Privy Council Appeal No. 40 *of* 1951

T. R. M. Thevaraya Pillay - - - - - - - - *Appellant*

v.

Mooka Pillay s/o Muthiah Pillay - - - - - *Respondent*

FROM

THE COURT OF APPEAL IN THE SUPREME COURT OF THE FEDERATION OF MALAYA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH MARCH, 1954

Present at the Hearing:

LORD COHEN
SIR LIONEL LEACH
MR. L. M. D. DE SILVA

[*Delivered by* MR. L. M. D. DE SILVA]

This is an appeal from a judgment dated the 28th March, 1951, of the Court of Appeal of the Supreme Court of the Federation of Malaya dismissing an appeal from a judgment of the Supreme Court of the Federation of Malaya in favour of the respondent in an action in which the respondent was the plaintiff and the appellant the defendant.

In the said action the respondent claimed that he was entitled to a decree ordering the appellant to execute in his favour a registrable transfer of an undivided half share belonging to the appellant of a land in terms of a deed of sale (produced in the case and marked P.13) executed by the appellant on the 17th January, 1947. The appellant pleaded that P.13 was a forgery and that the genuine deed of sale was the document X.14 produced by him. X.14 was impugned by the respondent as a forgery.

P.13 and X.14 are in identical terms except for the words " If I do not agree to execute the transfer I shall pay an extra Rs. 5000/- and take over the estate " which occur at the end of X.14. Relying upon these words the appellant pleaded that he was entitled to make a payment in money instead of executing a transfer.

The appellant raised other defences which are not persisted in on this appeal. He also counterclaimed for possession of his undivided half share of the land.

The Courts in Malaya have arrived at concurrent findings according to which P.13 is the genuine deed of sale and X.14 and certain other documents produced by the appellant are forgeries.

The sole point which could have been, and was, argued before their Lordships on behalf of the appellant was that in arriving at certain views which greatly influenced his judgment the learned trial judge misdirected himself on the facts and that a fresh trial ought to be ordered on the ground that with the rejection of the views mentioned the foundation of the judgment disappears. It was said that the same error was repeated by the Court of Appeal.

It is necessary to examine the judgment to ascertain whether it can be said that the learned trial judge misdirected himself, and if so, whether the misdirection can be said to have vitiated the findings of the Courts in Malaya.

It was common ground that a dispute arose between the appellant and the respondent over the question of the sale of the land and that in the course of that dispute at some time early in 1949 they went together to see one Mr. Bhaduri a solicitor. It was also common ground that on the day of that visit and prior to it the respondent had called to see the appellant at the shop of one Nadessah who was the appellant's agent.

The passage in the judgment of the learned trial judge which has been criticised is the following:—

> " According to the defendant, on the morning of their visit to Mr. Bhaduri the plaintiff first came to Nadessah's shop. There he produced a bundle of papers and tore it up. This bundle contained the originals of some of the carbon copies forming Exhibit X.19 and Exhibit X.14 which, the defendant alleged, was plaintiff's copy of the Agreement made in India on the 17th January, 1947. Immediately after this they both went to see Mr. Bhaduri, before whom the defendant says they agreed to settle the matter by a payment by him of $10,000/- to the plaintiff on which he would receive back his share of the property.
>
> But what does Mr. Bhaduri say? And his is evidence which I unhesitatingly accept. Of what was actually said his recollection is naturally hazy: but Mr. Bhaduri was certain that, when they came, the plaintiff handed P.13 to him and he put it in his safe.
>
> Mr. Bhaduri remembered that defendant subsequently visited him at his office and at his house in connection with the matter. The defendant said that he went very often to the lawyer's office.
>
> If the defendant's story is true, I could understand why he made no protest to Mr. Bhaduri when plaintiff handed him P.13, for he might then not have known what it was. But that very morning, according to Nadessah, the torn papers were collected and handed to the clerk to give to defendant, and this clerk did give them to defendant.
>
> Exhibit X.14 is not so badly torn that it is not easily recognisable and, if defendant's story is true, it is amazing that he made no protest to Mr. Bhaduri and no mention of the incident or existence of X.14 to the Ipoh solicitors whom he consulted or to Mr. Shearn when he later saw him in Kuala Lumpur.
>
> It is even more amazing that the plaintiff should tear up a genuine document in front of the defendant and, leaving the torn pieces on the ground to be recovered, a few minutes later produce a forgery, again in front of the defendant, to Mr. Bhaduri. I think such conduct is too Machiavellian even for a litigant of his type."

It was argued that the statement " Mr. Bhaduri is certain that when they came the plaintiff handed P.13 to him and he put it in his safe " is incorrect. In the course of his evidence Mr. Bhaduri did not say that he was " certain " and it was argued that he could not have been because, as observed by the learned trial judge, he had said his recollection was hazy. It was argued further that the learned trial Judge misdirected himself in considering the handing of P.13 to Mr. Bhaduri as having taken place on the occasion referred to when defendant and plaintiff were both present because the plaintiff had said " Defendant and I both went to see Mr. Bhaduri. That was after Mr. Bhaduri had P.13 ". And with regard to the occasion on which both saw Mr. Bhaduri plaintiff had said " Mr. Bhaduri produced Ex. P.13. He held it in his hands. Neither defendant nor I took it to have a look at it ". The evidence of the plaintiff is supported by the evidence of the defendant.

