(1985) 05 KL CK 0004

In the High Court Of Kerala

Case No : A.S. No. 75 of 1979

Mani J. Meenattoor — APPELLANT

Vs

Mrs. Amy Homi Colabwalla and Others — RESPONDENT

Date of Decision : 16-05-1985

Acts Referred:

Transfer of Property Act, 1882 — Section 55(2), 66

Citation : AIR 1986 Ker 149

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

Bench : Division Bench

Advocate : M.M. Abdul Aziz and Chacko J. Kallivayalil, for the Appellant; T.L. Viswanatha Iyer, for the Respondent

Final Decision : Dismissed

Judgement

Balakrishna Menon, J.—To decide the two questions raised by defendant-appellant 1, it is unnecessary to state the facts of the case in detail. The bare facts necessary for the disposal of the appeal are as follows:

2. Defendant 2 entered into an agreement with the deceased'' plaintiff 1 for the purchase of 1103.86 acres of private forest in South Wynad Taluk known as the Valiya Para Estate. The agreement provided for the sale of the land to defendant 2 or his nominees. Defendant 1 as per Ext. Al sale deed dt. 6-7-1968 purchased 490.98 acres of land from the plaintiff as advised by defendant 2 for a price fixed at Rs. 100,000/-to wards which a sum of Rs. 38,000/- was paid on the date of sale and the balance Rs. 62,000/-was to be paid within six months thereafter. Defendant 1 was put in possession of the land on the date of Ext Al itself. The period of six months fixed in Ext. Al for payment of the balance consideration of Rs. 62,000/- expired on 6-1-1969. The plaintiff issued Ext. A2 notice dt. 6-3-1969 to defendant 1 demanding payment of the balance consideration and requiring defendant 1 to desist from cutting and removing trees in the land sold before the balance consideration is paid. There was no reply to Ext. A2 notice and a suit was filed on 21-11-1969, for recovery for the sum of Rs. 62,0007-with

interest from the date of sale. The plaintiff died during the pendency of the suit and plaintiff 2 is brought on record as his legal representative.

3. Various contentions were raised by defendant 1 in defence to the suit For the purpose of this appeal it is necessary to advert only to the following contentions.

4. Defendant 1 had shortly after Ext. Al applied to the Collector of the District for a clear-felling permit under the Madras Preservation of Private Forests Act, with a view to clearfell the land and convert it into a cardamom and coffee plantation. The plaintiff opposed the application as per his statement of objections a copy of which is produced as Ext. A6. Shortly afterwards the present suit was filed and the plaintiff obtained an order of temporary injunction in I. A. No. 3201 of 1969 against defendant 1 from cutting trees from the land sold under Ext Al. For the reason of the plaintiffs'' objection defendant 1 could not cut and remove the trees and convert the land into a plantation. The Kerala Private Forests Vesting and Assignment) Act came into force on 10-5-1971, and the entire land has vested in the Government free of all encumbrances. The sale deed Ext 1 was without the requisite permission of the Collector u/s 3 M. P. P. F. Act It is, therefore, void and no relief can be claimed on the basis of the void document. The plaintiff in preventing defendant 1 from cutting and removing the trees by raising objections before the Collector and obtaining an order of temporary injunction from the Court below has violated the covenant for quiet enjoyment u/s 55(1)(f) T. P. Act. It was for the reason of the plaintiffs'' objection that the land could not be clear-felled and converted into a plantation. It remained as a private, forest and ultimately vested in Government on 10-5-1971 free of all encumbrances. The plaintiff is therefore precluded from claiming the balance consideration due under Ext. Al. The 1st defendant is in the position of a mortgagor in possession for the reason of the charge u/s 55(4) T. P. Act and as mortgagor he is entitled to cut and remove the standing timber by virtue of the provisions contained in Section Section 66 T. P. Act.

5. The Court below overruled all these contentions raised on behalf of defendant 1 and decreed the suit for recovery of the balance consideration of Rs. 62,000/- with interest from the date of Ext. Al.

6. The Court below on the evidence adduced in the case found that the transaction Ext. Al was after obtaining the requisite sanction of the Collector u/s 3, M.P.P.F. Act. The respondent has produced the order of sanction of the Collector dt. 5-4-1968 for sale of the land, as additional evidence in the appeal as per C. M. P. No. 15144 of 1985. We have admitted the document as additional evidence in the appeal, and in view of the original order produced. Counsel for the appellant does not seriously press the contention that the sale dated Ext. Al is void for want of sanction of the Collector u/s 3 M. P. P. F. Act. Section 55(2) T. P. Act; enacts that the 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. The seller is entitled to a charge on the property for the unpaid purchase money as provided for in Sub-section (4) Section 55 T. P.

