

(1985) 06 KL CK 0027

In the High Court Of Kerala

Case No : A.S. No. 95 of 1979 and Cross Objection

Gouri Amma Kanakamma

APPELLANT

Vs

Kesavan Govindan and Others

RESPONDENT

Date of Decision : 13-06-1985

Acts Referred:

Transfer of Property Act, 1882 — Section 55, 55(2)

Citation : AIR 1986 Ker 30

Hon'ble Judges : P.C. Balakrishna Menon, J;K. Sukumaran, J

Bench : Division Bench

Advocate : S. Narayan Poti and S. Sivaraman, for the Appellant; V. Harihara Iyer and C.K.S. Panicker, for the Respondent

Final Decision : Dismissed

Judgement

Balakrishna Menon, J.—For the purpose of this appeal by defendants 6 and 9, it is not necessary to go into the facts of the case in detail. The bare facts necessary for the disposal of the appeal are as follows :

2. In pursuance to an agreement Ext. A7 dated 2-11-1965 between the plaintiffs on the one hand and defendants 1 and 2 on the other, two documents Exts. A2 and A3 were executed by defendants 1 and 2 in favour of the plaintiffs conveying title to immovable properties mentioned therein. Ext. A2 dated 11-2-1965 is a deed of exchange, and Ext. A3 dated 16-4-1966 is a sale deed conveying immovable properties to the 1st plaintiff. The 1st defendant died during the pendency of the suit and defendants 6 to 9 were impleaded as his legal representatives. The appeal is by two among the legal representatives of the 1st defendant.

3. Part of the property conveyed to the plaintiffs under Exts. A2 and A3 was lost on account of the decree in O. S. No. 471 of 1966 obtained by a third party. Ext. A8 dated 22-/-1970 is the preliminary decree for redemption and recovery of possession of the property concerned. The present defendants 1 and 2 are also

parties to that suit. The present plaintiffs appealed against Ext. A8 preliminary decree for redemption and recovery of possession of the property. The appellate Court confirmed the decree whereupon a second appeal was filed before this Court by the present plaintiffs. The present defendants 1 and 2 who were also parties to O. S. No. 471 of 1966 had suffered the preliminary decree Ext. A8 and had not taken up the matter in appeal. At the second appeal stage there was a compromise as evidenced by Ext. A10 and in pursuance to the compromise decree a final decree was passed a certified copy of which is produced as Ext. A9. It was in "pursuance to these proceedings that portions of the property conveyed to the plaintiffs under Exts. A2 and A3 were lost. The plaintiffs claim compensation for the loss of property from defendants 1 and 2, who had purported to convey title to the plaintiffs. They have also claimed mesne profits which they were obliged to pay to the plaintiffs in O. S. No. 471/1966 and also costs of that litigation. The plaintiffs had also to pay a sum of Rs. 3031.35 to salvage another item of property conveyed under Ext. A3. It is to recover these amounts that the present suit had been filed.

4. The defendants raised various contentions in their written statements denying the plaintiffs' right to recover damages for the loss of property as aforesaid. The Court below has decreed a sum of Rs. 6515.13 as the value of the property lost on account of eviction by title paramount. Rs. 3894.80 as the mesne profits that the plaintiffs were obliged to pay to the decree holder in O. S. No. 471 of 1966 and Rs. 900/- as costs that they had to incur in defending the litigation with respect to the property. A further sum of Rs. 3031.35 was decreed as the amount spent by the plaintiff to salvage another item of property conveyed under Ext. A3. .

5. There is no appeal against the decree for payment of Rs.3031.35. The appeal relates only to the decree in relation to the other items mentioned above.

6. Counsel for the appellants submits that the decree by way of compensation for the property lost is not sustainable in the present case as according to him the plaintiffs were fully aware of the defect in title at the time when defendants 1 and 2 conveyed the properties to them and hence they are precluded from claiming compensation for the loss of property. We find it difficult to accept this argument. As per Section 55(2) of the T. P. Act, a seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same. This warranty of title subsists whether the buyer is aware of the defect in title or not.

7. Counsel relies on the decision in Ramalinga Padayachi Vs. Natesa Padayachi, in support of his proposition that in a case where there is no representation by the seller regarding title the implied warranty of title u/s 55(2) of the Transfer of Property Act will not be available. In the aforesaid decision of the Madras High Court, Kailasam J. has accepted the dictum of the Full Bench in Adikesavan Naidu v. Gurunatha Chetti ILR 40 Mad 338: AIR 1918 Mad 1315 that the implied warranty of title u/s 55(2) is available to a buyer even if he is aware of the defect

in title of the seller. The learned Judge also refers to the decision in *Md. Ali Sheriff v. Venkatapathi Raju* 39 Mad LJ 449 : AIR 1920 Mad 634 wherein a Bench of the Madras High Court held that mere knowledge on the part of the buyer of the defect in title of the vendor would not by itself defeat the buyer's right on the basis of the covenant implied by Section 55(2) of the T. P. Act. On the facts of the case, before the learned Judge, however, it was held that the implied warranty of title cannot be inferred as the evidence was overwhelming that the purchaser was fully aware of the defect in the seller's title and a sale deed was got executed with ulterior motive to commence litigation against the lawful owner of the property. Section 55 of the Transfer of Property Act itself being subject to any contract to the contrary, on the facts of the case before the learned Judge the inference was irresistible that the implied warranty of title u/s 55(2) was not available to the buyer on the facts discussed in the judgment. We are not therefore persuaded to accept the proposition put forward by the learned Counsel for the appellant on the authority of the decision of the Madras High Court in *Ramalinga Padayachi Vs. Natesa Padayachi*, that for the reason of the buyer's awareness of the seller's defect in title the implied warranty u/s 55(2) will not be available to him.

8. It is next contended that the compensation for the loss of property fixed by the Court below is excessive as according to him a much larger extent of property covered by Ext. A3 was conveyed for a total price of Rs. 6,000/-. We do not see any substance in this submission. Compensation payable is for the loss of property on the date on which it was lost, and not the price at which the properties including the lost property had been purchased long time back. The value of the property is fixed on the basis of the Commissioner's mahazar and report marked as Exts. A17 and A18. Nothing has been brought out to discredit the Commissioner's valuation of the property lost. We therefore overrule the contention that the value of the property lost should be fixed at the price at which it had been conveyed to the buyer.

9. It is next contended that the property was lost by reason of Ext. A9 compromise decree to which the defendants 1 and 2 are not parties. It is the contention of the appellants that the compromise decree itself is collusive and for that reason also no compensation for loss of property can be granted against the defendants. We see no substance in this contention also. Defendants 1 and 2 have suffered Ext. A8 preliminary decree. It was only the present plaintiffs who took up the matter in appeal and on dismissal of the appeal filed a second appeal before this Court. It was at the stage of the second appeal that the matter was compromised as per Ext. A10 compromise decree. Even though the defendants are not parties to the compromise they were parties to the proceedings before this Court and it would have been open to them to oppose the compromise if it was against their interests. It is clear no such contention was available to them for the reason that they had not appealed against the preliminary decree Ext. A8.

10. The plaintiffs have filed a memorandum of cross-objections claiming that the

value of the property lost should have been fixed on the basis of the value shown in Ext. A7 agreement for sale dated 2-11-1965. Ext. A7 takes in several other items also and as earlier held the compensation payable is the market value of the property on the date on which it was lost. We have already found that there is no material to interfere with the valuation of property arrived at by the Court below on the basis of the Commissioner's report Ext. A18.

The appeal and the memorandum of cross-objection fail and are dismissed. No costs.