
(1996) 10 AP CK 0081

In the Andhra Pradesh High Court

Case No : Letters Patent Appeal No. 70 of 1989

Tavvala Veerabhadra Rao

APPELLANT

Vs

Bonam Venugopala Rao and Others

RESPONDENT

Date of Decision : 09-10-1996

Acts Referred:

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

Citation : (1997) 4 ALT 713

Hon'ble Judges : Lingaraja Rath, J; B.S. Raikote, J

Bench : Division Bench

Advocate : M.S.K. Sastry, for the Appellant; N.V. Suryanarayana Murthy, for the Respondent

Final Decision : Allowed

Judgement

B.S. Raikote, J.—This Letters Patent Appeal is preferred by the original plaintiff in O.S.No. 43 of 1976 on the file of the Subordinate Judge Court, Rajahmundry. It was a suit for recovery of a sum of Rs. 16,000/- with interest and costs from the defendants on the allegation that the 1st defendant sold suit schedule -A property in favour of the plaintiff vide registered sale deed dated 18-4-1964 vide annexure A-1 for a consideration of Rs. 6,000/-; the B-schedule property were offered as security in the sale deed vide annexure A-1 towards the loss that may be caused to the plaintiff on account of any obstruction by any one at any time in future in respect of A-schedule property covered by the said deed. It is further alleged by the plaintiff that there is not only an obstruction to the title of the plaintiff but it is discovered that the defendants had no title to the property in as much as the plaintiff's vendor D.W.1 claimed to have got the plaintiff A and B schedule property under the settlement deed Ex.A-5, dated 4-9-1961 executed by one Smt. Galla Ammajirao who in turn got them under a partition decree under Ex.A-13, a decree in O.S.No. 47 of 1922, dated 4-2-1926 on the file of the Subordinate Judge Court, Rajahmundry, but the said decree does not mention the suit property. He further alleged that the property that was sold under Ex.A-1

was an undivided half share of defendant No. 1 in Sy.No. 37/2 (87/3 is old Sy.No.) of Rajahmundry in 9 acres and 30 cents. The said half share sold under Ex.A-1 comes to 4 acres and 65 cents. As per the sale deed, Ex.A-1 plaintiff was to be put in possession of the property by the 1st defendant and when the plaintiff wanted to take steps for partition and separate possession of half share and contacted other co-owner Pothula Ramkrishna Rao, but the said Pothula Ramkrishna Rao told him that neither defendant No. 1 nor his predecessors in interest, Smt. Galla Ammajirao had any title or possession over the suit schedule A-property. At that time the plaintiff demanded from the 1st defendant to give possession and title deeds of the suit land. He did not do so. On a further enquiry the plaintiff came to know that neither the 1st defendant nor Smt. Galla Ammajirao had any title to the suit schedule-A property. Since there was a breach of warranty of title of the plaintiff he sought a mortgage decree against the defendants. Defendant Nos. 2 and 3 are the purchasers of the suit schedule B property. During the pendency of the suit defendant No. 3 died and as such defendants 4 to 7 are brought on record as his legal representatives. The defendant No. 1 remained ex parte.

2. By filing a written statement the defendants have contended that the plaintiff has purchased suit schedule-A property after being satisfied about the title of the 1st defendant. The defendant No. 1 got plaintiff A and B schedule properties under the settlement deed, Ex.A-5, dated 5-9-1961 from Smt. Galla Ammajirao. As such there was no defect in the title and the indemnity offered was not for any defect in the title. They further contended that the plaintiff himself was guilty of not taking steps to take possession of the suit schedule-A properties. Defendants 4 to 7 contended that item Nos. 2 and 3 of the schedule B properties purchased by them from defendant No. 1 were demolished by the Rajahmundry Municipality for widening the road and as such those properties are not in existence and the Rajahmundry Municipality had offered a paltry sum as compensation and the defendant No. 4 has refused to receive the same. As against this allegation of defendant Nos. 4 to 7 the plaintiff pleaded by rejoinder that what Rajahmundry Municipality had demolished was only a super-structure and it had not acquired the entire property. At any rate, plaintiff contended, defendants No. 4 to 7 are not absolved of their liability. It is to be mentioned at this stage itself that the 1st defendant, who is the vendor of the plaintiff neither filed a written statement nor contested the suit. On the basis of these pleadings and counter pleadings the plaintiff and defendants went to trial. Plaintiff examined himself as P.W. 1. He examined Sista Kameshwar Rao as P.W. 2. He got marked documents in support of the case vide annexure A-1 to A-14. On the other hand for the defendants, the defendant No. 4 examined himself as D.W. 1 and Bonam Venugopal Rao as D.W. 2. In support of their case defendants also filed documents vide annexure B-1 to B-4.

