
(1966) 02 KL CK 0015

In the High Court Of Kerala

Case No : Second Appeal No. 1407 of 1961

Gomathy Ammal Gomathy Ammal

APPELLANT

Vs

Rukmini Amma Padmavathi Amma and Others

RESPONDENT

Date of Decision : 01-02-1966

Acts Referred:

Transfer of Property Act, 1882 — Section 43

Citation : AIR 1967 Ker 58

Hon'ble Judges : T.S. Krishnamoorthy Iyer, J;S. Velu Pillai, J

Bench : Division Bench

Advocate : S. Easwara Iyer, for the Appellant; G. Viswanatha Iyer, for the Respondent

Judgement

Velu Pillai, J.—One Kochukunjamma executed a gift-deed Ext. D-6, with respect to the suit property and to some of her other assets in favour of her brother's son, Parameswaran Pillai, in the year 1938, reserving the full proprietary interest and possession to herself and stipulating that Parameswaran Pillai may enjoy the property absolutely after her, On the 8th March, 1946, Parameswaran Pillai sold the property by Ext. P-2 to one Krishna Pillai and his wife Madhavi Amma, reciting falsely as has now been found, that Kochukunjamma was no more and that he had become the full owner. The property was at the time outstanding on a mortgage with defendants 1 and 2, under Ext. P-1 dated the 6th September, 1943, executed by Kochukunjamma and by Parameswaran Pillai. It has been found and that finding has not been challenged, that Kochukunjamma died on the 14th October, 1946. Krishna Pillai and Madhavi Amma sold the property to the plaintiff under two sale deeds, Ext P-4 dated the 2nd December and Ext. P-3 dated the 16th December, 1957. The plaintiff who is the appellant in this second appeal, instituted the present suit for redemption of Ext. P-1.

Despite Ext P-2, Parameswaran Pillai had sold the property by Ext. D-5 to defendants 1 and 3 on the 3rd September. 1951- According to them, no interest

passed under Ext. P-2, the earlier sale deed. The first Court accepted their contention; it also held, that though Parameswaran Pillai became the owner of the property after the death of Kochukunjamma, the vendees under Ext. P-2 or the plaintiff having failed to exercise their option u/s 43 of the Transfer of Property Act, Ext. D-5 has to prevail and the suit has to fail. In appeal by the plaintiff, the Court accepted the above view but differed from the primary Court by holding, that defendants 1 and 3 took Ext. D-5 with notice of the prior transfer. It however dismissed the suit on the ground, that the property, which is of kandukrishi tenure having been registered in favour of the defendants 1 and 3 the plaintiff has no title to it.

2. The plaintiff has a case, that under Ext. D-6 Parameswaran Pillai took a vested interest which he was capable of transferring under Ext. P-2 and Kochukunjamma having died, the plaintiff could recover. Though the Munsiff was prepared to accept this case, the judge was not. On going through the relevant provision in Ext. D-6, we are inclined to agree with the latter. There is no dispositive word in Ext. D-6 conveying a present interest to Parameswaran Pillai, and on the contrary there is the reservation of full proprietary interest and possession for Kochukunjamma. The stipulation that Parameswaran Pillai may take the property absolutely after her lifetime is no conveyance of an interest in praesenti. As for the present, the only stipulation was, that Parameswaran Pillai may effect mutation in his name forthwith. Mutation may evidence a transfer of an interest but is not per se a transfer. Even if the donor had the intention at the back of her mind to create a vested remainder, she has not succeeded in effectuating that intention by the use of apt expression.

3. The main question turns on the true understanding of the scope and content of Section 43 of the Transfer of Property Act, which reads as follows:

"Where a person fraudulently or erroneously represents that he is authorised to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option."

