

P. V. Ayyappa Reddiar

Vs

Ayyappan Pillai Janardhanan Pillai and Another

Civil Appeal No. 515 of 1967

(A. N. Ray, C. A. Vaidialingam JJ)

16.03.1971

JUDGMENT

VAIDIALINGAM, J. -

1. This appeal by the plaintiff, on certificate, is directed against the decree and judgment dated January 14, 1965 of the Kerala High Court in A.S No. 655 OF 1961 reversing the decree of the trial Court and dismissing the appellant's suit specific performance.
2. The deceased first defendant had obtained from her father under a Stridhanakuri Ex. P-2 dated July 14, 1906 a parcel of land bearing survey No. 8583-A/2 of Quilon village of an extent of 13.625 cents.
3. The first defendant had put up shops on a part of the land and was enjoying the property. She had become liable to pay certain decree debts under the decree evidenced by Exs. P-18 and P-19 dated March 30, 1954 and August 22, 1955 respectively. To discharge these decree debts the first defendant had usufructuarily mortgaged under Ex. P-16 dated January 8, 1957 the properties obtained by her under Ex. P-2. At this stage it may be mentioned that in Ex. P-16 the first defendant had referred to her having obtained title to the properties under Ex. P-2, the Stridhanakuri, which had been registered as document No. 4286 of 1081 (M.E.) on the file of the Sub-Registrar, Quilon. There is a further recital that the original title deed is lost and so only a copy has been given to the mortgagee. We are particularly referring to this aspect as these recitals may have a bearing in considering the claim of the plaintiff that he got the original document EX. P-2 on the date of the agreement in his favour. Under Ex. P-4 dated March 5, 1959, the first defendant sold from and out of the properties obtained by her under Ex. P-2 to the wife of the second defendant an extent of 3.58 cents being the front portion of the property for Rs. 18,000/- By this sale she discharged all the liabilities over the properties and the mortgage Ex. P-16 was also discharged. Schedule 'A' to Ex. P-4 comprises of the items actually sold to the second defendant's wife. Schedule 'B' to Ex. P-4 comprised of suit properties to the extent of 9 cents and 797 sq. links and they were given as indemnity to the vendee under Ex. P-4.
4. According to the plaintiff the first defendant entered into an agreement Ex. P-1 on March 28, 1959 in and by which she agreed to sell the suit properties for a sum of Rs. 25,000/-. In this agreement the registered document number of Ex. P-2 was given as 4442 of 1081 (M.E.) on the file of the Sub-Registrar, Quilon. The first defendant agreed to complete the sale within 45 days and also to furnish the plaintiff with a certified copy of the encumbrance certificate. The plaintiff also claimed to have paid a sum of Rs. 1,001/- as advance. There is a definite recital in Ex. P-1 that there is no encumbrance or liability outstanding on the suit properties. The attestors to this document are

P.W. 1 (who is also the scribe) P.W. 2, the broker, and P.W. 8, son-in-law of the first defendant.

5. According to the plaintiff, the first defendant was evading to complete the transaction which necessitated the issue of the notice dated April 29, 1959 calling upon her to receive the balance amount and execute the sale deed. This was followed by a publication in a Vernacular paper dated May 9, 1959 evidenced by Ex. P-13. On behalf of the first defendant a reply Ex. P-12 dated May 9, 1959 was received wherein the first defendant repudiated the agreement Ex. P-1. The first defendant also set up an agreement dated March 26, 1959, Ex. D-2 in favour of the second defendant. She also replied that the said agreements had been followed up by the execution of a sale deed in favour of the second defendant Ex. D-3 on May 9, 1959. According to the plaintiff Ex. D-2 is an ante-dated document brought into effect to defraud the rights of the plaintiff and that the second defendant had taken both the agreement Ex. D-2 and the sale deed Ex. D-3 with full knowledge of the prior agreement in favour of the plaintiff and hence the second defendant was not a bona fide purchaser.

6. On these allegations the plaintiff instituted the suit in question on May 21, 1959 for specific performance of his agreement Ex. P-1. He also prayed for a declaration that the sale Ex. D-3 is null and void.

7. The first defendant appears to have died within a fortnight or so of the institution of the suit and her daughter, defendant No. 3, was brought on record as her legal representative.

8. The second defendant contested the claim of the plaintiff and pleaded that the agreement in his favour Ex. D-2 is a genuine one and that he is a bona fide purchaser without notice of any agreement in favour of the plaintiff. He further pleaded that the plaintiff in order to defeat his rights had managed to bring into existence the agreement Ex. P-1. The third defendant also contested the claim of the plaintiff.

