
(1996) 11 KL CK 0036
In the High Court Of Kerala
Case No : A.F.A. No. 44 of 1991

S. Krishnaswami Pillai

APPELLANT

Vs

N. Lakshmanan Pillai and Others

RESPONDENT

Date of Decision : 27-11-1996

Acts Referred:

Registration Act, 1908 — Section 47

Citation : (1996) 2 KLJ 669

Hon'ble Judges : T.V. Ramakrishnan, J;B.N. Patnaik, J

Bench : Division Bench

Advocate : James Vincent, for the Appellant; S.V. Balakrishna Iyer and P.B. Krishnan, for the Respondent

Final Decision : Dismissed

Judgement

B.N. Patnaik, J.—This second appeal preferred by the plaintiff arises out of a suit, registered as O.S. No. 274 of 1980, for enforcement of the right of pre-emption, on the file of the Sub Court, Thiruvananthapuram. The suit was decreed by the trial court and the second defendant was directed to execute the sale deed in favour of the plaintiff in respect of the plaint schedule property for a consideration of Rs. 16,000/-. The second defendant was the purchaser of the suit property which was sold by the first defendant against which the plaintiff as a co-sharer claimed the right of pre-emption. On appeal, preferred by the second defendant, the learned singly Judge set aside the judgment and decree of the trial court and dismissed the suit by the judgment dated 23.10.1990 in A.S. No. 4 of 1984. The plaintiff's case, in brief, is as follows:

The plaintiff and the first defendant are brothers. Chandramathi Animal Chempakam Ammal was their mother. The suit property originally belonged to her. She executed a settlement deed in favour of her sons and allotted A Schedule property therein in favour of the first defendant; B Schedule was given to one Parameswaran Pillai; C Schedule was given to the plaintiff; D Schedule was given to Sri. Gopala Pillai; E Schedule was given to Sri. Neelakanda Pillai and

F Schedule was given to Sri. P.S. Rajan. D Schedule property which is the subject matter of the suit was acquired by the first defendant, by a deed of exchange dated 9.9.1964 executed between him and Sri. Gopala Pillai. Chandramathi died on 19.8.1968 and from that day onwards the first defendant came to possess and enjoy the plaint schedule property. According to para 10 of the settlement deed, if any of the allottees intended to sell the property or a portion thereof, he could sell it only to one or more of the other allottees and not to any outsider. It was also provided in the settlement deed that the successors of the allottees would have absolute right of enjoyment and disposal after the death of the allottees. The first defendant entered into an agreement with the second defendant, who is not one of the allottees, for sale of the plaint schedule property in contravention of the condition mentioned in para 10 of the settlement deed without offering it to the plaintiff at the first instance. The plaintiff, as one of the Co-sharer allottees, is entitled to purchase the property and he is ready and willing to pay the market price. The second defendant filed O.S. No. 237 of 1979 against the first defendant for specific performance of the contract for sale of the property. The plaintiff, therefore, instituted the suit with a prayer to direct the first defendant to sell the property to him, and alternatively, if the second defendant got his title by way of purchase from the first defendant, then he should execute the sale deed in favour of the plaintiff and deliver possession thereof on receipt of a consideration of Rs. 16,000/-.

2. The first defendant was declared ex parte. He died on 28.5.1982 during the pendency of the suit. Hence additional defendants 3 to 9 were impleaded as his legal heirs.

3. It is contended by the second defendant that he obtained a decree against the first defendant and got the sale deed executed through court on 23.1.1981, in O.S. No. 237/79. But the present suit was instituted on 22.7.1980. At the time of filing the suit, there was no cause of action for the plaintiff to file the suit. He is a bona fide purchaser for value. The plaintiff has no right to purchase the property from him by enforcing any right of pre-emption. Since the suit is not maintainable, the right of pre-emption, if any, cannot be enforced.