The plain reading is, that when the other ingredients prescribed are found to exist, upon the acquisition by the transferor of any interest in the property professed to be transferred, there springs into existence an option for the transferee to have the transfer operate on such newly acquired interest. That option accrues to him, by the terms of the Section proprio vigore and not by anything that he has to do. Being an option it is open to him not to claim the benefit, In this sense the newly acquired interest does not automatically pass, eo instante with the acquisition as under the English law, there being the interposition of the option. The manifestation of the will of the transferee to have

the transfer so operate, may be deemed to be an exercise of the option, but this is not to say, that he must adhere to any specific form for such exercise. We need only require or demand of the transferor that such interest shall pass, to him. This idea runs through the second part of the Section, which speaks of the existence of the said option, and not of the exercise of the option. This view gains considerable strength from the observations of the Supreme Court in *The Jumma Masjid, Mercara Vs. Kodimaniandra Deviah*, at p. 850 where Venkatarama Aiyar, J. observed as follows on Section 43:

"When these conditions are satisfied, the section enacts that if the transferor subsequently acquires the property, the transferee becomes entitled to it, if the transfer has not meantime been thrown up or cancelled and is subsisting."

4. In *Girja Shankar and Others Vs. Jagannath and Others*, , Malik. C.J. observed thus:

"I do not think the section requires that after the transferor has acquired title in the property the transferee must immediately give him notice that he proposes to hold him bound by the agreement and that it is the exercise of this option that the subsequent transferee must have notice of before he can be bound To me the phrase "notice of the existence of the option" has been used as the first transferee who has an equitable interest only has nothing more than an option to proceed against the property included in his transfer, it being merely an equitable right and not a transfer of a legal interest."

Malik, C.J. was also inclined to think, that under the second part of the Section it is sufficient that the subsequent transferee had notice of the prior transfer; for this case it is not necessary to decide the point. The view of the lower Courts that the respondents defendants 1 & 3 are entitled to succeed, because the plaintiff or her vendors had not exercised the option, is unsound and cannot stand.

4a. Learned counsel for the defendants contended, that the rule in Section 43 can apply only so long as the contract of transfer subsists, and that in the present case. Ext. P-2 having been executed in the year 1946 and the notices for redemption being in the year 1957, the contract of transfer could not have been subsisting at the date of the suit. According to the argument, the contract of transfer had ceased to subsist upon the expiry of the period of three years from the date thereof, which is the period of limitation for a suit to enforce specific performance of a contract under Article 113 of the Limitation Act. The argument is wholly unsound and implies, that what is contemplated by the words "contract of transfer" is a contract to transfer or a contract to sell. A contract of the latter kind is specifically provided for in Section 18(a) of the Specific Relief Act, and the Supreme Court had occasion to compare and contrast the two Provisions in *Silla Chandra Sekharam Vs. Ramchandra Sahu*, . It is useful to quote Section 18(a):

"Where a person contracts to sell or let certain property, having only an imperfect title thereto, the purchaser or lessee (except as otherwise provided by

this Chapter) has the following rights:

(a) if the vendor or lessor has subsequently to the sale or lease acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest:"

The words employed being "sale" and "lease" in Clause (a), the question arose whether the section would come into play only after a sale deed or a lease deed is executed, or in other words, whether the expression "subsequently to the sale or lease" in the section meant "subsequently to the contract to sell or let" or subsequently to the execution of the sale deed or lease deed by the vendor or the lessor, as the case may be in pursuance of the contract to sell or let. Considering this, the Court observed

" It follows from the consideration of both the sets of circumstances, viz., when the person contracting to sell or let, himself performs his part of the contract and when he is made to perform the contract wholly or partially by Court, the occasion to apply for specific performance of the contract with respect to the property over which the person contracting to sell or let had originally imperfect title, does not arise."