9. From the above facts it will be seen that the material question that arose for consideration was which of the two contracts was earlier and true.

10. The trial Courts found that Ex. P-1 was written on March 28, 1959 and signed by the first defendant and that the plaintiff paid a sum of Rs. 1,001/- as advance to the first defendant on March 29, 1959. The trial Court further found that the original Stridhanakuri Ex. P-2 was handed over to the plaintiff when Ex. P-1 was executed by the first defendant. The court found that the agreement in favour of the plaintiff Ex. P-1 was true and genuine. Regarding the agreement Ex. D-2, relied on by the second defendant, the trial Court held that it was executed subsequent to Ex. P-1 and has been ante-dated to suit the case of second defendant. It was further found that the claim of the second defendant that he paid Rs. 5,001/- on the date of Ex. D-2 is very suspicious. The trial Court further found that the second defendant had notice of the agreement in favour of the plaintiff and as Ex. D-2 is an ante-dated document, the second defendant is not a bona fide purchaser for purchaser for valuable consideration. On the basis of these findings the trial Court decreed the plaintiff's suit for specific performance.

11. On appeal by the second defendant the High Court reversed the decree of the trial Court. The High Court on a consideration of the evidence held that the first contract for sale of the suit property by the first defendant was Ex. D-2 dated March 26, 1959 executed in favour of the second defendant and that this agreement was followed up by the execution of a conveyance on May 9, 1959 under Ex. D-3. The High Court found that the second defendant had paid a sum of Rs. 5,001/- as advance on the date of Ex. D-2 and that he paid the balance amount on the date of the sale deed Ex. D-3. It

was further found that the second defendant had no knowledge of any agreement in favour of the plaintiff, and, therefore, he is a bona fide purchaser for value. Regarding the agreement Ex. P-1, the High Court found that it was not executed by the first defendant on March 29, 1959 through the machination of P.W. 5 who is a nephew of P.W. 8 and P.W. 6, the son of the plaintiff. In this they were assisted by P.W. 8, who was told that Ex. P-1 will be treated only as a contingent contract and that it will take effect only in case the second defendant does not complete the transaction of sale in his favour in pursuance of Ex. D-2. The High Court has further found that that as Ex. D-2 has taken effect and materialised by the execution of sale deed Ex. D-3, the plaintiff is no longer entitled to base any claim on Ex. P-1. In this view the claim of the plaintiff for specific performance was rejected. As there was an alternative prayer by the plaintiff for the return of the sum of Rs. 1,001/- paid as advance and as P.W. 8 had admitted the receipt of this amount, the High Court passed a decree in favour of the plaintiff for recovery of the sum of Rs. 1,001/- from third defendant, who was the legal representative of the deceased first defendant. Subject to this direction the plaintiff's suit was dismissed.

12. Mr. T. N. Subramonia Ayyar, learned Counsel for the appellant has very strongly attacked the reasons given by the High Court for dismissing the suit of the plaintiff. The Counsel pointed out that there was absolutely no pleading by any of the parties that Ex. P-1 was a contingent contract and a finding to that effect by the High Court is not based upon the evidence adduced in the case. The learned counsel further pointed out various circumstances which according to him will show that the High Court has not properly appreciated the evidence on record so as to justify a reversal of the decree passed by the trial Court. We will deal with those circumstances pointed out by him presently.

13. Mr. A. R. Somnath Iyer, learned Counsel for the first respondent, pointed out that the High Court was perfectly justified in considering the nature of the agreement relied on by the plaintiff as to whether he was entitled to base any rights on the same. The learned Counsel also pointed out that there is inherent evidence in Ex. P-1, which will clearly show that the plaintiff having come to know of the agreement executed by the first defendant in favour of the second respondent has been able to have an agreement executed in his favour by influencing P.W. 8, the son-in-law of the first defendant. The Counsel also pointed out that in bringing into existence Ex. P-1 a very important part had been played by P.W. 5, who is an employee under the plaintiff and was none else than the nephew of P.W. 8. and also by the plaintiff's son P.W. 6 and this has been commented upon by the High Court. The Counsel strongly supported the various findings recorded by the High Court. On a consideration of the various aspects presented before us, we are satisfied that the decision of the High Court does not call for any interference.

