
(1962) 03 KL CK 0015

In the High Court Of Kerala

Case No : Second Appeal No. 954 of 1958

Kannambath Narayanan Nair

APPELLANT

Vs

Kannambath Sankaran Nair and Others

RESPONDENT

Date of Decision : 02-03-1962

Acts Referred:

Evidence Act, 1872 — Section 115

Malabar Tenancy (Amendment) Act, 1956 — Section 5(2)

Transfer of Property Act, 1882 — Section 53

Citation : AIR 1963 Ker 79

Hon'ble Judges : M. Madhavan Nair, J

Bench : Single Bench

Advocate : A.A. Achuthan Nambiar, for the Appellant;

Final Decision : Allowed

Judgement

M. Madhavan Nair, J.—This second appeal is by the plaintiff who sued for a declaration that an assignment executed by him in favour of the 1st defendant, who is none other than his own younger brother, was sham and did not come to effect.

2. The plaintiff was holding the suit property as 3 lessee. In October 1942, the landlord served on him Ext, A 7 notice to quit, to which he sent the reply Ext, A8 ue-nyrng the landlord's right to resume the land under the provisions of the Malabar Tenancy Act. Apprehending that the landlord might institute a suit for his eviction, the plaintiff, on February 9, 1943, executed Ext. A1 as signment of his tenancy in the name of the 1st defendant, who was then in the Army, The assignment was designeo to secure the benefit of the Indian Soldiers' Litigation Act, to delay any attempt by the landlord to resuma the land through a court of law. As apprehended the landlord did sue for the plaintiff's eviction, in O. S. No. 345 of 1943 on the file of the Munsif, Koothuparamba, Ext. A9 being the plaint therein, claiming the land for his bona lida cultivation. The assignment under Ext. A1 was pressed into service in that suit which was consequently stayed till 1947.

Meanwhile other enactments of tenants' protection came to be in succession and therefore the suit had a chequered career. In 1954 the brothers fell out; and on August 16, 1954, the 1st defendant filed an additional written statement, Ext. XIV expressing his willingness to surrender the property to the landlord. The plaintiff, who was thrown off his chord by this unexpected event, instituted the present suit on August 25, 1954, for a declaration that the assignment which he had executed in favour of the 1st defendant was a sham document not intended to be put nor come to effect and that the 1st defendant had no interest in the suit property. In answer thereto the 1st defendant asserted the assignment valid and operative and himself the real tenant of the property the Munsif accepted validity of the assignment and dismissed the suit, observing also that the plaintiff is not entitled to any relief against a fraudulent conveyance made by himself. On appeal, the District Judge felt "no hesitation to hold that Ext. A1 is sham and was not intended to be acted upon," but observing "plaintiff has succeeded so far in staying the suit, firstly under the Soldiers' Litigation Act and later on by other Stay Acts, the later of which were made available to him only on account of his initial move. I am inclined to hold that plaintiff intended fraud and that what was intended by him was effected by him to a substantial extent, if not fully" dismissed the appeal. The plaintiff has therefore come up in second appeal.

3. The Supreme Court has pointed out in *Deity Patta-bhiramaswamy v. Hanymayya* AIR 1959 SC 57 that the High Court has no Jurisdiction to interfere in second appeal with a finding of fact entered by the first appellate court on an appreciation of the evidence on record, even if it be grossly erroneous. The findings, that Ext. A1 was a sham deed, and that it was designed to delay eviction of the plaintiff by the landlord which object was carried out substantially, have to be accepted and this second appeal decided on that basis only. The question then is whether the plaintiff is debarred by his protraction of the landlord's suit for his eviction from asserting his real title to the tenancy in this suit and securing the declaration sought for.