3. On appreciation of the entire evidence on record the trial Judge being of the opinion that the 1st defendant did not have any title or possession over the suit schedule property sold under Ex.A-1 to the plaintiff and thus there was a breach

of warranty of title and as such the plaintiff was entitled to recover the consideration paid under the sale deed dated 18-4-1964 vide annexure A-1, and consequently granted a preliminary decree in favour of the plaintiff ordering the sale of B-schedule property for the recovery of a sum of Rs. 6,000/- towards the refund of sale consideration under Ex.A-1. He also granted a decree for an amount of Rs. 575/- that was spent towards stamp and registration charges. Thus, he granted a decree for Rs. 6,575/- with proportionate costs and interest at the rate of 6 per cent per annum from 19-2-1976 till the date of realisation. Being aggrieved by the said judgment and decree defendants No. 2 to 7 preferred an appeal before this Court in A.S.No. 286 of 1981. The learned single Judge after hearing both sides, being of the opinion that u/s 55(2) of the Transfer of Property Act there is a statutory presumption that the vendor had title to the property and as such a power to transfer the same, and the plaintiff has filed this present suit just before the expiry of the limitation and as such he is not entitled to any relief, in this view of the matter he allowed the appeal and set aside the judgment and decree of the trial Court by dismissing the plaintiff suit. It is in these circumstances the plaintiff has filed the present Letters Patent Appeal.

4. The learned Counsel appearing for the plaintiff contended that the interpretation laid by the learned single Judge on Section 55(2) of the Transfer of Property Act is not correct. He further submitted that on the basis of the evidence on record it is disclosed that defendant No. 1 represented that he got title to the suit A schedule property on the basis of the settlement dated 4-9-1961 vide annexure A-5 from Smt. Galla Ammajirao. Smt. Galla Ammajirao in turn got this suit schedule A property under a decree dated 4-2-1926 in O.S. No. 47/22 vide annexure A-13 but as per the said partition decree Smt. Galla Ammajirao got a share in two other Survey Numbers namely 218/13 and Sy.No. 592 of Rajahmundry. The said Galla Ammajirao was given half share in Sy.No. 592 (to the extent of 14 acres and odd) and in Survey No. 218/13 she got 18 cents whereas the property that was transferred by defendant No. 1 to the plaintiff i.e. in Sy.No. 87/3 (new number is 37/2). On this basis the learned Counsel for the appellant contended that as per the said partition decree vide annexure A-13 the suit survey number 87/3 was not allotted to Smt. Galla Ammajirao. If that is so, defendant No. 1 could not have got the property from the said Smt. Galla Ammajirao under the settlement deed, A-5. Therefore, defendant No. 1 did not have any title and as such he could not convey any title under Ex.A-1. On this basis the learned Counsel for the appellant submitted that the learned single Judge was in error in setting-aside the judgment and decree of the trial Court passed in favour of the plaintiff. On the other hand the learned Counsel for the respondents/ defendants 2 to 7 supported the impugned judgment and decree of the learned single Judge.

5. Having regard to the contentions urged by the learned Counsel on both sides the point that arises for our consideration is whether the learned single Judge is correct in holding that Section 55(2) of the Transfer of Property Act raises a

presumption in favour of the title and plaintiff was negligent in not taking steps early and as such the plaintiff is not entitled to a decree as prayed for.

6. From both the pleadings and evidence on record it is an admitted fact on behalf of defendants 2 to 7 that defendant No. 1 derived the title on the basis of a partition decree dated 4-2-1926 in O.S.No. 47 of 1922 marked in the case at Ex.A-13 and a subsequent settlement deed dated 4-9-1961 vide annexure A-5. From the reading of Ex.A-13 a decree dated 4-2-1926 Smt. Galla Ammajirao was allotted two survey numbers in Sy.No. 218/13 and Sy.No. 592 of Rajahmundry. She was given half in Survey No. 592 the extent of which roughly comes to 14 acres and 83 1/2 cents and 18 cents in Sy. No. 592. One Smt. Pothula Bullamma was the 1st defendant in the said suit and the Survey Nos. 82/3 measuring 9 acres 17 cents was allotted to her. Smt. Galla Ammajirao also got a cash of Rs. 9,152-13-05 paise. From this decree it follows that the suit Survey No. 87/3 was not allotted to Smt. Galla Ammajirao nor it was a subject matter of that suit. It is not the case of the defendants that this Survey number was acquired by Smt. Galla Ammajirao subsequent thereto nor there is any evidence to that effect. From this the only conclusion possible was Smt. Galla Ammajirao did not derive any right, title and interest to the suit land in Survey No. 87/3 (new Sy.No. 37/2) and if that is so she could not have settled the property in favour of the 1st defendant under Ex.A-5 dated 4-9-1961, the registered settlement deed executed by Smt. Galla Ammajirao in favour of the original defendant No. 1 Sri M. Victor Wellington. On the basis of this material the learned single Judge also concluded that 1st defendant did not get any title to the suit land on the basis of Ex.A-5 and A-13. However, he non-suited the plaintiff on the ground that u/s 55(2) of the Transfer of Property Act, there is a presumption in favour of the title and the plaintiff has brought the suit just before the expiry of the limitation and as such he is not entitled to any decree. The learned Counsel for the appellant is seriously challenging this finding of the learned single Judge. On the other hand the learned Counsel for the respondents submits that there is no error in the conclusions arrived at by the learned single Judge.