14. As pointed out by Mr. Subramonia Ayyar, it is no doubt true that there is no specific pleading by any party that Ex. P-1 is a contingent contract, but when the High Court was considering the competing claim of two parties claiming under two separate agreements and when the High Court was upholding the truth of the execution of the two agreements, there is no error committed by the High Court in discussing the circumstances under which Ex. P-1 came to be executed. It was in considering such a question that the High Court has held that the plaintiff got Ex. P-1 executed in his favour with full knowledge of the execution of Ex. D-2. As Ex. D-2 is of an earlier date and held to be a true transaction, the High Court was justified in holding that Ex. P-1 was got executed only on the basis that the plaintiff can rely on the same if the second defendant does not complete the transaction of purchase under the agreement Ex. D-2. Therefore, we see no error in the approach made by the High Court in this regard.

15. We will now deal with the circumstances pointed by Mr. Subramonia Ayyar, which, according to him, will show that Ex. D-2 is an antedated document.

16. The first circumstance pointed out by Mr. Subramonia Ayyar is that evidence of P.W. 2 the broker clearly shows that the second defendant was not anxious to purchase the suit properties as his wife had made a recent purchase the suit properties as his wife had made a recent purchase under Ex. P-4. He referred to us to the evidence of P.W. 2, the broker that when he approached the second defendant regarding the intention of the first defendant to sell the property, the second defendant did not evince any anxiety to purchase the property. We are not inclined to accept this contention of the learned Counsel. P.W. 2's evidence only show that when the second defendant was consulted regarding the purchase of the suit properties, he replied that it can be considered some days later. This is a perfectly natural answer that could be expected from the second defendant specially as his wife had purchased a portion of the property only a late as March 5, 1959. Even P.W. 2 does not say that the second defendant stated he is not prepared to buy the property. The second defendant has also given evidence as D.W. 4 to the effect that about a week before the date of agreement of Ex. D-2, the defendant's son came and intimated to him about the desire of the first defendant to sell the suit properties. He went and met the first defendant and the matter was finalized.

17. The second circumstance relied upon by the learned Counsel for the appellant is about the purchase of the stamp paper for Ex. D-2. It was contended that the learned Sub-Judge had disbelieved an entry in Ex. P-5, the day book kept by D.W. I the vendor of stamps, from whom the stamp papers for engrossing Ex. D-2 are stated to have been purchased. It is urged there is a manipulation in the records to make it appear that the stamp papers for Ex. D-2 had been purchased on March 24, 1959.

18. So far as this is concerned, the High Court has gone into the matter rather elaborately, D.W. 3, an assistant to the Shroff, and the Sub-Treasury Officer, P.W. 4 were examined with regard to the day book Ex. 5 and none of them have referred to any inter-polation in the said day book. According to the second defendant stamp papers were purchased on March 24, 1959 and Ex. D-2 was written and signed on March 26, 1959. The stamp paper on which Ex. D-2 was written bears No. 2537. Ex. P-5 shows that the said stamp paper was sold on March 24, 1959 to the first defendant. Further D.W. 1 the person who sold the stamp paper had given evidence and the appellant did not even care to cross-examine him with regard to any interpolation in Ex. P-5. The High Court has quite rightly held that the stamp paper for Ex. D-2 had been purchased on March 24, 1959 and that the trial Court has disbelieved the stamp register book Ex. P-5 on a very flimsy ground.

19. The next circumstance pointed out by the learned Counsel for the appellant is regarding the books of accounts produced by the Second defendant, to show the payment of Rs. 5,001/- as advance on March 26, 1959. The High Court has taken note of the fact that the Second defendant had produced not only the rough day book Ex. D-12 but also the fair day book Ex. D-13 and the ledger Ex. D-14. From all these documents, the High Court has held that the second defendant's case of payment of advance is true. On the other hand, the trial Court has totally ignored Ex. D-13 and Ex. D-14 and held that the claim of the second defendant regarding the payment of Rs. 5,001/- as advance is suspicious and this conclusion is based merely on the rough day book Ex. D-12. Such a finding recorded by the trial Court was properly set aside by the High Court.

20. Considerable reliance has been placed upon the circumstance that the second defendant was not given the original title deed Ex. P-2 by the first defendant and that the appellant has produced, Ex.