4. The suit for plaintiff's eviction was instituted in 1943. Even the notice to quit was issued in October 1942 only. The rights of landlords in regard to lands demised to lessees have been the subject of several statutory Declarations by the Madras Legislature the last of which was in the Malabar Tenancy (Amendment) Act 22 of 1956. It is provided in Section 5(2) of that Act:

"Where before the commencement of the Malabar Tenancy (Amendment) Act, 1954 (Madras Act VII of 1954), a landlord has obtained possession of a holding in execution* of a decree passed by a court on or after 1st July 1942 under Clause (5) or Clause (6) of Section 14 or under Clause (5) or clause (6) of Section 20 of the Malabar Tenancy Act, 1929 (Madras Act 14 of 1930), and such decree would not have been passed if the principal Act, as amended by the Malabar Tenancy (Second Amendment) Act, 1945 (Madras Act 24 of 1945), the Malabar Tenancy (Amendment) Act, 1951 (Madras Act 33 of 1951) and this Act had been in force at that time, the tenant shall be entitled to be restored to the

possession of the holding with all the rights and subject to all the liabilities of a tenant it he makes an application in that behalf in the Court which passed the decree within twelve months of the commencement of this Act. . . . "

It is thus clear that even if a landlord had obtained a decree on July 1, 1942 for eviction of a tenant and in execution thereof resumed the land after the aforesaid date, such resumption would be nullified and the tenant restored to possession, status quo ante. This is virtually and in effect a negation of the landlord's right to evict his tenants even if it had been decreed in July 1942. It eviction of tenants after 1st July 1942 for bona fide cultivation of the land by the landlord is declared not legal by the legislature -- that is the effect of Section 5(2) of the Madras Act 22 of 1956 - plaintiffs attempt to delay or avoid his eviction by his landlord on the same ground after the said date cannot be characterised as anyway wrongful, much less fraudulent.

5. Counsel points out that unless application has been made by a tenant within "time allowed by the Act, the eviction effected would not be disturbed, much less annulled, by courts. Of course, all legal rights are subject to the law of limitation, and any legal right is apt to be lost if not pressed into service within the time set by law for its enforcement; and therefore the fact that the Act 22 of 1956 has set a period of one year only for the tenant to apply for restoration in possession does not militate against the above conclusions.

6. Shri A. Achuthan Nambiar, counsel for the plaintiff, reports that the suit for plaintiff's eviction (O. S. No. 345 of 1943) had been dismissed without any advertence to the claim of bona fide need for cultivation urged as the ground for eviction by the landlord. Though he wanted to file an attested copy of the Judgment in that suit, as it has not been produced earlier after notice to the other party, I have refused to look into the same. Suffice it to say that the concern here is only to see if an attempt to delay the landlord in getting a decree for eviction of his lessee in a suit instituted in 1943 amounted to fraud in law. Fraud in its widest connotation may be any unfair means used to obtain an unconscionable advantage over another. Even then a transaction designed to obstruct an act which the law did not favour and ruled to nullify with retrospective effect cannot be characterised as fraud or foul play. As subsequently declared retroactively by the legislature, the landlord had no right of eviction of the present plaintiff since 1st July 1942; and the suit for his eviction was instituted only in 1943. Even if the landlord had obtained a decree at the first hearing of the suit, and reduced the property to his possession in execution thereof, the same had to be annulled and plaintiff put back in possession of the property as required by Act 22 of 1956. Nothing can be clearer to declare that the landlord had not, subsequent to 1st July 1942, the right to evict a tenant on the ground of a desire to resume for direct cultivation. Obstructing an untenable action cannot be a sin on the part of a party, to keep him out or deny him the normal protection of the Court,

7. Even if the attempt to delay eviction by resort to Ex. A1 be a fraud, it cannot

estop the plaintiff from relying on his present possession of the suit property. The maxim *Allegans suam turpitudinem non est audlendus* (a person alleging his own turpitude is not to be heard) is subject to several exceptions. One such exception is where the fraudulent transaction remains still "executory and the purpose of the fraud has not been effected. An other exception is where two persons conspire to defraud a third, and in order to do so enter into a colourable transaction and after the purpose of the fraud has been achieved, one of the confederates seeks to enforce the transaction concealing the real facts, in the latter, the rule is *In pari delicto, potior est conditio possidentis* (in equal fault, the condition of the possessor is the better) Courts should not, by preventing one party from showing the real nature of the transaction, make itself the instrument of the other to enforce a transaction which is tainted with fraud and which had been brought about and utilised by the joint acts of both the parties,

"In such circumstances, public policy demands that the truth be ascertained; and if it is found that both the plaintiff and the defendant were in *in pari delicto* the court shall refuse its support to either confederate."