Once the vendor or lessor had executed the document of sale or lease, no question of specific performance arises. The Court then proceeded to consider the analogy of Section 18(a) with Section 43 of the Transfer of Property Act and said:

"The actual right of the transferee u/s 43 and Clause (a) of Section 18 is however expressed in different language. In cases where Section 43 operates, the transferee, at his option, can have the transfer operate on any interests which the transferor may acquire in the property at any time during which the contract for transfer subsists. The illustration to the section indicates, that the transferee can require the transferor to deliver the property acquired to him. The purchaser or lessee on the other hand, acting under Clause (a) of Section 18, can compel the seller or the lessor to make good the contract out of such interest. The difference between the two provisions is this that in the case of the operation of Section 43, no recourse to Court is necessary. The transfer operates on the property transferred and the transferee can call upon the transferor to deliver the property to him. The purchaser or the lessor having the right mentioned in Clause (a) of Section 18 has to go to Court to compel the vendor or lessor to perform the contract out of the interests subsequently acquired by him. The purchaser or lessee goes to the Court to enforce the contract and the contract in Clause (a) of Section 18 must refer to the contract to sell or let and not to the contract of sale or lease, which, as indicated earlier, if voluntary, would have covered the entire property contracted to be sold or leased, and if enforced through Court no occasion for the operation of Clause (a) of section 18 would arise. Clause (a) of Section 18 and Section 43 of the Transfer of Property Act, have to be interpreted so as to prevent an overlapping of the two provisions, and so the Court came to the conclusion that the use of the words, "vendor" or "lessor" or the words

"sale" or "lease" did not point to a completed sale or lease.

5. Section 43 employs the words "contract of transfer" and not "contract to transfer or to contract to sell", as in Section 54 of the Transfer of Property Act. On the observations of the Supreme Court, there is no scope for introducing the concept of enforcing specific performance of a contract to sell, into framework of Section 43. The contract of transfer as contemplated must be deemed to subsist so long as it has not been "rescinded or thrown up or cancelled". In the present case, the contract of transfer was not rescinded by the vendees under Ext. P-2 or by the plaintiff claiming title under them, and all that was necessary for the plaintiff was to require the transferor or those claiming under him to deliver the property.

6. The next question to decide is whether under the latter part of Section 43, defendants 1 and 3 are entitled to protection. That part enacts an exception to the main part of Section 43 and being in the nature of an exception, and a plea under it relating as it does to facts within the knowledge of the transferee, the burden of establishing the plea is on him who has set it up. This is in accord with the rule laid down by the Privy Council in AIR 1934 68 (Privy Council) & AIR 1946 97 (Privy Council). The District Judge has found, that defendants 1 and 3 had taken Ext D-5 with notice of the prior transfer. It is necessary for them to establish conclusively, that they had no notice of the option of the prior transferee u/s 43. All that was needed for the vendees under Ext D-5 was to make a search in the registry for any prior transfer and on discovering one, to peruse its copy. In the present case, it would have given them notice of the false recital in Ext. P-2. That would have put them on notice as to the option

They made: no such attempt and according to the testimony of the third defendant, he did not make a search because, he said, he "bona fide" thought that there was no such transfer. This means nothing, and in any event cannot exonerate the vendees under Ext D-5 from the duty of making an independent search in the registry. At the date of Ext. D-5, the Transfer of Property Act had not come into force u/s 3 of the Act as amended, registration of a document by itself imports notice thereof. The law prior to the amendment has been laid down by the Privy Council in *Tilakdhari Lal v Khedan Lal* AIR 1921 PC 112 & in the concerned area by the Travancore High Court in *Mariyadumperumal Chidambarathanu v. Namasivayom Sivakami* (1927) 17 TLJ 329. The Privy Council said:

"..... .but none-the-less it shows that it would not be reasonable to hold that registration was notice to the world of every deed which the register contained. The doctrine must be subject to some modification. There may be circumstances in which omission to search the register would, even under the definition already given, result in notice being obtained and the circumstances necessary for this purpose may be very slight, but in the present case no such circumstances are found.

