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refusing to set aside the *ex parte* decree is reversed and the *ex parte* decree is set aside.

Before Mr. Justice Niamat-ullah and Mr. Justice Rachhpal Singh

1933 *November*, 16

FAZAL HUSAIN (DEFENDANT) *v.* MUHAMMAD KAZIM (PLAINTIFF)*

Transfer of Property Act (IV of 1882), section 41—Transfer by ostensible owner—Consent of real owner to the transfer itself not required by section—Degree of care and inquiry required of the transferee—Entries for 12 years in revenue papers not sufficient—Co-sharers—Exclusive user of common land by one co-sharer—Groves planted by one co-sharer—Right of the others regarding share—Trusts Act (II of 1882), section 90.

For the application of section 41 of the Transfer of Property Act it is essential that the consent of the true owner to the possession of the ostensible owner must continue up to the date of the transfer, but it is not necessary that the transfer itself should be with the consent of the true owner. Section 41 of the Transfer of Property Act enacts a rule which is a species of estoppel, but falling short of the requirements of section 115, Indian Evidence Act. If it is proved that the transfer was made with the consent of the rightful owner, the case would fall within the purview of section 115, Indian Evidence Act, and the other conditions of section 41 need not be satisfied. Such consent will estop the owner, even though the transferee made no inquiries to ascertain that the transferor had power to make the transfer,—a condition which is essential for the application of section 41. *Shafiq-Ullah Khan* v. *Sami-Ullah Khan* (1), discussed.

No hard and fast rule can be laid down as regards the extent to which a transferee from the ostensible owner should, as required by section 41, take reasonable care to ascertain that the transferor had power to make the transfer; each case must necessarily depend on its own circumstances. It cannot be laid down as a general rule that where the transferor was in sole possession for a considerable length of time and was the sole recorded owner, the transferee, who otherwise acts in good faith, is entitled to the protection of section 41, if he satisfied himself by inspecting the revenue records. The only test that can be laid down is that the transferee should show that he acted like a

*First Appeal No. 72 of 1929, from a decree of Krishna Das, Subordinate Judge of Ghazipur, dated the 30th of November, 1928.

(1) (1929) I.L.R., 52 All., 139.

reasonable man of business and with ordinary prudence. Such a person would not be satisfied by merely inspecting the revenue records, but would inquire as to how his vendor acquired the property. If the source of his vendor's title appears to be a transfer, he should call for the title deeds; if it appears to be by inheritance, he would naturally inquire as to who were the heirs of the deceased owner, and if he is satisfied that his vendor was the only heir he is entitled to the protection of section 41, though it may subsequently turn out that there were other heirs as well.

If a co-sharer in zamindari property plants a grove on common land and the other co-sharers do not object to it, the grove should be considered to belong to the former and the site remains as the joint property of all the co-sharers. At the time of partition the claim of the other co-sharers can be adjusted by allotting to them land of the same quality or otherwise compensating them for the separate possession of one-co-sharer alone over the grove. The other co-sharers can not claim to share in the advantages of the grove under section 90 of the Trusts Act; the principle underlying that section is inapplicable because the co-sharer planting a grove cannot be said to be acting in derogation of the rights of the other co-sharers; and he has done it without objection on their part.

The facts material for the purpose of this report may be summarised as follows. Syed Amir Hasan and his sister inherited certain shares in properties which originally belonged to their grandfather Syed Ali Husain. Amir Hasan, however, was in sole possession and his name alone was recorded in the revenue papers; although the sister and her son were maintained by Amir Hasan, they never received any profits from him. Amir Hasan dealt with the property as his own and made certain transfers of portions, describing himself as the owner; one of such transferees was Fazal Husain. Among other things, Amir Hasan planted some groves on joint land. Several years after the death of the sister, her son brought a suit against Amir Hasan and some of the transferees for possession of the share inherited by him in the properties. The defence of Amir Hasan was that his possession had been throughout adverse to the plaintiff's mother and the plaintiff himself and that they had lost their rights by lapse of time. Fazal Husain,

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transferee, raised an additional plea that the transfers in his favour were governed by section 41 of the Transfer of Property Act. The trial court found on all points against the defendants and decreed the suit. On appeal—

Messrs. *Majid Ali* and *S. N. Sahai,* for the appellants.