7. In order to appreciate the rival contentions on both sides we are extracting the relevant portion of Section 55 of the Transfer of Property Act:

"55. (1) The seller is bound-

(a) to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover.

(b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power.

55.(2) 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.

55.(3) Where the whole of the purchase money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power:.....

56.(5) (a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest.....

An omission to make such disclosures as are mentioned in this section, paragraph (1), Clause (a), and paragraph (5), Clause (a), is fraudulent."

From the reading of the entire Section including the relevant portions extracted above it is clear that in the absence of any contract to the contrary the seller is bound to disclose to the buyer any material defect in the property or in the seller's title thereto, of which the seller is aware and the buyer could not with ordinary care discover, and produce to the buyer, on his request for examination all the documents of title relating to the property. Clause (2) further provides that the seller deemed to contract with the buyer with the interest which the seller possesses in the property. From the reading of Clauses (1) and (2) of Section 55 of the Transfer of Property Act, it is clear that, in the sale by the seller to the buyer, there is always an implied warranty that the seller would make good the title in case either he has no title or his title was subsequently found to be discovered to be defective or he should compensate the buyer for the loss sustained by him. In other words, whenever a person proposes to sell the property it is presumed that he shall be deemed to sell his subsisting interest in the property. Section 55(1)(a) further directs that such seller shall disclose if there are any material defects in the property or in the seller's title. Therefore, from these principles of law embodied in Section 55 (1) and (2) it follows that the buyer can sue the seller in case his title was either found to be defective or he had no title at all on the basis of this implied statutory warranty provided in the said section. To the same effect is the law declared by the Division Bench of this Court in a decision "N. Narasingarayadu v. N. Ankineedu 1961 ALT 421 : 1961 (1) An.W.R. 462 : AIR 1962 A.P. 192& ". In the said judgment after extracting Section 55(2) of the Transfer of Property Act, held that:

"Under the above section, every sale for consideration carries with it a covenant for title. Such a covenant is implied. It is open to the vendor to contract themselves out of the covenants for title. That contract to the contrary must be express. As pointed out in Digamber Das v. Nishibala Debi 8 Ind. Cas 91:

"When reliance is placed upon an express contract to exclude the operation of the statute, the contract to be binding must be in plain and unambiguous language."

In the present case, there is no express language under the sale deed Ex.B. 1 which can exclude the statutory covenant of title u/s 55(2). We find that there was warranty of title u/s 55(2) of the Transfer of Property Act."

However, in that case it is further held that the plaintiff must be diligent in prosecuting his case as any other prudent person. The other High Courts have even stated that the plaintiff would be entitled to damages on the basis of implied warranty even when he was aware of the defect in his vendor's title.

For this proposition a reference was made to the following decisions in "Basappa v. Kodliah AIR 1959 Mys 46", Mt. Lakhpatt Kuer Vs. Durga Prasad, ", Parasurama Mudaliar Vs. Muthuswami Pillai and Others, ", & Sheekumar Tewari and Another Vs. Central Co-operative Bank Dinapur and Others, " and Nawal Kishore Vs. Sarju and Another ". In the instant case the sale deed, Ex.A-1 provides an indemnity clause as under:

".....to avoid any dispute or loss that may be caused to you on account of any obstruction by any one at any time in future in respect of "A" schedule property covered by sale, the property mentioned in the "B" schedule is herewith furnished to you as security."

