

1907
January 22.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William
Burkitt.

DAMBAR SINGH AND ANOTHER (PLAINTIFFS). v. JAWITRI KUNWAR
(DEFENDANT). *

Act No. IV of 1882 (*Transfer of Property Act*), section 41—*Transfer by ostensible owner—Owners of property transferred, minors—Guardian incapable of consenting to apparent ownership of transferor.*

Held that the guardian of a minor owner of immovable property is incapable of consenting, even though such consent be express, to a third person holding himself out as owner of the minor's property, so as to enable a transferee from such person to claim the benefit of section 41 of the *Transfer of Property Act, 1882*.

THE facts of this case are briefly as follows:—The plaintiffs Dambar Singh and Shib Sahai Singh were entitled by right of their father Jai Singh to certain immovable property. Whilst these plaintiffs were minors under the guardianship of their mother Rukmin Kunwar, one Beni Singh the plaintiffs' half-brother acted as *sarbarahkar* of his step-mother Rukmin Kunwar. In this capacity Beni Singh sold to Jawitri Kunwar, who was his wife, certain property which was really the property of the minors. On attaining majority the plaintiffs sued to recover from Jawitri Kunwar the property so sold to her by Beni Singh. The Court of first instance, treating the transaction as a sale by an ostensible owner within the meaning of section 41 of the *Transfer of Property Act* gave the plaintiffs a decree conditional upon their repaying to the defendant the sale consideration amounting to Rs. 6,000. Against this decree the plaintiffs appealed to the High Court.

Mr. B. E. O'Connor, Babu Jogindro Nath Chaudhri and Dr. Tej Bahadur Sapru, for the appellants.

Maulvi Muhammad Ishaq, for the respondents.

STANLEY, C.J., and BURKITT, J.—The suit out of which this appeal has arisen, is closely connected with First Appeal No. 231 of 1904, in which we have delivered judgment to-day. In that case it will be remembered that one Beni Singh and his father, Jai Singh, had some litigation which eventually ended in a partition suit, by which Beni Singh took one-half of the property and his father, Jai Singh, remained in possession of the

* First Appeal No. 233 of 1904, from a decree of Pandit Girraj Kishore Datt, Subordinate Judge of Moradabad, dated the 11th of August 1904.

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remainder. Beni Singh's wife was one Jawitri Kunwar. This suit is to recover possession of certain villages which were conveyed by Beni Singh to Musammat Jawitri Kunwar by a sale-deed of the 22nd of January 1886. It is contended that Beni Singh had no title whatever to make that conveyance. This point was not raised in the Court below. Most of the villages conveyed by that sale-deed came to Jai Singh after the partition between him and his son, Beni, on the successive deaths of two widows, Musammat Tulsha and Musammat Khushalo in 1881 and 1883. On their deaths the properties of their husbands, Sher Singh and Dhuma Singh, came to Jai Singh by collateral succession. It is shown that Beni Singh for some time acted as *sarbarahkar* of his step-mother, Musammat Rukmin Kunwar—from the death of Jai Singh in 1885 down to the year 1887. In the latter year Rukmin Kunwar was appointed guardian of the person and property of her minor sons. It was during this period (1885 to 1887), while Beni Singh was acting as *sarbarahkar*, that he executed the transfer to his wife, Musammat Jawitri Kunwar, after having had his name recorded in respect of those villages on his father's death. The transfer purports to have been made in consideration of a sum of Rs. 6,000, which Beni Singh acknowledges to have received from his wife. The plaintiffs appellants, who are the sons of Jai Singh by his wife Musammat Rukmin Kunwar, claimed possession of these villages as part of their father's estate. The Subordinate Judge gave them a decree for possession, but on condition that they should repay to Musammat Jawitri Kunwar the sum of Rs. 6,000, which was said to have been paid by her to her husband as consideration for the sale. The reason which the Subordinate Judge gives for the orders is because it was purchased by Musammat Jawitri Kunwar "in good faith, in lieu of Rs. 6,000 at a time when Beni Singh was the ostensible owner of the property with the implied consent of Musammat Rukmin Kunwar, the mother and guardian of the person and property of the plaintiffs, and Musammat Jawitri Kunwar, a *pardanashin* lady, had acted in good faith after taking reasonable care to ascertain, so far as she could that, Beni Singh had power to transfer the said property to her." We find it difficult to understand exactly the reasons

