
(1963) 10 KL CK 0025
In the High Court Of Kerala
Case No : A.S. No. 78 of 1959

Bappu Rawther Abdul Kassim Rawther APPELLANT
Vs
State of Kerala RESPONDENT

Date of Decision : 21-10-1963

Acts Referred:

Contract Act, 1872 — Section 17, 238, 65, 75

Citation : AIR 1964 Ker 109

Hon'ble Judges : K.K. Mathew, J

Bench : Single Bench

Advocate : T.K. Narayana Pillai, for the Appellant; Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

K.K. Mathew, J.—The plaintiff is the appellant. The suit was for recovery of damages. 5 acres and 24 cents of property in S. No. 303/1 belonged to one Kochukunhu. That property together with 57 cents in S. No. 15/2, was sold in one lot in revenue auction for arrears of Abkari dues due from the said Kochu Kunhu and it was purchased by the plaintiff. It was alleged that Kochu Kunhu had no title to S. No. 303/1 at the time of the revenue auction; and the suit was for recovery of the proportionate amount of the purchase money from the State, The defendant, the State of Kerala, contended that there was no warranty of title in a revenue sale, that the plaintiff was aware of the want of title of Kochu Kunhu to S. No. 303/1 and that the plaintiff was not entitled in any reliefs.

2. The Court below found that there was no warranty of title in a revenue sale, and that the plaintiff was not entitled to any relief, for the reason that there was no total failure of consideration.

3. The question for consideration in this appeal, therefore, is whether the plaintiff is entitled to a refund of the proportionate purchase money. It is admitted that originally these two properties belonged to the defaulter and that there was a

subsisting mortgage on S. No. 303/1 when the State attached that property. The mortgagee instituted a suit in O. S. 570/112 and obtained a decree and in execution thereof the transferee of the decree purchased the property in 1119. When the auction purchaser was about to take delivery, the "Government Pleader filed an application, Ext. II. in the case, objecting to delivery. Ext. II was filed on 23-3-1112. That petition was allowed by the Munsif, but in revision the petition was dismissed.

When the properties were put up for sale in the revenue case, it was stated in the sale proclamation that what was being sold in S. No. 303 /1 was (" * * * * .")

Ext. D3 is the proclamation notice and in the relevant column the above description has been inserted, Ext. D-3 is dated 18-3-1122. The revenue sale took place on 30-3-1122 and after the sale the plaintiff was given delivery of possession of the properties by the State, but soon after, the auction purchaser in O. S. No. 570/112 recovered possession of S. No. 303/1 from the plaintiff.

The plaintiff's case is that so far as S. No. 303/1 is concerned, Kochu Kunhu had no title at the time of the revenue sale as that property had already been sold in execution of the decree in O. S. 570/112. It was therefore argued that as there was a total failure of consideration so far as that item is concerned the plaintiff is entitled to get a refund of the proportionate amount paid by him as purchase money. Plaintiff purchased the two items for a total consideration of 1825 Sirkar rupees. He subsequently sold S. No. 15/2 for Rs. 300/- under Ext. P-5. So the plaintiff claimed the sale amount with interest after deducting Rs. 300/-, the consideration for Ext. P-5 sale.

4. The main ground relied upon by counsel for the appellant was that the State knew as a matter of fact that Kochu Kunhu had no title to the property when the property was put up for sale, and yet by the proclamation it was represented that Kochu Kunhu had the equity of redemption of the property, and as that representation was fraudulent, the plaintiff was entitled to damages. He also submitted that in any event as by the sale of S. No. 303/1 no right was conveyed to the plaintiff for the reason that the property had already been sold in execution in O. S. 570/112, he was entitled to recover the proportionate purchase money as there was a failure of consideration to that extent.

5. Dealing with the last point first, it may be said that although there is no warranty of title in a sale in invitum, a purchaser is entitled to sue and recover the purchase money in an action for money had and received if there is a total failure of consideration. No doubt there is difference of opinion on the question whether an auction purchaser is entitled to recover the purchase money in a suit, when it turns out that the judgment-debtor has no title to the property for the reason that there is a total failure of consideration. The Madras, the Travancore, and the Travancore-Cochin High Courts have taken the view that such a suit is maintainable. In Varkey Mathai and Others Vs. Oommen Oommen and Others, Madhavan Nair, J. has referred to those rulings, and followed them. I think the

principle laid down in those rulings can be applied to the facts of this case, although the question here arises in the context of a sale under the Revenue Recovery Act.