See the unanimous judgment of five learned Judges in *Qadir Bakhsh v. Haham* AIR 1932 Lah 503 . If obstructing plaintiff's eviction by his landlord was a fraud or a wrong, the defendant joined with the plaintiff in that evil design and was actively carrying out the same as counsel on both sides conceded before me, till August 15, 1954, when he chose to resign and file the additional written statement Ext. A14; and before he could proceed further in the matter this suit came in on August 25, 1954. Thus the defendant was the plaintiff's confederate in the fraud and cannot estop the plaintiff from proving the reality of facts. Possession of the property is still found to be with the plaintiff. Hence, even if it be found that Ext. A1 was a fraudulent transaction the post session of the plaintiff has to be upheld as rightful against the defendant

8. In *Immani Appa Rao and Others Vs. Gollapalli Ramalingamurthi and Others*, the Supreme Court has observed:

"If it is found that both the parties are equally guilty and that the fraud intended by them has been carried out the position would be that the party raising the defence is not asking the Court's assistance. In any active manner all that the defence suggests is that a confederate fraud should not be permitted to obtain a decree from the Court because the document of title on which the claim is based really conveys no title at all. It is true that as a result of permitting respondent 2 and the appellants to prove their plea they would incidentally do assisted in retaining their possession; but this assistance is of a purely passive character and all that the Court is doing in effect is that on the facts proved it proposes to allow possession to rest where it lies. It appears to us that this latter course is less injurious to public interest than the former.

There can be no question of estoppel in such a case for the obvious reason that the fraud in question was agreed by both the parties and both parties have

assisted each other in carrying out the fraud. When it is said that a person cannot plead his own fraud it really means that a person cannot be permitted to go to a Court of Law to seek for its assistance and yet base his claim for the Court's assistance on the ground of his fraud. In this connection it would be relevant to remember that respondent 1 can be said to be guilty of a double fraud; first he joined respondent 2 in his fraudulent scheme and participated in the commission of fraud the object of which was to defeat the creditors of respondent 2, and then he committed another fraud in suppressing from the Court the fraudulent character of the transfer when he made out the claim for the recovery of the properties conveyed to him. The conveyance in his favour is not supported by any consideration and is the result of fraud; as such it conveys no title to him. Yet, if the plea of fraud is not allowed to be raised in defence the Court would in substance be giving effect to a document which is void ab initio. Therefore, we are inclined to hold that the paramount consideration of public interest requires that the plea of fraud should be allowed to be raised and tried, and if it is upheld the estate should be allowed to remain where it rests. The adoption of this course, we think, is less injurious to public interest than the alternative course of "giving effect to a fraudulent transfer."

9. The only ground on which the real title of the plaintiff to the suit property, found by the court below, has been denied to him is that it was fraud on his part to have relied on Ext. A1 and thereby delayed the landlord's action to evict him from his holding. The result is that the 1st defendant, in whom the plaintiff placed confidence to secure his tenancy, and who in that design betrayed him and wanted to surrender the property to the landlord, has been now held by the court below as the absolute holder of the tenancy which he himself abdicated before. The fact that the property is still in the possession of the plaintiff, as stated by counsel on both sides before me, only affirms the conclusion that the assignment was sham and never intended to be put to effect. The attitude of the 1st defendant in Ext. A-14 as being ready to surrender the tenancy to the landlord also indicates in a way that he had no real interest in the tenancy. There is no virtue in the defendant now claiming the property as belonging to him as the tenant thereof with statutory fixity for its enjoyment.

10. In any view, the plaintiff is entitled to the declaration sought for in this suit. The second appeal succeeds and the suit is decreed in terms of the plaint with costs here and hitherto. Leave granted.