(as per the English translation furnished to the Court)

Even in the absence of such indemnity clause as per Section 55(2) of the Act itself, one can sue for damages on the basis of implied warranty as to title. At any rate in this case in addition to implied statutory warranty there is also a separate indemnity clause. As held by the learned single Judge the vendor of the plaintiff i.e., Defendant No. 1 did not derive any title on the basis of Ex.A-2 and Ex.A-13. From this fact it follows that it is not a case of a mere defect in title but it is a case of no title at all. In a similar circumstance another Division Bench of this Court held in a decision in "Shaik Buddan Sab v. Nagamma 1976 (2) An.W.R. 294 : AIR 1977 A.P. 90 : 1976 ALT 125" that in case where vendor had no title at all it would be a case of misrepresentation amounting to fraud and that there was no equity or any other principle in allowing the defendants to get away with their fraud. Justice Jeevan Reddy (as he then was) speaking for the Bench held that

"11.....After giving earnest consideration to the matter we are of the opinion that the said clause has no application in a case where the vendor has no title whatsoever to the property sold. In this case, there were two items of property, purchased under two separate registered sale deeds. Defendants 1 and 2 were the purchasers under one such sale-deed, and to the extent of 6 acres only. Regarding the other piece of land i.e. Ac.6-97 cents, they had absolutely no title, or even a pretence of title. Even then, they purported to sell not only the piece of land owned by them, but also the other piece of land with which they were totally unconcerned. While it cannot be denied that a purchaser must also exercise reasonable care and make reasonable enquiries before purchasing a property, yet, in a case like the one before us, we cannot deprive the plaintiff of the damages by saying that he is guilty of not making reasonable enquiries. As we have mentioned earlier, it would be a case of clear misrepresentation amounting to fraud on the part of the vendors and we see no equity nor any

other principle in allowing the defendants to get away with their fraud."

From the reading of the above judgment it is clear that this Court has held that in a case of this type where misrepresentation amounts to fraud the plaintiff cannot be deprived of the damages even if he is guilty of not making reasonable enquiries. In view of this law declared by the Division Bench of this Court, in our humble opinion, the learned single Judge is not right in dismissing the suit only on the ground that the plaintiff was negligent in prosecuting his remedies. Even otherwise on the basis of the appreciation of evidence on record we find that there was no much negligence on the part of the plaintiff. As P.W. 1 he has stated in his evidence that sale deed was executed by defendant No. 1 vide Ex.A-1 and he was not put in possession of the property and he made enquiries if the first defendant got title to the property. He further stated that he obtained security also over B-schedule property for the sale consideration under Ex.A-1 sale deed. He further stated that later he found that defendant No. 1 had no title and defendant No. 1 became scarce and so issued a notice before the suit and thereafter filed a suit for recovery of sale consideration and also for damages with a charge over B-schedule property. He stated that after purchasing the property he tried to get it partitioned. On enquiries he learnt from Pottula Ramakrishna Rao that the said property belongs to the said Pottula Ramakrishna Rao's mother and Galla Ammajirao had no right or possession over the property. He further admitted that in 1964 he took a copy of the decree vide Ex.A-13, and he came to know that Galla Ammaji Rao had no title in the year 1964 after obtaining Ex.A-13, he approached the defendant No. 1 who simply postponed the issue and became scarce thereafter. He could meet the 1st defendant in the year 1975. He further stated that he waited till 1975 with the hope that he could meet the defendant No. 1 so that he could give notice. On the basis of this evidence it can be said that though he was not that diligent in prosecuting his case yet in our opinion the plaintiff cannot be disentitled to the relief as prayed for, when it is a case of, not merely defect in title but it is a case of no title on the part of the defendant No. 1 amounting to a fraudulent transaction. Moreover, the suit is filed in time as held by the learned single Judge. The Division Bench of the Court in "Shaik Buddan Sab v. Nagamma 1976 (2) An.W.R. 294 : AIR 1977 A.P. 90 : 1976 ALT 125" (7 supra) in similar circumstances held that in cases of this type the plaintiff cannot be deprived of the damages by saying that he was guilty of not making reasonable enquiries etc. It further held that in cases of clear misrepresentation amounting to fraud there was no equity or any other principle allowing the defendant to get away with their fraud and accordingly decreed the suit. In view of the law declared by the said Division Bench of this Court we are of the opinion that the trial Court was right in decreeing the plaintiff's suit and the other question whether the plaintiff was put in possession of the land as per Ex.A-1 or not would not be material in view of the findings that the defendant No. 1 had no title to the said land and accordingly he was liable for damages due to the breach of warranty.