6. The next question is whether it is possible to give any relief to the plaintiff, in the circumstances of this case. It was submitted for the respondent that there was no total failure of consideration as the plaintiff got title to and possession of S. No. 15/2, and as both items were sold in one lot and for a single consideration. I think the argument is sound. Unless the consideration can be severed it is impossible to find out the extent of the failure of consideration. As the sale of the two items was in one lot for a single consideration, it is difficult to say that the consideration failed in toto. There is also no criterion to apportion the consideration as between the two properties.

In *Firm Narasingi Vannechand v. Narasayya*, AIR 1945 Mad 363 it was held that when a judgment-debtor is found to have no title to a part of the property sold in auction, a suit by the auction purchaser for refund of the proportionate part of the purchase money is not maintainable. In the course of the judgment Leach C. J., observed:

"It must be borne in mind that there is no warranty of title in a Court-sale. If the judgment-debtor has no interest in the property sold the sale can be set aside, but the Code says that if the judgment-debtor has some interest in the property auctioned the sale must stand."

The learned Judge relied on the decision in *Nagalinga Chettiar Vs. Guruswami Aiyar and Others*, in support of this proposition. In that case two items of properties were sold in one lot : it was subsequently found that the judgment-debtor had no title to one of the items. It was-held that the purchaser was not entitled to recover the proportionate part of the purchase money as it cannot be said that there was a total failure of consideration.

7. No doubt if it is possible to sever the consideration it is open to the Court to grant the relief. That is clear from the speech of Lord Atkin in the *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* 1943 AC 32. His Lordship there referred to certain cases where reliefs were granted on the ground that consideration was severable.

".....Where a contract to deliver wood was prevented by the defendant preventing performance by not loading all, the wood; *Rugg v. Minett* (1809) 11 East. 210, where the buyer had paid part of the purchase price on a sale of turpentine in casks, where the property in some casks had passed while in seller's warehouse, but in some had not, and the purchaser was entitled to recover as money had and received the proportion properly attributable to the casks in which the property had not passed."

But it is difficult to apply that principle to this case as it cannot be said that the consideration is severable. Hence I think, the plaintiff cannot succeed on the

ground that the consideration for sale of S. No. 303/1 failed.

8. The more formidable argument advanced by counsel for the appellant was that the State was guilty of fraud in having put up the property for sale, when, as a matter of fact, it knew that the defaulter had no title to the property. The argument was elaborated in this way: The State, being a corporation can only act through its agents or representatives and that knowledge of one agent must be attributed to another agent. It is clear from Ext. II that the Government Pleader who filed that application was aware of the auction sale in execution of the decree in O. S. 570/112, and that the High Court had repelled the objections of the State to the delivery of the property to the auction purchaser in that case, and if the State, through one of its agents knew at the time when the revenue sale was conducted that the defaulter had no title at all to the property, and if that property was proclaimed for sale stating that the defaulter had the equity of redemption in that property, the State was guilty of fraud, and if on account of that fraud the plaintiff sustained damage, the plaintiff was entitled to recover compensation for the same from the State.

In this connection counsel referred me to the ruling in *Sundara Gopalan v. Venkatavarada Ayyangar* ILR 17 Mad 228 for the proposition that fraud would vitiate a sale in invitum, even if there is no warranty of title in such a sale. At page 231 Muthuswamy Iyer, J., said:

"I do not desire to be understood as suggesting that in case of fraud there would be no remedy, but this is not that case. What I hold is that where the Court sale is not vitiated by fraud, the only extent, to which the purchaser can claim relief, is that indicated by section 315....."

But in order to make out a case of fraud against the State it must be proved that the agent making the representation was aware of the sale of the property in execution of the decree in O. S. 570/112 when the property was put up for auction in the revenue case.

9. The whole argument of the appellant proceeded on the assumption that the State is liable for the fraud of its officers while acting in the discharge of their statutory duties. It is doubtful whether the State, when it acts in its sovereign capacity through its agents or officers, can be made liable for their tortious acts, even when they act within the scope of their employment. Assuming that fraud makes the sale void, in order to constitute fraud, it is well known, that the person making the statement must have been aware of the falsity of the statement. (See *Deny v. Peek* (1889) 14 AC 337). So it has to be proved that the Tahsildar had the knowledge of the sale in execution of the decree in O. S. 570/112.

There is no proof in this case that the Tahsildar had actual knowledge of the sale and that it was with that knowledge that he proclaimed the property for sale. But it was argued that that knowledge must be imputed to him because, at any rate, the Government Pleader, the other agent of the State, was aware of the sale.