4. The trial court found that though initially there was no cause of action to file the suit, yet subsequent events, namely, execution of the sale deed in favour of the second defendant by the court in O.S. No. 237/79 during the pendency of this suit supplied the deficiency of cause of action. The legal representatives of the first defendant are also bound by the terms of the settlement deed inasmuch as the sale took place during the life time of the first defendant. Since it is a voluntary sale, the plaintiff can enforce the right of pre-emption and claim for transfer of title in his favour, on payment of due consideration as he is prepared and willing to purchase it as a co-sharer. But, the learned single Judge while agreeing with the findings of the trial court, that the plaintiff had the cause of action to institute the suit and that the sale in favour of the second defendant was a voluntary one, held that the plaintiff lost the right of pre-emption after the

death of the first defendant. According to the terms of the settlement deed, the legal representatives of the first defendant have absolute right and they were not bound by the conditions laid down in para 10 of the settlement deed. With this finding, the learned single Judge allowed the appeal and dismissed the suit.

5. The first respondent herein, who was the second defendant in the suit, has filed a cross-objection contending therein that the learned single Judge erred in holding that the suit was maintainable although, on facts and in the circumstances of the case, the plaintiff did not have any cause of action to file the suit.

6. Mr. James Vincent, learned counsel for the appellant/plaintiff, assailed the finding of the learned single Judge on the ground that the right being attached to the land and the same being not a personal right, the plaintiff has a right to pursue the land. The second defendant having purchased the land of the first defendant in supersession of the right of the plaintiff, the second defendant is liable to transfer the property to the plaintiff.

7. Mr. P.B. Krishnan, learned counsel for the respondents, contended that the suit was premature inasmuch as the plaintiff had no cause of action to file the suit.

8. At the time of hearing of this appeal, the finding of the learned single Judge with regard to the maintainability of the suit was vehemently challenged. Hence, counsel on both sides at first addressed the court on the question of maintainability of the suit. We did not consider the merits of the other findings of the learned single Judge inasmuch as we ultimately found, on the following grounds, that the suit is not maintainable and is bound to be dismissed.

9. In this case, admittedly the suit was filed on 22.7.1980. A decree for specific performance was passed in O.S. No. 237/79 by which the first defendant was directed to execute the sale deed in favour of the second defendant. But, the sale deed was executed on 23.1.1981. Thus the suit was filed prior to the sale of the suit property.

10. When a sale deed is executed in pursuance of a decree for specific performance of a contract, it is a sale on behalf of the judgment-debtor, who has agreed to sell the property to the decree-holder alone. What all that the court does in such a case is that on failure of the judgment-debtor to execute the sale deed, either the court itself or a person appointed by it executes the sale deed on behalf of the judgment-debtor. The consent of the party is there to execute the sale deed when he entered into the agreement for sale. When the execution court enforces the decree it only performs what the judgment-debtor had agreed to perform and such a performance in execution of the decree cannot be said to be an involuntary one. It does not amount to a court sale inasmuch as no third person is allowed to participate in any auction nor does the court issue any sale certificate. Further, no direction is given in a decree for specific performance to sell it in an auction to satisfy the decree. The decree is satisfied only by execution of the sale deed and not by selling the property in auction. In these

circumstances, we hold that the execution of a sale deed by the court or by a person appointed by it in execution of a decree for specific performance of a contract for sale of land is deemed to be a voluntary sale by the judgment-debtor. This view is supported by the decision of the Calcutta High Court in *Gopi Nath Das Vs. Namai Charan Das and Another*, . Thus the sale in question is a voluntary one.

11. In *Shri Audh Behari Singh Vs. Gajadhar Jaipuria and Others*, , it is laid down by the Supreme Court, that the right of pre-emption becomes enforceable only when there is a sale. The law of pre-emption creates a right which attaches to the property and on that footing only it can be enforced against the purchaser.

In *Radhakisan Laxminarayan Toshniwal Vs. Shridhar Ramchandra Alshi and Others*, , the Supreme Court has laid down as follows:

The transfer of property where the Transfer of Property Act applies has to be under the provisions of the Transfer of Property Act only and Mohammedan Law of transfer of property cannot override the statute law.

Under S.54 of the Transfer of Property Act a contract for sale does not of itself create any interest in or charge on immovable property. Where, therefore, the parties enter into a mere agreement to sell, it creates no interest in favour of the vendee and the proprietary title does not validly pass from the vendors to the vendee and until that is completed no right to enforce pre-emption arises. A suit for pre-emption brought on the basis of such an agreement is without any cause of action as there is no right of pre-emption in the plaintiff which could be enforced under the Code.