In (1927) 17 TLJ 321 after a consideration of previous decided cases on the subject, the Court said :

"Without going so far as to lay down as an absolute proposition that registration is notice to subsequent alienees, we would hold that a subsequent alienee, who is expected as a prudent person to make inquiry or inspection in the Registry Office, should be presumed to have had constructive or imputed notice of the prior registered deed, and consequently also of its contents as notice of the existence of a deed affecting title is notice of its contents."

We see nothing in this statement of the law which runs contrary to the dictum of the Privy Council. It has been found by the two Courts, that the prior transferee under Ext. P-2 had no knowledge, that the title of Parameswaran Pillai to convey under Ext. P-2 was defective in any respect. As a result we hold, differing from the Courts below, that the plaintiff is entitled to the interest acquired by Parameswaran Pillai upon the death of Kochukunjamma.

7. In the appellate Court, a fresh document was filed on behalf of defendants 1 and 3 to show that the suit property, which is of kandukrishi tenure as stated, has been registered in their names and pattah issued to them by the Tahsildar on behalf of the paramount owner. The plaintiff also produced by way of additional evidence, the proceedings relating to such registry. From the orders passed on the two applications it is evident, that the Court had admitted them though it did not mark them. The argument also seems to have been advanced before the Judge, that being of kandukrishi tenure the property is inalienable and therefore, the principle of Section 43 could not apply. The rule as laid down in Kanakku Raman Ananthan v. Chempakakutti Narayani (1911) 1 TLJ 334 is that the holders of kandukrishi lands are mere tenants-at-will; they cannot transfer their occupancy right without the previous consent of the Sirkar, and therefore, a mortgage of such right without the consent of the Sirkar will not be binding on the latter. This is not to say, that the property itself is inalienable so as to rule out Section 43.

8. But it was contended, that the property having been registered in the names of defendants 1 and 3, the plaintiff is not entitled to a decree for redemption as the title now vests in them by virtue of the registry. In meeting this argument learned counsel for the plaintiff contended, that the registry must be deemed to have been ordered on the strength of the decision of this suit in the first Court, adverse to the plaintiff, and on the strength of possession held by defendants 1 and 3 as mortgagees of the property. In reply it was urged, that whatever might have induced the authority to order registry, so long as defendants 1 and 3 have obtained such registry in open contest against the plaintiff, their title to the property has to prevail. In the above circumstances Section 90 of the Trusts Act is not attracted. Learned counsel for the plaintiff then argued, that on the basis of the decision of this Court as regards the validity of Ext. P-2, if favourable, it might be open to the plaintiff to move the authority for the cancellation of the registry in the names of defendants 1 and 3 or for a registry in the name of the

plaintiff

As to this we express no opinion whatever, We can only hold, that though the sale deed Ext. P-2 and the subsequent sale deeds Exts. P-3 and P-4, have to operate on the title of Parameswaran Pillai acquired by him on the death of Kochukunjamma, the plaintiff is not entitled to recover possession of the property from defendants 1 and 3 so long as the registry in their name stands. If and when, within the prescribed period of limitation for the execution of the decree now passed, the plaintiff succeeds in securing the registry, it shall be open to her to execute the decree. There was an issue raised for trial relating to the value of improvements payable on redemption which the two Courts did not think it necessary to decide in the view they have taken. In the event of the decree for possession materialising as stated above, it will become necessary to try and decide the question and this may be done in execution.

9. In the result, the judgment and decree of the lower Court are reversed. A declaration is granted to the plaintiff that Exts. P-2, P-3 and P-4 are operative on the interest of Parameswaran Pillai. If within the prescribed period of limitation, the plaintiff obtains registry of the property in supersession of that in favour of defendants 1 and 3, the plaintiff may recover possession of the property and in the event of such recovery, the question as to the value of improvements shall be decided in the nature of the contest raised between the parties, we direct them to bear their cost throughout. The cross-objection is dismissed without costs.