When an agent makes a statement and the agent is ignorant of the falsity of that statement, but the principal or another agent is aware of its falsity, but does not know or believe that the agent: will make the statement, the question whether the principal is liable for fraud has come up for consideration.

In *Cornfoot v. Fowke* (1840) 6 M 358 the owner of a house employed an agent to let the house to a third person. Asked by a prospective tenant whether there is anything objectionable about the house the agent replied "nothing whatever". Yet the owner knew, but the agent did not know, that in the next door there was a brothel. The tenant failed to complete the agreement and sued the principal for damages. Parke B. , in discussing the question of fraud made the following observation at page 373:

"Now the simple facts, that the plaintiff knew of the existence of the nuisance, and that the agent, who did not know of it, represented that it did not exist, are not enough to constitute fraud: each person is innocent, because the plaintiff makes no false representation, and the agent, though he makes one, does not know it to be false; and it seems to me to be an untenable proposition, that if each be innocent, the act of either or both can be a fraud. No case could be found in which such a principle is laid down, as was admitted in the course of the argument. It must be conceded, that if one employ an agent to make a contract and that agent, though the principal be perfectly guiltless, knowingly commit a fraud in making it, not only is the contract void, but the principal is liable to an action..... But, in the present case, the agent acted without any fraudulent intent; and therefore his act alone neither renders the plaintiff liable to an action nor vitiates the contract."

This case did not meet with approval of the House of Lords in *Pearsort and Son Ltd. v. Dublin Corporation*, 1907 AC 351. There, the defendant had invited the plaintiffs to tender for certain sewage work and for the purpose of enabling them to tender, plans with drawings and specifications were given to the plaintiffs by the defendant. These plans and drawings and specifications had been prepared by engineers employed by the corporation and in these drawings and plans were certain statements as to the relevant circumstances of the work. In particular there was a statement as the existence of a wall at a depth of 9 feet. The only relevance of that was that if the statement was true the cost of the work will be less.

Relying on the truth of the statement the contractors agreed to do the work for a sum. But they found that the statement was wholly untrue and therefore they incurred very much more expense. They filed an action for damages for fraud. It was held by the House of Lords that it cannot be said that the principal was not guilty of fraud. Lord Halsbury said at page 357:

"I do not understand the learned Judge to express any doubt as to the liability of the principals for the fraud of their agent, if there was fraud:..... In it was supposed to decide that the principals and agent could be so divided in

responsibility that -- like the schoolboy's game of "I did not take it, I have not got it" -- the united principal and agent might commit fraud with impunity, it would be quite new to our jurisprudence. One of the learned Judges who decided the case of (1840) 6 M 358 explained it by saying that it was only decided in a point of pleading, and another by saying that it was attempted to add a term to a written contract which was not in it. Whether these were satisfactory reasons to say that the case is not law if it is supposed to affirm the proposition to which I have referred I cannot conclude without saying that I desire to associate myself entirely with the observations which have been made by the Lord Chancellor, that it matters not in respect of principal and agent (who represent but one person) which of them possesses the guilty knowledge or which of them makes the incriminating statement. If between them the misrepresentation is made so as to induce the wrong, and thereby damages are caused, it matters not which is the person who makes the representation or which is the person who has the guilty knowledge."

In *London County Freehold and Leasehold Properties Ltd. v. Berkeley Property and Investment Co. Ltd.* 1936 2 All ER 1039 the same question came up for consideration, and it was held that the principal was liable for fraud. In that case a person was about to buy a block of flats from a company, and he wanted to know whether the tenants paid the rent regularly. Thereupon one of company's agents, Mr. De Kees, consulted another agent of the company namely the property manager. Mr. Addis, and then informed the purchaser that the tenants paid the rent regularly, when in fact many did not. Goddard, J. held that the company cannot be made liable for any fraud.

This Court of appeal took the opposite view that the company was liable for fraud. One reason was that one of the company's agents had been fraudulent so that the ordinary rule of vicarious liability applies. According to a second and more substantial reason, however, the company was liable in fraud for Mr. De Rees's false but innocent presentation, which the company through its agent Mr. Addis knew to be untrue, even though the company did not know that Mr. De Rees made the statement. It followed from this that the company would be liable where one of its agents made an innocent though untrue statement, provided that the statement was known to be untrue by any other agent or officer of the company.

