on the title.

Observation of Supreme Court

The Apex Court referred Section 58 (c) of the Transfer of Property Act. Section 58(c) is the Mortgage by conditional sale - "Where the mortgagor ostensibly sells the mortgaged. Property.

* on condition that on default of payment of the mortgage money on a certain date the sale shall become absolute
* on condition not on such payment being made the sale shall become void, or
* On condition that on such putamens being made the buyer shall transfer the property to the seller.
* the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale

[Provided that no such transaction shall be deemed to be a mortgage. unless the condition is embodied in the document which effects or purports to effect the sale]".

The Apex Court observed that from a perusal of the proviso to Section 58(c) of the Act, it indicates that no transaction shall be deemed to be a mortgage unless the condition is embodied in the document which effects or pumparts to effect the sale

Therefore, any recital relating to mortgage or the transaction being in the nature of a conditional sale should be an intrinsic part of the very sale deed which would be the subject matter.

Therefore, from the perusal of the document i.c. the sale deed dated 10 December, 1968 made it clear that the document did not disclose that the transaction was one of mortgage or that of a conditional sale.

However, the issue as to whether it should be construct as mortgage had arisen from the agreement dated 10 December, 1968 being a contemporancous document was relied upon by the plaintiff (respondent) to claim that the same indicated that the transaction was a mortgage and the relationship of debtor and the creditor was established by the said document. In addition to above, the document dated 29 August, 1969 was also to be noticed.

It was no doubt true that in the document, it depicted that the sale deed was re-conveyable when the plaintiff (respondent) would repay Rs.5, 000/- to the defendant (appellant) and he land would be re-transferred.

The Apex Court noticed that Supreme Court in the case of Dharmafl Shankar Shinde & Ors, Vs. Rajaram Sripad Joshi (D) Lrs, and Ors. (2019) 6 SCALE 682 had considered the entire conspectus of the provision contained in Section 58(c) of the TPA with reference even to the decisions relied upon by the respondent (plaintiff) and had arrived at the conclusion that a sale with a mere condition of re-transfer is not a mortgage.

It was further held therein that keeping in view the proviso to Section 58(c] of the Act, if the sale and agreement to repurchase are embodied in separate documents then the transactions cannot be a mortgage by conditional sale irrespective of whether the documents are the contemporaneously executed,

It is further held therein that even in the case of a single document the real character of the transaction was to be ascertained from the provisions of the deed viewed in the light of the surrounding circumstances and intention of the parties.

The Supreme Court noticed that in the instant case admittedly the claim of the respondent (plaintiff) was based on the reliance placed on a contemporaneous document.

Hence at the outset, it was evident that the case of the respondent (plaintiff) could not overcome the rigour of law to term it as a mortgage by conditional sale. That apart even if the nature of the transaction was taken note of and in that context if the sale dated 10 December, 1968 was carefully perused, it not only did not indicate any clause to demonstrate it as a mortgage but, on

the other hand, referred to the sale consideration, the manner in which it was received and the (respondent) plaintiff as the vendor by executing the document had assured the appellant (defendant) that he should enjoy possession of the said land ancestrally which, in other words, was an absolute conveyance.

It was also observed by Apex court that even if the agreement dated 10 December, 1968 was taken into consideration; the same could not alter recitals in the sale deed to treat the same as a mortgage by conditional sale. At best the said agreement could only be treated as an agreement whereby the (appellant) defendant had agreed to re cornify the property subject to the repayment being made as provided there under. It was in that circumstance, the document dated 29 August, 1969 was to be viewed.

From a combined reading of documents, it was disclosed that not only the respondent (plaintiff) had not repaid the sum of Ra.5, 000/- with interest but had received a further sum of Rs.2, 224/-, thus in all taking the financial assistance treated as sale consideration to Ra. 7, 124/-, Hence, if the re-conveyance as agreed was to be effected the said amount was to be repaid on "Velamavasya" failing which the right of re-conveyance would be forfeited and the sale deed would become absolute after which even the right of re conveyance would not be available The amount of Rs.2, 224/- was not repaid by the respondent [plaintiff). Therefore, be document could not be considered as a mortgage by conditional sale.

Therefore, in the above background, if the entire transaction was taken into consideration since the amount was not repaid, the appellant (defendant) had acquired absolute right to the property. Hence, he had also initiated mutation promenading's to secure the revenue entries relating to the land in his favour. Though the respondent (plaintim had opposed the proceedings the very contention urged and the Tehsildar by the order dated 23 July, 1 had ordered the revenue entries to be changed to the name of the appellant (defendant). The Change of mutation in the name of the (appellant) defendant was a formidable circumstance to show that the sale deed conveyed absolute right and title to the appellant (defendant].