

*Privy Council Appeal No. 125 of 1929.*  
*Allahabad Appeal No. 35 of 1928.*

**Shankar and another** - - - - - *Appellants*

v.

**Daooji Misir and others** - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 10TH MARCH, 1931.

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*Present at the Hearing :*

LORD BLANESBURGH.

LORD ATKIN.

SIR LANCELOT SANDERSON.

[*Delivered by* SIR LANCELOT SANDERSON.]

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This is an appeal by two of the plaintiffs in the suit, viz., Shankar and Ramnath against a decree of the High Court of Judicature at Allahabad dated the 14th May, 1928, which reversed a decree of the District Judge of Benares dated the 10th November, 1925. The last-mentioned decree had affirmed a decree of the Additional Subordinate Judge of Benares dated the 6th August, 1925.

Paltu, the seventh respondent and the first plaintiff in the suit, is the father of the plaintiff appellants.

Munnu Lal was the father of Paltu ; Munnu Lal, Paltu and the plaintiff appellants were members of a joint Hindu family, governed by the *Mitakshara* law, and the house, which was the subject-matter of the suit, was part of the ancestral property of the said joint family.

The suit was instituted on the 8th November, 1924 ; at that time Ramnath was a minor, and sued through Shankar as his next friend.

The material facts are as follows :—

On the 8th May, 1915, Munnu Lal executed a deed conveying the said house to his son-in-law, Phalgu, with the ostensible object of paying off debts.

At the date of the above-mentioned deed both the plaintiff appellants were minors.

Munnu Lal died in 1919, and after his death Phalgu executed and obtained the registration of a deed of sale of the said house in favour of Musummat Ganga Dei, the wife of Parsotam Misir. The last-mentioned sale deed for which there was consideration was dated the 9th of October, 1919.

Parsotam Misir and his wife were the defendants in the suit.

The first five respondents to this appeal are the heirs and legal representatives of Parsotam, who died after the institution of the suit, and the defendant Musammat Ganga Dei is the sixth respondent.

The suit was brought to recover possession of the said house, of which the plaintiff appellants had been dispossessed in November, 1921, together with mesne profits.

The Subordinate Judge made a decree in favour of the plaintiffs for possession of the said house on condition that they should pay the sum of Rs. 1,046 to the defendants within six months of the decree. The Subordinate Judge directed that, on payment of the said amount, the plaintiffs should get their costs of the suit from the defendants. It appears that the defendants had paid off a mortgage on the said house of Rs. 1,000 and Rs. 46 interest thereon, and the learned Judge was of opinion that in equity the plaintiffs ought to pay the said sums to the defendants before they could be allowed to obtain unencumbered possession of the said house.

No question has been raised in this appeal with regard to the condition imposed by the Subordinate Judge : and rightly so. In substance it was justified. The defendants as against the plaintiffs were entitled to stand in the shoes of the mortgagees in respect of the incumbrance upon the property which they had discharged out of their own moneys.

The defendants appealed to the District Judge against the above-mentioned decree, and the plaintiffs filed a cross-objection alleging that the Subordinate Judge should have decreed the plaintiffs' suit without the payment of any amount.

The District Judge dismissed both the appeal and the cross-objection with costs.

The heirs and legal representatives of Parsotam Misir appealed from the District Judge to the High Court, which allowed the appeal, set aside the decrees of the District Judge and of the Subordinate Judge, and dismissed the plaintiffs' suit : the plaintiffs were ordered to pay the costs in all courts.

The Subordinate Judge held that the deed of the 8th May, 1915, executed by Munnu Lal was without consideration, and without any legal or family necessity, and that really it was a sham transaction : he held further that Paltu was not a consenting party to the said deed.

These two findings were affirmed by the District Judge. Consequently they were accepted by the High Court, and this appeal must be decided on the assumption that these two findings are correct.

The learned Judges of the High Court held that Paltu was clearly barred by the provisions of Section 41 of the Transfer of Property Act (Act IV of 1882), and that his sons, viz., the plaintiff appellants, also were barred by that section. They based their decision on the conclusion that Phalgu was the ostensible owner of the house, that the defendants took reasonable care to ascertain that Phalgu had power to make the sale dated the 9th of October, 1919, and that they acted in good faith : that Paltu, who was in prison at the time of the execution of the deed, dated the 8th May, 1915, by his conduct after coming out of prison, and when he knew of the deed consented to Phalgu being the ostensible owner.

They held further that the plaintiff appellants, then minors, had not such a separate interest from that of the manager and the other adult members of the joint family as would enable them to avoid the estoppel employed by the said section of the Transfer of Property Act, and consequently that they were estopped in common with the rest of the family.

The learned counsel who appeared for the respondents 1 to 6 in this appeal, confined his argument to this point, and endeavoured to uphold the High Court's judgment by relying on the provisions of Section 41 of the Transfer of Property Act.