8. The learned Counsel appearing for the respondents contended that the lands

which were offered as security as shown in schedule-B for indemnifying the plaintiff in the sale deed, Ex.A-1, are not available to satisfy the decree. He contended that item No. 1 of B-schedule property has already been purchased by D-3, Chalamuri Appa Rao from defendant No. 1 under registered sale deed dated 1-12-1964 for a consideration of Rs. 16,650/- vide annexure A-8. He further submitted that item Nos. 2 and 3 were purchased by defendant No. 2 on 9-7-1973 in a Court auction in E.P.No. 275 of 1972 in O.S.No. 316 of 1971 vide Ex.A-9. In the additional written statement filed on behalf of defendant No. 4 it is further stated that the Rajahmundry Municipality by resolution resolved to widen the road and for such widening of the road item Nos. 2 and 3 were acquired by offering a petty compensation which the defendants have refused to accept and consequent to such acquisition item Nos. 2 and 3 shop premises have been demolished and as such these properties are not in existence. Therefore, the suit is liable to be dismissed regarding item Nos. 1, 2 and 3 of the suit schedule property. On the other hand, the Counsel for the appellant/Plaintiff contended that in Ex.A-8, sale deed it is clearly mentioned that there is charge regarding that property under sale (item No. 1) of the sale deed, Ex. A-1. Therefore, defendant No. 2 who is the purchaser has purchased with the said charge and such charge goes along with the property. Therefore, item No. 1 is available for the decree. He further submitted that item Nos. 2 and 3 of the B schedule property are not acquired by the Rajahmundry Municipality and they are available even as on to-day. He further submitted that a decree could be passed against item Nos. 2 and 3 also and if such property exists the decree would be executed otherwise it would not. At any rate he submitted that the defendants are liable for the damages awarded by the decree, regarding B schedule property in their possession. He further submitted that even item No. 1 which is purchased in a Court auction is liable for the decree in view of the judgment of the Supreme Court in a decision in The Ahmedabad Municipal Corporation of the City of Ahmedabad Vs. Haji Abdulgafur Haji Hussienbhai, .

9. So far as the item No. 1 purchased by the 2nd defendant in Court auction on 19-7-1973 vide Ex.A-1 is concerned defendant No. 2 admits in his evidence that on enquiry Chelumuri Appa Rao, defendant No. 3 informed him that item No. 1 was given a security in the deed at Ex.A-1 and the same is mentioned in the registered sale deed, Ex.A-8. He further adds that as per the records item Nos. 2 and 3 of B schedule property were in possession of enjoyment of Chelumuri Appa Rao who told him that there would not be any objection to purchase item No. 1, in Court auction, as the highest bidder. From this fact, it is clear that he has purchased item No. 1 in Court auction, knowing fully well that there is a charge over the said item No. 1 in the sale deed, Ex.A-1. Even otherwise as per the judgment of the Supreme Court in a decision in The Ahmedabad Municipal Corporation of the City of Ahmedabad Vs. Haji Abdulgafur Haji Hussienbhai, " in which it is held that

"3. To begin with it was contended that there is no warranty of title in an auction sale. This general contention seems to us to be well founded because it is

axiomatic that the purchaser at auction sale takes the property subject to all the defects of title and the doctrine caveat emptor (let the purchaser beware) applies to such purchaser."

In this view of the matter, item No. 1 of the B schedule property is liable under the decree passed in favour of the plaintiff in this case. So far as item Nos. 2 and 3 are concerned the 3rd defendant has purchased them under the sale deed, Ex.A-8, and Ex.A-8 itself states that the sale is made subject to the charge under Ex.A-1. From this fact it follows that defendant No. 3 cannot say that he was not aware of the charge being created vide item Nos. 2 and 3 since he is bound by the sale deed, he has obtained from defendant No. 1 vide Ex.A-8. Thus, even item Nos. 2 and 3 of the B schedule property are liable to the decree that is passed in favour of the plaintiff. But, further contention of the learned Counsel for the respondents is that item Nos. 2 and 3 are not in existence since they are acquired by Rajahmundry Municipality. But, the learned Counsel for the appellants asserts that as per his instructions item Nos. 2 and 3 property are in existence. Whatever it may be in our opinion there could be a decree even as against item Nos. 2 and 3B schedule property and if such properties are in existence the decree would be executed against them. In this view of the matter, we hold that there is no legal impediment for passing a decree in respect of item Nos. 1, 2 and 3 of the B schedule property. 10. For the foregoing reasons, we allow the appeal and set-aside the judgment and decree dated 24-6-1988 of the learned single Judge passed in Appeal No. 286 of 1981 and restore the judgment and decree passed by the Subordinate Judge, Rajahmundry dated 29-2-1980 in O.S.No. 43 of 1976. No costs.