There are no equities in favour of a pre-emptor, whose sole object is to disturb a valid transaction by virtue of the rights created in him by statute. To defeat the law of pre-emption by any legitimate means is not fraud on the part of either the vendor or the vendee and a person is entitled to steer clear of the law of pre-emption by all lawful means.

Moreover, the right of pre-emption is a weak right and is not looked upon with favour by courts and therefore the courts cannot go out of their way to help the pre-emptor.

In *Ram Saran Lall and Others Vs. Mst. Domini Kuer and Others*, , the relevant facts are as follows:

P executed a sale deed on January 31, 1946, in respect of a house in favour of D and presented it for registration on the same day. On coming to know of the execution of the sale deed, the appellant who had a right of pre-emption, made the talab-i-mowasibat on February 2, 1946. The deed was copied out in the Registrar's books on February 9, 1946, and thereupon the registration became complete as provided in S.61 of the Registration Act. The appellant filed a suit for pre-emption. D resisted the suit on the ground that the sale was completed on February 9, 1946, and the talab had been made prematurely. The appellant

contended that in view of S.47 of the Registration Act a registered document operated from the time it would have otherwise operated and the sale was completed on the date of its execution.

It was held as follows:

The sale was completed only on February 9, 1946, when the registration was complete, that the talab was made prematurely and that the suit must fail. Section 47 merely permitted a document when registered to operate from a date which may be earlier than the date on which it was registered, it did not say when the sale would be deemed to be complete. A sale which was required to be registered was not completed until the registration of the deed was completed.

This court in *Chinna Kunji, Kadukayil Vilakathu Veedu and Others Vs. Kesavan Kochukrishnan and Others*, held that pre-emption is the substitution of the pre-emptor in place of the vendee. That cannot be claimed before a vendee has arrived, that is to say, before a sale has taken place. The learned Judge after referring to the various decisions of the Privy Council, the Supreme Court and other High Courts, held as follows:

True it is that the right of pre-emption is a weak right and may be defeated by any lawful means. Any right, however strong, can be defeated by lawful means. The weakness in the right of pre-emption really lies in the fact that while other rights which are favoured by law can be enforced in a suit unaffected by events subsequent to the institution of the suit, the right of pre-emption is allowed to be defeated by transaction pendente lite. To entitle a plaintiff to a decree in pre-emption his right must have subsisted on the date of the pre-emptive sale and at the date of the institution of the suit and also on the date of the decree, and that if on any of the three dates the right has been superseded or lost, the plaintiff will not be entitled to decree.

We respectfully agree with the above view.

12. Faced with the contention that the suit itself was not maintainable on the ground of prematurity of cause of action as the sale was not complete on the date of suit, the learned counsel for the appellant submitted that the second defendant should not be allowed to take up such a contention which was not specifically taken up in the written statement. It is difficult to sustain the said contention in this case. For, we find that though specifically prematurity of cause of action was not pleaded in the written statement as a ground in support of the contention that the suit is not maintainable, the trial Court has considered the said question specifically under issue No. 1 framed relating to the maintainability of the suit. The learned single Judge has also elaborately considered the said question. Of course, both the trial Court as well as the learned single Judge have found against the said contention and have held the suit to be maintainable on finding that the cause of action was completed while the suit was pending and the Court was justified in taking note of the same and holding that the suit has become maintainable though at the time of filing the suit the cause of action was

not complete. It is the finding so entered by the trial Court and the learned single Judge that was challenged in the cross-objection. In view of the fact that objection regarding prematurity of the suit is one going to the very root of the maintainability of the suit and a specific contention regarding the maintainability of the suit was raised in the written statement and an issue was framed to that effect and the objection was specifically considered by the trial Court and the learned single Judge, we do not find any merit in the above submission of the learned counsel for the appellant. Such an objection cannot be allowed especially in a case where the plaintiff is enforcing a pre-emption right.

13. Since in this case the plaintiff did not have any cause of action to file the suit before the sale of the suit property, the suit must fail. For the reason stated above, we find that there is no merit in this appeal. The appeal is, therefore, dismissed. The Cross-objection is sustained. Parties shall bear their respective costs.