
(1964) 12 KL CK 0001
In the High Court Of Kerala
Case No : S. A. No. 829 of 1960

Muhammed

APPELLANT

Vs

Govardhanlal and Others

RESPONDENT

Date of Decision : 04-12-1964

Acts Referred:

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

Citation : (1965) KLJ 108

Hon'ble Judges : S. Velu Pillai, J

Bench : Single Bench

Advocate : T.S. Venkiteswara Iyer, for the Appellant; A.S. Krishna Iyer and A.K. Ramasheshadrinathan for 1st respondent, for the Respondent

Judgement

S. Velu Pillai, J.—The appellant sued to recover the sum of Rs. 3,750/- and interest from the first defendant, who may be referred to as the respondent, and from the estate of his deceased brother poppattalal, represented in the suit by his widow and children, who are respondents 2 to 4. Poppattalal and the respondent sold a property to the appellant by Ext. P. 2 in the year 1119, for a consideration of Rs. 3,750/-. At the time, there was in force, a contract for the sale of the property to Mohammed for Rs. 1,651/- of which they had received Rs. 1000/- in advance. Mohammed sued the respondents and others, including the appellant and P.W. 1 the assignee of the property from the appellant under Ext. P. 1, in O. S. 105 of 1121 for specific performance of the contract. On the impleadment of P.W. 1 on the basis of Ext. P. 1, the appellant was removed from the array of parties. In second appeal, specific performance was allowed and the case was remanded for passing a final decree on settlement of the value of improvements, if any, payable to P.W. 1. Before the final decree was passed, the appellant commenced the suit from which this second appeal arises, on the 22nd January, 1957, for refund of the consideration paid under Ext. P. 2. Pending this suit, Mohammed took delivery of possession of the property in execution of his decree, under Ext. P. 12 delivery receipt dated the 6th December, 1958. It was found in the earlier suit and it was not questioned in this second appeal, that the

appellant when he took Ext. P.2, had notice of the contract for sale to Mohammed. This suit was decreed by the Subordinate Judge, but was dismissed in appeal by the District Judge, chiefly on the ground, that the contract for sale did not create an interest in the property in favour of Mohammed, and that title to the property remained with the appellant, because no sale deed has yet been executed in favour of Mohammed as decreed, although as held, the property has been delivered to him in execution. In second appeal it was contended for the appellant, that possession of the property having been delivered in execution of the decree obtained by Mohammed, there has been a breach of the covenant for title implied by section 56(2) of the Cochin Transfer of Property Act, which was in force at the time, and which may be referred to as section 55(2) of the Indian Transfer of Property Act, and that the covenant for title so implied is comprehensive to include a covenant for quiet enjoyment. 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 Transfer of Property 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. That a covenant for title u/s 55(2) includes a covenant for quiet enjoyment was ruled by a Full Bench of the Nagpur High Court in *Kashirao v Babu* (AIR 1932 Nag 5). This was followed in later decisions of that court reported in AIR 1934 16 (Nagpur) and AIR 1948 382 (Nagpur) the latter of which was by a Division Bench. Two other cases taking the same view are *Noor Mohamed v Lilaram* (AIR 1928 Sin 61) and *Abdul Rahim v Kadu* (A.I.R. 1930 sind 12). Quite recently, the High Court of Jammu and Kashmir held in *Gwasha Lal v Kartar Singh* (A.I.R. 1961 J & K 66), that the covenant implied in section 55(2) is not only that the vendor had a good title to convey, but also, that the vendee should have peaceful and uninterrupted possession of the property. In this court, there is an observation to the contrary in *Ramalinga Iyer v Vasudevan Moosad* (1957 K. L. J. 445) which itself is based on an observation in Mulla's Transfer of Property Act, 4th edition, at page 307. The point did not arise in that case and was not decided and the observation of the learned commentator is against the weight of decided cases.

2. As stated, the District Judge has found, that there has been a dispossession in execution and that possession has passed to Mohammed. This in itself spells a disturbance of quiet enjoyment of the property by P.W. 1, who is but a transferee of the appellant pending that suit and whom the appellant had undertaken to indemnify in the event of an adverse decision, by express contract in Ext. P. 1. The respondent cannot be heard to contend, that because the appellant was

struck off the array of parties in that suit when P.W. 1 was impleaded pursuant to Ext. P. 1, the decree for specific performance is of no effect, or that the appellant cannot claim consequential reliefs. That decree binds the respondent and P.W. 1 was entitled to call upon the appellant to indemnify him. The appellant has no valid answer to such a claim. Having been a party to the execution proceedings, the respondent cannot also contend, that delivery of possession of the property from P.W. 1 was wrongful or illegal, because a sale deed has not yet been executed in favour of Mohammed pursuant to the decree. It was also argued, that whatever dispossession there had been, was not by title paramount, because the title remained with the appellant or with P.W. 1. In my judgment, once the covenant for quiet enjoyment is infringed, Section 55 (2) is attracted and the consequences must follow. The conveyance of title under Ext. P. 2, was voidable at the option of Mohammed, and that option he has exercised.

3. The appellant had notice of the contract for sale. The argument based on this, that the appellant had obtained what he bargained for, that is a title subject to the claim of Mohammed under the contract of sale and so cannot invoke Section 55 (2) is palpably unsound. It is quite clear from the express words of Ext. P. 2, that the respondent and his brother professed to convey to the appellant, the full proprietary interest in the property, without qualification or limitation. There was no reference in it to the prior contract for sale and whatever knowledge the appellant had or gained about it, was not from Ext. P. 2. Section 55 (2) applies when the title which the vendor professed to transfer is impaired.

4. Learned counsel for the appellant also pointed out that the respondent is now seeking to retain a double advantage, namely the consideration which he received from the appellant under Ext. P. 2, and the consideration of Rs. 1,651/- which has been accounted for by Mohammed, whereas the appellant stands to lose, by the provision for indemnity in Ext. P. 1. The sum of Rs. 1,000/- had been paid as advance by Mohammed when the contract of sale was entered into. The balance of Rs. 651/- was adjusted in execution towards costs due to him from the respondent under the decree for specific performance. It was on such adjustment, that Mohammed took delivery of possession. It was stated before me by the appellant's counsel, that he had filed in the lower appellate court the receipt taken by the appellant from P.W. 1 on refund of the sale consideration under Ext. P. 1. I do not rely upon it, as it is not in evidence before me. In my view, dispossession having taken place, the appellant is entitled to a refund of the sale consideration paid under Ext. P. 2. The appellant claimed interest on this amount only from the date of dispossession, and he has been granted a decree by the Subordinate Judge with costs as prayed for. The dismissal of the suit by the District Judge is not justified. The result is, that in reversal of the decree of the District Judge; the decree of the Subordinate Judge is restored with costs against the first defendant-respondent in this court, and in the court below. In the nature of the questions involved, I grant the respondent leave to appeal.