Mr. *Mushtaq Ahmad,* for the respondents.

NIAMAT-ULLAH and RACHHPAL SINGH, JJ.:—[After setting forth the facts in detail, and after discussing the evidence on the question of adverse possession and coming to the conclusion that adverse possession on the part of Amir Hasan had not been established, the judgment of their Lordships proceeded as follows.]

As regards the groves, which are specified in list A annexed to the written statement of defendant No. 1, the learned Subordinate Judge found that they had been planted by Amir Hasan on common land. The learned Subordinate Judge has allowed the plaintiff a share not only in the site but also in the trees. The only ground on which his decision is based is that ancestral land has been made use of by Amir Hasan, whose possession was on behalf of himself and his sister. He does not find that in planting the groves Amir Hasan acted for himself and his sister, in which case the groves should be considered to have been planted by both. There is nothing to suggest that Amir Hasan acted in that matter in a representative capacity. He was in the habit of treating the ancestral property as his own. We are clearly of opinion that in planting the grove he was actuated by the same considerations which were present to his mind when he made transfers of part of ancestral property. While on the one hand we do not consider that Amir Hasan should be deemed to have been in adverse possession of the plots on which he planted those groves, we do not think, on the other hand, that his sister, who did not object to her brother planting the groves, can be considered to be a sharer not only in the land but also in the trees planted by him. The groves

should be considered to belong to Amir Hasan and his heirs but the site should be considered to be the property of all the co-sharers. At the time of partition the claim of the other co-sharers can be adjusted by allowing to them land of the same quality in lieu of the grove land or otherwise compensating them for the separate possession of Amir Hasan's heirs. The learned advocate for the plaintiff referred us to section 90 of the Indian Trusts Act and argued that the advantage gained by Amir Hasan should be allowed to be shared by his co-owners, in derogation of whose rights the groves were planted. We do not think that the principle underlying that section is applicable to the circumstances of the present case. It is a common practice for one of the co-sharers to be in separate possession of part of the common land, the other co-sharers being left to their remedy by partition and obtaining compensation by the award of land of a similar quality. Amir Hasan cannot be considered to have acted "in derogation" of the rights of the other co-sharers. The fact that out of common land one co-sharer appropriates to his exclusive use a portion thereof, without objection by the others, cannot be considered to be in derogation of the rights of other co-sharers, who can be compensated by other land of similar quality being allotted to them. The acquiescence of the co-sharers concerned has also a material bearing in determining the right of the co-sharer planting a grove for himself. There is no suggestion that Mt. Habiba Bibi or the plaintiff took exception to Amir Hasan planting the groves. For these reasons we are of opinion that the learned Subordinate Judge should have dismissed the plaintiff's claim to a share in the groves. His decree requires modification in this respect.

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The appeal of Fazal Husain, defendant No. 6, has raised only one question, namely, whether he is entitled to the benefit of section 41 of the Transfer of Property

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Act. Mr. *Mushtaq Ahmad* referred us, at the outset, to the language of section 41 and the interpretation thereof in a case decided by a Division Bench of this Court. To examine his argument we must quote the language of section 41, which runs as follows: "Where, with the consent, express or implied, of the person 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 authorized 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."

It is argued that section 41 cannot apply unless (1) the transferor was an ostensible owner with the consent, express or implied, of the real owner, and (2) the transfer was made with such consent of the real owner. The language and the punctuation of the section lend some support to this construction; but this view leads to a great anomaly. Section 41 enacts a rule which is a species of estoppel but falling short of the requirements of section 115, Indian Evidence Act. If it is proved that the transfer was made with the consent of the rightful owner, the case would fall within the purview of section 115, Indian Evidence Act, and the other conditions of section 41 need not be satisfied. Such consent will estop the owner, even though the transferee made no inquiries to ascertain that the transferor had power to make the transfer,—a condition which is essential for the application of section 41. Reliance is placed on *Shafiq-Ullah Khan* v. *Sami-Ullah Khan* (1), in which SULAIMAN, J., is reported to have observed as follows at page 143: "Now under section 41, not only should the transferor be the ostensible owner of the property with the consent, express or implied, of the true owner but he must also transfer the same with such consent, express or implied. There can be no doubt