Act. There cannot therefore be any doubt that he is entitled to take such steps to see that the security is not depleted. The land assigned as per Ext. A1 took in also'' the standing timber of considerable value, the removal of which would adversely affect the plaintiffs interests in the security for realisation of unpaid purchase money.

7. In Mulla''s T. P. Act, Sixth Edn. it is stated at page 326:

"The implied covenant of title applies to any lawful eviction by title paramount and imports an absolute warranty of the title professed to be transferred and of the seller''s power to deal with it. Comparing the covenant u/s 55(2) with the covenant implied under the Law of Property Act, 1925, in England, the learned Author says at page 328:

"These covenantsare in some respectsmore limited and in some respects more extensive than the covenant implied by Section 55(2). The English covenants are more limited because they apply only to acts of the seller, and his predecessors in title, subsequent to the last purchase for value (x); while the Indian covenant applies to any lawful eviction by title paramount and is an absolute warranty of the title transferred. The English covenants are more extensive as they include the covenant for quiet enjoyment, for freedom from incumbrances and for further assurance. The Indian covenant for title does not include a covenant for quiet enjoyment; but some Nagpur cases seem to assume that it does."

In Muhammed v. Govardhanlal. 1963 Ker LT 182. Velu Pillai J. stated at page 183:

"The decided cases on the subject to which my attention has been drawn are uniformly of the view, that the covenant implied by Section 55(2) of the Indian T. P. Act, includes a covenant for quiet enjoyment. The principle deducible from them appears to be that title which is covenanted for under the section includes, depending on the nature of the title conveyed, the right of the vendee to be in possession and enjoyment of the property and so a disturbance of such possession and enjoyment necessarily affects the title conveyed and constitutes a breach or infringement of the covenant implied by the section. I see no reason to differ from the view, that if the right to be in possession and enjoyment is part of the title conveyed, a disturbance of such possession and enjoyment may be deemed to affect the title".

In Dr. Gwasha Lal v. Kartar Singh AIR 1961 J & K 66, Fazl Ali J. referring to Section 55(2) T. P. Act. stated at page 71:

"A perusal of this clause clearly shows that the statute imports an implied warranty of title in a contract of sale even though there is no express warranty. The warranty of title contained in the Act relates firstly to the question that the vendor has a good title to convey and that the vendor has power to convey the property and secondly that the vendee should enjoy a peaceful and undisturbed possession of the property sold."

M.S. Menon, J. (as he then was) in the decision in Ramalinga Iyer v. Vasudevan

Moosad 1957 Ker LT 588 has referred to and accepted Mulla''s observation as the correct interpretation of Section 55(2) T. P. Act. It is also held that a covenant for quiet enjoyment is a restricted covenant limited to disturbance by the covenantor or persons claiming under him. In AIR 1932 5 (Nagpur) , Niyogi, A. J. C. in his concurring judgment stated at page 9:

"When a vendee, whose possession is disturbed by the rightful claimant, sues his vendor for compensation, his claim in substance, is one founded on the breach of the covenant for quiet enjoyment. The covenant for title in a generic sense includes a covenant for quiet possession, but in its special sense means only a covenant as to the vendor''s right to convey."

Jackson, Offg. J. C. stated at page 10:--

"As Niyogi, A. J. C. has pointed out, the usual covenants for title are four, and the expression "covenant for title" does not, as is too often assumed, mean merely "covenant for right to convey", but includes "covenant for quiet enjoyment"

8. On an anxious consideration of these decisions, we are clearly of the view that the covenant implied u/s 55(2) T. P. Act for quiet enjoyment relates only to the title conveyed if the title itself is subject to restrictions there cannot be a covenant for enjoyment of a higher title. The title conveyed may not in all cases entitle the vendee to get possession and in such cases it is wrong to state that the covenant for quiet enjoyment would take in a right to be in possession of the property conveyed. In the present case the title conveyed under Ext. 1 is subject to the statutory charge u/s 55(4) T. P. Act, and the seller is entitled to take all necessary steps to preserve his security. We therefore overrule the contention based on Section 55(2) T. P. Act.