Their Lordships do not think it necessary to consider or decide the question whether Paltu's conduct, after his release from prison, amounted to an implied consent on his part to Phalgu being the ostensible owner, for even if it did, such consent, in their Lordships' opinion, in view of the facts of this case, would not affect the rights of his minor sons, viz., the plaintiff appellants. Their Lordships, however, must not be taken to affirm the finding of the High Court in this respect.

Before considering the application of Section 41 of the Transfer of Property Act to the case of the plaintiff appellants, it is desirable to refer to Section 7 of the same Act.

"Every person competent to contract and entitled to transferable property, or authorised to dispose of transferable property not his own, is competent to transfer such property either wholly or in part and either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force."

It is to be noted that the power to transfer described in the section is qualified by the concluding words : viz., to the

extent and in the manner allowed and prescribed by any law for the time being in force.

Now Munnulal was the head of the joint Hindu family which was governed by the *Mitakshara* law at the time of the execution by him of the deed dated 8th May, 1915. His power under such law to alienate the immoveable ancestral property of the joint family was limited, and he could not make any alienation of the ancestral house, the subject-matter of the suit, unless he obtained the consent of the other members of the joint family, if they could give it, or unless there was some established necessity to justify the transaction.

In this case, neither of the two conditions was fulfilled. The plaintiff appellants were minors, and they did not and could not give their consent, and there was no established necessity for the transaction—inasmuch as it has been decided that the deed was a sham transaction. Consequently, no property passed by the said deed to Phalgu.

The question then arises whether the plaintiff appellants are prevented by the terms of Section 41 of the Transfer of Property Act from recovering possession of the said house. The terms of the section are as follows :—

“ Where, with the consent, express or implied, of the persons interested in immoveable 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.”

There is no doubt that the plaintiff appellants were persons interested in the said house within the meaning of the section, at the time of the said deed, dated the 8th May, 1915. The house was immoveable ancestral property, and the family being governed by *Mitakshara* law, each of the plaintiff appellants acquired a proprietary interest in such ancestral property by his birth.

There is no suggestion that they gave any express consent to the transaction or to Phalgu being treated as the ostensible owner of the said house.

Nor can any such consent be implied, for the plaintiff appellants were minors at the date of the said deed of sale, and at all material times. By reason of such minority, they were not competent to enter into any contract, or to authorise any contract with relation to the alienation of the said immoveable ancestral property.

The learned Judges of the High Court, however, as already stated, thought that if the manager and the adult members of the family consented to Phalgu being the ostensible owner of the said house, the plaintiff appellants being then minors had no such separate interest “ as would enable them to avoid the estoppel employed by Section 41.”

Their Lordships cannot accept that conclusion. The proprietary interest of each of the plaintiff appellants in the said joint ancestral house was acquired by birth, and was equal to the proprietary interest of the adult members of the joint family.

In their Lordships' opinion, there is no reason why full effect should not be given to the plain language of Section 41 of the Transfer of Property Act, and if that be so, it is clear that Phalgu was not the ostensible owner of the said ancestral family house with the consent express or implied of the persons interested in the said ancestral house, inasmuch as the plaintiff appellants, who had an interest in the said house, did not and could not by reason of the disability of infancy give their consent.

In their Lordships' opinion, therefore, the plaintiff appellants are not prevented by the terms of Section 41 of the Transfer of Property Act from alleging that the deed of the 8th May, 1915, was merely a sham transaction and that Phalgu had no authority to transfer the said house to the defendants.

In view of the above-mentioned conclusion, it is not necessary for their Lordships to consider the question as to which the Courts in India arrived at different conclusions, namely, whether the defendants took reasonable care to ascertain that Phalgu had power to make the sale and whether they acted in good faith. For even if they did, Section 41 of the Transfer of Property Act will not avail them, inasmuch as Phalgu was not the ostensible owner of the said house with the consent express or implied of the plaintiff appellants who had an interest therein.

In view of the fact that Phalgu had no title in the said house which he could transfer to the defendants, and inasmuch as the defendants were not protected by the provisions of Section 41 of the Transfer of Property Act, the defendants must be held to have obtained no title to the said house.

Consequently, the decree of the Subordinate Judge that the plaintiffs should recover possession of the said house was correct, and inasmuch as no objection is now raised to the condition, which the learned Judge attached thereto, his decree should be restored.

Their Lordships therefore will humbly advise His Majesty that the appeal should be allowed, the decree of the High Court set aside, and the decree of the Subordinate Judge dated the 6th August, 1925, and the decree of the District Judge, dated the 10th November, 1925, should be restored.

The respondents one to six must pay the plaintiff appellants' costs in this appeal and in the High Court.

In the Privy Council.

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SHANKAR AND ANOTHER

v.

DAOOJI MISIR AND OTHERS.

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DELIVERED BY SIR LANCELOT SANDERSON.

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