P-2. The claim of the appellant is that Ex. P-2, the Stridhanakuri, was given to him by the first defendant at time when Ex. P-1 was executed and therefore Ex. D-2 is an ante-dated document. It is true that the plaintiff claims to have been given the original Stridhanakuri Ex. P-2 and it is also true that he has produced the same; but it will be seen that there is no reference in Ex. P-1 to the first defendant having handed over the original document of title to the plaintiff. Ex. P-1 has been registered as document No. 4286 of 1081 (M.E.) on the file of the Sub-Registrar, Quilon, whereas the number of the document is given in Ex. P-1 as 4442 of 1081 (M.E.). If really the plaintiff had Ex. P-2 at the time when Ex. P-1 was written, the wrong number given for the document is inexplicable.

21. Further the trial Court in holding in favour of the plaintiff has placed considerable reliance on the fact that Ex. P-2 was produced by him and it has proceeded on the basis that the defendants have no answer as to how the plaintiff got the document Ex. P-2.

22. Apart from the features, pointed out by us earlier, which will show that the plaintiff could not have got Ex. P-2 at the time of the agreement, there is a further circumstance to show that even the first defendant was not in possession of Ex. P-2 on the date. of Ex. P-1, i.e., on March 29, 1959. We have already referred to the usufructuary mortgage Ex. P-16 executed by the first defendant on January 8, 1957. We have also adverted to the recitals in the said document that Ex. P-2 Stridhanakuri being document No. 4286 of 1081 (M.E.) has been lost and as such the original title deed was not being given to the mortgagee. P.W. 8 has given an explanation as to how it has gone out of the possession of the first defendant and the High Court has accepted his explanation. No doubt it is a mystery as to how the plaintiff got Ex. P-2, but the evidence clearly shows that the first defendant could not have given Ex. P-2 to the plaintiff at the time of Ex. P-1. The conduct of the plaintiff in getting Ex. P-2 is rather very suspicious. The trial Court has merely proceeded on the basis that there is no explanation forthcoming from the defendant as to how the plaintiff got possession of Ex. P-2. This finding was arrived at by the trial Court without reference to the recitals in Ex. P-16, the wrong registration number in Ex. P-1 and the explanation given by P.W. 8 with reference to Ex. P-2. Such a finding was properly considered by the High Court to be erroneous.

23. Another circumstance pointed out to us on behalf of the appellant is that Ex. D-2 has been written by a person, who is not the usual document writer of the second defendant. It is pointed out that D.W. 2. is the usual document Writer for the second defendant but Ex. D-2 has been written by D.W. 3, who was an assistant of D.W. 2 This does not advance the case of the appellant in any manner. D.W. 3 admittedly was working as an assistant under D.W. 2, D.W. 3 was also a licensee under the Document Writers Licencing Rules. In fact even the sale deed Ex. D-3 has been written by him. D.W. 2 has given evidence to the effect that he was advising D.W. 3 in the preparation of these documents.

24. The last circumstance pointed out to us is that P.W. 8 is an attesor to both Ex. P-1 and Ex. D-2, P.W. 8 is the son-in-law of the first defendant and he must managed to bring into existence Ex. D-2 by ante-dating the same. It is no doubt true that P.W. 8 is an attesor to both Ex. P-1 and Ex. D-2, but he has given evidence on the side of the plaintiff and he has also been cross-examined by the plaintiff when the answer given by him were not to the plaintiff's liking. P.W. 8 has given evidence to the effect that Ex. D-2 was executed on March 26, 1959. On coming to know about this agreement, his nephew P.W. 5, who was working with the plaintiff and the son of the plaintiff contacted him and raised doubts in his mind about the second defendant completing the purchase. He has further stated that in case the second defendant does not complete the purchase, the plaintiff was prepared to buy the same and for that purpose he got the agreement Ex. P-1 executed in his

favour. He has further deposed that if the second defendant completes the purchase, the advance of Rs. 1,001/- received under Ex. P-1 was to be returned to the plaintiff. In view of the fact that P.W. 8 is an attester to both the documents, it is but natural that his evidence should be approached with great caution. But having gone through his evidence and the answers given by him, we are of the opinion that the High Court was justified in acting upon his evidence regarding the circumstances under which Ex. P-1 came to be executed, specially when the answers given by the witness have been left unchallenged in further cross examination by the plaintiff. It is really on the basis of this evidence by P.W. 8 that the High Court, while accepting the truth of the execution of Ex. P-1 has held that it was intended to have effect only if the second defendant did not complete the transaction of purchase as per Ex. D-2.

25. Having considered the entire matter, we hold that none of the circumstances pointed out above, is of any assistance to the appellant to dislodge the finding arrived at by the High Court in favour of the second defendant.

26. The decree and judgment of the High Court are confirmed and this appeal is dismissed with costs of the first respondent.

</html