9. There is also no force in the contention based on Section 66, T, P. Act. As per Section 66, a mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate; but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act. The section contains an explanation as per which the security is insufficient unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage. The argument is that for the reason of a charge u/s 55(4), T. P. Act, for the unpaid purchase money, the buyer is to be equated to the position of a mortgagor in a simple mortgage as per Section 100 T. P. Act, and the mortgagor in possession is entitled to cut and remove the standing timber on the mortgaged property to the extent not to reduce the security beyond the limit prescribed under the Explanation to Section 66.

10. Counsel relies on the following passage in Sanjiva Row''s Transfer of Property Act. Fourth Edition, Vol. 2, page 1212:

"While recognising the mortgagor as owner and having the right to use and enjoy the property, in any way he likes, this section imposes upon him the duty not to commit any act which is destructive or permanently injurious to the mortgaged property, if the security is insufficient or will be rendered insufficient by such act. Thus, the mortgagor is at liberty to cultivate the land and take the crops growing on them, or to cut and appropriate, for his own use, underwood, on the same footing as yearly crops. He is also entitled to cut and sell the timber and appropriate the proceeds.'' Ail these are merely acts of enjoyment of the property by the owner, and are, in no sense, alienations or conversions of the security."

The same Author at page 1213 refers to the following observations of Wigram, V. C. in King v. Smith (1843) 2 Hare 239:

''The question which must be tried is whether the property the mortgagee takes as a security is sufficient in this sense -- that the security is worth so much more than the money advanced -- that the act of cutting timber is not to be considered as substantially impairing the value which was the basis of the contract between the parties at the time it was entered into."

Reliance is also placed on the decision in Surapudi Muniappa v. Nookala Seshayya Gari Subbiah AIR 1917 Mad 880, where Courts Trotter J. (as he then was) stated at page 881:

"The mortgagor was entitled to the standing timber and turn it into chattels; and the only remedy against him would be an action for damages for the depreciation of the mortgage security if it can be shown that he has in fact by his action lowered the value of the mortgage security below the statutory minimum: See Section 66, T. P. Act."

Srinivasa Aiyangar J. in his concurring judgment stated at page 883:

"Now coming to the question in dispute in this case, as 1 have already observed, the mortgagor is entitled to use and enjoy the mortgaged property in any way he likes. He is at liberty to cultivate the lands and take the crops grown on them. He is also entitled to cut and appropriate for his own use underwood, on the same footing as yearly crops. He is also entitled to cut and sell the timber and appropriate the proceeds. All these are merely acts of enjoyment of the property by the owner and are in no sense alienations or conversions of the security; in fact so far as the use or enjoyment of the properties is concerned, the mortgagor is entitled to its unrestricted enjoyment as if no mortgage existed on the property subject only to this qualification that he by his acts does not render the security insufficient."

If the mortgagee is entitled to sustain an action in damages against the mortgagor for the depreciation of the mortgage security by his act of cutting and removing the standing timber as stated by Coutts Trotter J., there can hardly be any doubt that he is entitled to raise objections before the statutory authority under the M. P. P. F. Act when the mortgagor applies for permission for the cutting and removal of trees in the mortgaged property. He is also entitled to institute a suit for injunction before the damage is actually committed. In the present case the standing timber on the land forms part of the property conveyed under Ext. AI by the plaintiff to defendant I. The charge for the unpaid purchase money extends also to the trees standing on the land. Apparently the limber was of considerable value. There is nothing on record to show that even after the removal of the standing timber, the security for the unpaid purchase money will satisfy the requirements of the Explanation to Section 66, T. P. Act. Section 66 in terms does not authorise the cutting and removal of standing timber on the property mortgaged. The section on the other hand, prohibits the mortgagor from committing any act destructive or permanently injurious to the mortgaged property, so as to render the security insufficient. It is for the mortgagor to prove that cutting and removal of trees by a process of clear-felling are only acts of enjoyment of the property, and notwithstanding such clear-felling, there will be no serious impairment of the security. There is no such evidence in this case and defendant 1 cannot absolve himself of his liability for payment of the unpaid purchase money for the reason that the plaintiff had taken timely steps to conserve the charge u/s 55(4) T. P. Act.

The appeal fails and is dismissed: in the circumstances, without any order as to costs.

Immediately after the pronouncement of the judgment Counsel for the appellant made an oral application for leave to appeal to, the Supreme Court. We do not see that the case involves any substantial question of law of general importance that needs to be decided by the Supreme Court. Hence the prayer is rejected.