It is obvious that this case repudiated the authority of (1840) 6 M 358. In the course of the judgment Slesser L. J., after quoting the observations of Lord Loreburn, L. C., and Lord Halsbury in *Pearson and Son* case 1907 AC 351 said at page 1047:

"For myself, I cannot see why if the physical act of several agents may collectively be deemed in law to be the joint responsibility of a principal, the same principle should not apply to states of mind. The agent and principal are in law one for the purpose of the acts which make up the fraudulent misrepresentation; and equally the same considerations apply if, as here, both

Mr. De Rees and Mr. Addis were servants of the same corporation and the ingredients of the fraud are all to be found in the acts of the agents of one principal."

At page 1050 M. Romer L. J., made the following observations:

"There was at one time a difference of judicial opinion upon the question whether a representation made by an agent innocently on behalf of a principal can be treated as a fraudulent representation for which the principal is liable, when the principal, though having no knowledge that the representation is made, knows that it is untrue. But it has now been laid down by the House of Lords that in such a case the principal is as much liable as though he had himself made the representation knowing it to be untrue."

10. In a still later case, *Armstrong v. Strain* 1952 1 KB 232 the question again came up for consideration, and it was held that the principal cannot be made liable for fraud in such circumstances. In that case an estate agent sold a bungalow to a purchaser on behalf of the principal. The agent told the purchaser that any building society would lend half the purchase money on it, a statement which turned out to be untrue. The principal had not authorised the agent's statement nor did he know that the agent was making it. But he knew that the statement was untrue, and had he made the statement himself it would certainly have been fraudulent. Suing in fraud the purchaser argued that the principle of *London County Case* 1936 2 All ER 1039 applied, that is, that despite their "innocent division", the principal and agent were one in law, which made the principal liable. But judgment went against the purchaser. Two Courts confidently reaffirmed (1840) 6 M 358.

The result therefore is that we are back where we began with the doctrine of (1840) 6 M & W 358 stronger than ever. In the course of the judgment it was observed by Singleton L. J., that the decision of the House of Lords referred to above was not conclusive, and that he found great difficulty in finding actual fraud when the agent did not know the false character of the statement made by him. The same view was taken by Birkett, L. J.

11. The whole question was reviewed by Patrick Devlin in an article contributed by him to the *Law Quarterly Review*, Vol. 53, page 344 and his conclusion is that the decision in *London County case* 1936 2 All ER 1039 was not right. At page 362 it is stated:

"There is no way of combining an innocent principal and agent so as to produce dishonesty. You may add knowledge to knowledge or, as Slessor L. J., put it, state of mind to state of mind. But you cannot add an innocent state of mind to an innocent state of mind and get as a result a dishonest state of mind. You cannot add innocent knowledge to innocent knowledge and get guilty knowledge. If it be possible to fuse a number of states of mind together and from the composition thereby obtained to distil a notional dishonesty, it might be possible to satisfy the requirements for an action of deceit, even in the case of an

innocent division of the ingredients. But to do this would be to go far beyond any principle of law that has yet been laid down..... There is no possible way known to philosophy or psychology by which an intent can be divided; and no possible reason why the law should try to invent one."

12. This being the state of authorities, in the absence of any evidence that the Tahsildar was actually aware of the sale in execution in O. S. No. 570/112, I do not think I will be justified in imputing the knowledge of the other agent or the supposed vicarious knowledge of the State through that agent to the Tahsildar and finding fraud in him for making the statement in the proclamation, so as to make the State vicariously liable for fraud.

13. The other point argued was that the Tahsildar was negligent in making the statement in the proclamation about the right, title and interest of the defaulter as regards S. No. 303/1 and that that negligent statement induced the plaintiff to purchase the property, and as he has sustained damages on account of it, the State must be made to answer for it in damages. The case of negligence was not pleaded in the plaint or advanced in argument in the Court below. It is raised for the first time at the time of argument here.

I do not wish to make any pronouncement on the question whether there is any duty to be careful in making a statement of this character in the proclamation, or whether there is any special relationship between the State, when it puts up a property for sale, and the public, which implies a duty, to be careful in making a representation of this nature, or whether the purchaser would have a remedy in damages for negligence for innocent misrepresentation in case where there is a duty to be careful or a special relationship implying that duty in view of the recent decision of the House of Lords in *Hedley Byrne and Co. Ltd. v. Heller and Partners Ltd.*, 1963 2 All ER 575.

14. In the result, I confirm the decree of the Court below and dismiss this appeal, but in the circumstances I make no order as to costs.