(1) (1929) I.L.R., 52 All., 139.

that the adverbial clause 'with the consent, express or implied' modifies not only the verb 'is' but also the verb 'transfers'." Taken apart from the context, this dictum supports the contention of the learned advocate for the transferee. We do not think the learned Judge meant the observation to be taken literally. He was considering a case in which a person, who was the ostensible owner with the consent, express or implied, of the true owner, made a transfer during the pendency of a suit by such owner in which the title of the ostensible owner had been questioned and which had been instituted only five days before the date of the transfer. On the one side it was argued that the transfer was affected by the rule of *lis pendens* and was not, therefore, binding on the true owner, who eventually obtained a decree against the transferor, the ostensible owner. On behalf of the transferee *pendente lite* it was argued that he was protected by section 41 of the Transfer of Property Act. The learned Judge pointed out that though the transferor was the ostensible owner with the consent, express or implied, of the true owner till the date of the suit, but the true owner expressly repudiated the right of the transferor by instituting his suit, so that, on the date of the transfer the ostensible ownership was not with the consent of the rightful owner. After the sentences quoted above, the learned Judge further observed that "It must, therefore, be held that the consent, express or implied, must continue up to the time of the transfer." The essence of his decision is that the consent of the true owner to the possession of the ostensible owner must continue to the date of the transfer, before section 41 of the Transfer of Property Act can apply.

PULLAN, J., who was the other learned Judge forming the Division Bench, observed at page 148 that "the section lays down as a preliminary that the transaction must be with the consent, express or implied, of such persons (rightful owners). It is not enough for the

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transferee to say that, as far as he knows, the other persons interested in the property have no objection to the transfer. He must take some definite step to ascertain whether they consent or not. This again does not mean that they consented in the past, but the transferee must ascertain if they consent at the time of transfer. A person who has filed a suit challenging the whole right of the transferors to dispose of the property *ipso facto* does not consent to the transfer." The last sentence, quoted above, taken by itself and apart from the context in which it occurs, is apt to give an inaccurate impression as to what the learned Judge intended to hold. Clearly his intention was to emphasise that the transferor should be shown to have been the ostensible owner, with the consent, express or implied, of the true owner; and that such consent should subsist on the date of the transfer. We do not think that according to the true interpretation of section 41, the transfer itself should be with the consent of the true owner. Nor do we think that the learned Judges intended to take that view. If they did, their observations, which are in the nature of *obiter dictum*, are not binding on us.

The learned advocate for the transferee strongly relied on *Mul Raj* v. *Fazal Imam* (1) and *Mubarak-un-nissa Bibi* v. *Muhammad Raza Khan* (2) for the proposition that where the transferor was in sole possession for a considerable length of time and was the sole recorded owner of the property in suit, the transferee, who otherwise acts in good faith, is entitled to the protection afforded by section 41 of the Transfer of Property Act, if he satisfied himself by inspecting the revenue records. We do not think that any hard and fast rule can be laid down as regards the extent to which a transferee from the ostensible owner should "take reasonable care to ascertain that the transferor had power to make the transfer". Each case must necessarily depend on its own circumstances. We do not think that the learned

(1) (1923) I.L.R., 45 All., 520. (2) (1924) I.L.R., 46 All., 377.

Judges meant to lay down any general rule of the kind above referred to. In our opinion the only test that can be laid down is that the transferee should show that he acted like a reasonable man of business and with ordinary prudence. We do not think that such a person would be satisfied by merely inspecting the revenue records which show that the transferor had been in possession for more than 12 years. The most natural question that would suggest itself to him is how his vendor acquired the property which he proposes to sell. If an inquiry as regards the source of his vendor's title elicits the information that he himself obtained it from another by transfer, he should call for title deeds. If, on the other hand, he finds that the vendor is in possession as an heir to a deceased relation, he would naturally inquire as to who were the heirs of the deceased at the time of his death; and if he is satisfied that the vendor was the only heir, he is entitled to the protection of section 41, though it may subsequently appear that the property belonged to some one else, wholly or in part, of whose existence he was not aware in spite of the inquiry on the above lines. In the case before us the transferee, Fazal Husain, did not go into the witness-box. The explanation offered on his behalf is that he generally resides in Cawnpore, where he carries on business. It is, however, not disputed that he is a resident of village Nonahra, where Amir Hasan resided, and that he occasionally visits his native place. It is true that his nephew, Sulaiman, is in charge of his affairs, and it was through him that the transfers in question were taken by him. Sulaiman has given his evidence which shows that he questioned the patwari and inspected the settlement papers and learnt from both those sources that Amir Hasan was the owner. He says that he was not aware that the plaintiff was the nephew of Amir Hasan, or that the latter had any co-sharers. He is 43 years of age. Fazal Husain himself is much older. He is described in the plaint as 55 years