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given by the Subordinate Judge for refusing to give other than a conditional decree. Presumably this order is passed under the provisions of section 41 of the Transfer of Property Act, that section lays down as follows:—"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, &c., &c." Now the first point to notice in this case is that the consent, express or implied, which is to be given must be that of the persons interested. Who were the persons interested in the villages which form the subject of the deed of conveyance? They were, undoubtedly, the two plaintiffs appellants. They were the only persons who could give such a consent, whether implied or express. But at the time when this transaction took place they were infants of tender years who could not possibly give such consent. Then the learned Subordinate Judge says:—"With the consent of the mother and guardian Musammat Rukmin Kunwar." But Musammat Rukmin Kunwar was not a person personally interested in the property, and we are unable to say that the consent, even if express, given by a guardian to a third party to hold himself out to the world as the owner of the infant's property, would be such a consent as is required by section 41 of the Transfer of Property Act. To hold so would be to open a wide door to fraud. We note the fact that it is admitted on both sides that there is no shred of evidence that consent was given by Musammat Rukmin Kunwar. We would also point out that at the date of the conveyance by Beni to the respondent, Musammat Rukmin Kunwar was not the guardian of the property of her children. For the above reason we are of opinion that the lower Court acted wrongly in imposing in its decree a direction that the appellants should first of all pay Rs. 6,000 to Musammat Jawitri.

Mr. O'Connor, for the appellants, also complains that the lower Court has given mesne profits only from the date of the decree and not from the date of the institution of the suit. We think that as a matter of course on getting a decree for the recovery of mesne profits a successful plaintiff is entitled to mesne profits at least from the date of the institution of the suit. We therefore modify the decree to this extent. For the above reasons we allow

this appeal, and we give the plaintiffs appellants a decree for possession of the property in suit unrestricted by the burden of paying Rs. 6,000 to Musammat Jawitri Kunwar, and we give mesne profits from the date of the institution of the suit. The appellants are entitled to their full costs in both Courts.

We may mention that several objections were filed in this Court after the presentation of the appeal under the provisions of section 561 of the Code of Civil Procedure. According to law, those objections should have been filed within one month from the date of the service of summons on the respondent. Now here it has been shown that the summonses were served on the 5th of December 1904, and these objections were not filed until the 9th of January 1905, that is to say, they were four days late. They should have been filed on the 5th of January at the latest. An attempt has been made to explain this delay by saying that the respondent was away from the village when the summons was served. An affidavit has been put in to support this excuse for the delay. To that affidavit we give very little credit. We cannot understand how the person who swore to its truthfulness, who is the agent of Musammat Jawitri, did not, if his story be true, at once inform her of the service. Further we have before us the affidavit of the process-server who swears that Musammat Jawitri was at the time in her house, that he could not obtain access to her, and he was obliged to affix the summons on the door of the house. We refuse to entertain the objections and reject them with costs.

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burdett.

GOBIND RAM (PLAINTIFF) v. MASIH-ULLAH KHAN AND OTHERS (DEFENDANTS.) *

Pre-emption—Wajib-ul-arz—Custom—Effect of perfect partition, no new wajib-ul-arzes for the new mahals being framed.

Where a village, in which, according to the wajib-ul-arz, a custom of pre-emption existed amongst the co-sharers, was divided by perfect partition into three mahals, but no fresh wajib-ul-arzes were framed for the new mahals, it was held that the custom was either abrogated in its entirety, or remained

* First Appeal No. 72 of 1905 from a decree of Maulvi Maula Bakhsh, Additional Subordinate Judge of Aligarh, dated the 20th of December 1904.

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