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of age. We do not think that Fazal Husain or Sulaiman were unaware of the fact that Amir Hasan had a sister, whose son the plaintiff is. They had every reason to believe that Amir Hasan derived his interests from his ancestors. We do not think that Fazal Husain or Sulaiman can, in the circumstances, be considered to have taken reasonable care to ascertain that the transferor had power to make the transfer. He should not have merely accepted the information given by the patwari and the settlement record, but should have asked Amir Hasan or someone else who was in a position to know, assuming Fazal Husain himself was not aware of the fact, whether Amir Hasan's father had left any other heir. It seems to us that Fazal Husain took it for granted that Amir Hasan's possession for more than 12 years conferred an indefeasible title on him. Relying on that view of Amir Hasan's position, Fazal Husain took the transfers in question. He did not care to obtain any legal advice, which would have warned him against accepting Amir Hasan's title in view of the fact that his sister was also an heir, and that possession of one co-sharer is not ordinarily adverse to the other. The position might have been different if Fazal Husain was not aware of the fact that Amir Hasan's father had left a daughter, of whose existence he was not told on inquiry being made of persons who were in a position to be aware of her existence. The lady appears to have lived in her brother's house, and seldom visited her husband's residence in the district of Patna. This is not a case in which the transferee had either no means of knowledge, or matters were intentionally or otherwise misrepresented to him. In these circumstances we think that the learned Subordinate Judge rightly held that Fazal Husain, defendant No. 6, is not entitled to the protection of section 41 of the Transfer of Property Act. His appeal must, therefore, fail.

The result is that appeal No. 72 of 1929 is dismissed with costs. Appeal No. 97 of 1930 is partly allowed, and

the decree of the lower court is so far modified that the plaintiff's suit in respect of the groves mentioned in list A annexed to the written statement of Amir Hasan is dismissed. In other respects the appeal is dismissed.

MISCELLANEOUS CIVIL

Before Mr. Justice King and Mr. Justice Rachhpal Singh

GAURI SHANKAR AND OTHERS (APPLICANTS) *v.* KASHI NATH AND ANOTHER (OPPOSITE PARTIES)*

1933 *November*, 16

Limitation Act (IX of 1908), section 12(2)—Application for review of judgment—Time spent in obtaining copy of judgment excluded.

Although, as ruled in the case of *Wajid Ali Shah* v. *Nawal Kishore* (1), it is not necessary that an application for review of judgment should be accompanied by a copy of the judgment sought to be reviewed, yet if, in fact, the applicant does obtain a copy of the judgment and files it with his application for review, the time spent in obtaining the copy should be excluded under section 12, sub-section (2) of the Limitation Act.

Messrs. *N. Upadhaya* and *Mansur Alam*, for the applicants.

Mr. *K. Verma*, for the opposite parties.

KING and RACHHPAL SINGH, JJ.:—This is an application under section 5 of the Limitation Act for condoning the delay of 4 days in filing an application for review of judgment.

The judgment was delivered by a Bench of this Court on the 12th of February, 1932. The applicant applied for a copy of the judgment on the same date. The copy was ready on the 26th of February, 1932, and delivery of the copy was actually taken on the 4th of March, 1932. The period of limitation for filing an application for review of judgment would ordinarily have expired on the 11th of May, 1932. The applicant did not make this application until the 30th of May, 1932.

*Review of judgment in First Appeal from Order No. 116 of 1931.

(1) (1893) I.L.R., 17 All., 213.