As against the argument in the preceding paragraph it was pointed out that Mr. Bhaduri did say "When they came the plaintiff handed me the document". (By "they" Mr. Bhaduri meant plaintiff and defendant.) It was contended that the learned trial judge was entitled to accept the statement. As to this their Lordships are of the view that if the learned trial judge had thought that that statement of Bhaduri should prevail over the evidence of both the plaintiff and defendant on the point he was certainly entitled to have accepted it. But although he has made a reference to the "hazy recollection" of Mr. Bhaduri he has made no reference to the evidence of the plaintiff and the defendant and there appears to be some doubt as to whether he considered that evidence.

In the Court of Appeal Foster Sutton, C.J., with whom Jobling, J., agreed said:—

> "It seems reasonably clear that Exhibit P.13 was the document which was handed by the respondent to Mr. Bhaduri when he and the appellant paid him a visit early in 1949, and it has never been suggested that the appellant contested its validity in the presence of Mr. Bhaduri."

The third judge of the Court of Appeal Briggs, J., said:—

> "Still on the issue of forgery, I would refer shortly to the evidence of Mr. Bhaduri. I think the learned trial Judge did, to some extent, misunderstand its effect. He thought Mr. Bhaduri had sworn that the plaintiff handed Exhibit P.13 to him on the very day when Exhibit X.14 was allegedly destroyed and the parties together saw him in his office. The case was so put to him by Counsel in his reply, but the evidence was not quite to that effect. The plaintiff was clear that he had taken P.13 to Mr. Bhaduri some time before he and the defendant saw Mr. Bhaduri together, and that, on that occasion, the defendant did not read P.13. The defendant's own evidence confirms this. Mr. Bhaduri says his recollection on the point is not clear. I think, however, that this is not a matter of sufficient weight to throw any doubt on the general correctness of the learned trial Judge's finding."

The reasons which led Briggs, J. to arrive at this conclusion were not stated by him.

Their Lordships find it unnecessary to reach a conclusion upon the question whether there has been misdirection because, on the assumption that there has been, they agree with Briggs, J., for the reasons which follow that the misdirection is not of sufficient weight to throw any doubt on the general correctness of the learned trial Judge's finding.

Their Lordships will examine the judgment to ascertain what force, if any, it loses if it is assumed that P.13 was handed to Mr. Bhaduri by plaintiff on an occasion when defendant was not present, and that on a later occasion when plaintiff and defendant were both present Mr. Bhaduri produced P.13 and held it in his hand but neither plaintiff nor defendant then examined it.

On an examination of the judgment it appears that the learned trial Judge says he was not amazed by the absence of a protest by the appellant to Mr. Bhaduri on the occasion when, as the learned trial Judge thought, P.13 was handed to Mr. Bhaduri in the appellant's presence. The learned trial judge makes allowance for the possibility that on such an occasion appellant may not have known what P.13 was. The learned trial Judge does express amazement at the fact that no protest was made to Mr. Bhaduri when the appellant discovered what the document X.14, torn but not so torn as not to be recognisable, was. He also expressed amazement at the fact that no mention of the incident of tearing up X.14 was made by the appellant to two firms of solicitors who had acted for him.

It appears from the evidence of the appellant and his witness Nadessah that, according to their story, the torn document X.14 was handed by

Nadessah's clerk to the appellant on the day when it was torn after the latter had returned from his visit to Mr. Bhaduri accompanied by the appellant. It cannot be said that the learned trial judge was not entitled to be amazed at the fact that the appellant did not bring that document and the incidents connected with it to the notice of Mr. Bhaduri on that day or at one of the numerous subsequent visits which he paid Mr. Bhaduri. On his own evidence appellant regarded Mr. Bhaduri as a reliable person.

The learned trial judge had every reason to be amazed by the story of the appellant that he had seen X.14 being torn up and had taken possession of it soon after but failed to mention the incident to two firms of solicitors he had consulted in succession. The view expressed by the learned trial judge with regard to this failure could not have been affected by any mistake he may have made regarding the day on which P.13 was handed to Mr. Bhaduri.

It appears moreover from the letter P.10[14] of the 16th March, 1949, that the appellant saw the original of P.13 on the 10th March, 1949, if he had not seen it earlier. Yet in the letter P.10[16] written by the appellant's lawyers in reply on the 9th April, P.13 is not denounced as a forgery which, if the appellant's story is true, he must have known it was as the genuine deed X.14 (in the form of a torn document) had been with him for some considerable time before that date.

As to the incidents in Nadessah's shop what is criticised is the passage " It is even more amazing that the plaintiff should tear up a genuine document in front of the defendant and, leaving the torn pieces on the ground to be recovered, a few minutes later produce a forgery, again in front of the defendant, to Mr. Bhaduri." The misdirection on the facts, if any, is to be found in the words " a few minutes later produce a forgery, again in front of the defendant, to Mr. Bhaduri." But even if it is conceded that the plaintiff did not " produce a forgery a few minutes later," it is still amazing that the plaintiff, who it is alleged forged P.13, should tear up the genuine document and leave the torn pieces on the ground to be recovered by the defendant if he were so minded or by someone else.

It appears from what has been said that even if it is conceded that the learned trial judge had misdirected himself on certain facts his reasoning loses no substantial force, if it loses any at all, when the alleged mistakes of fact are corrected.

What has been said is sufficient to reach the conclusion that the appeal should be dismissed. There are other features in the case which indicate that the learned trial judge's finding is correct. Of these their Lordships will give one instance. The body of the instrument of transfer appears, when either P.13 or X.14 is examined, to be in a form appropriate to an absolute sale. The words:

" If I do not agree to execute the transfer I shall pay an extra Rs. 5000/- and take over the estate " are inappropriate at the end of X.14 and appear to be an addition made to the contents of the genuine transfer.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the respondent the costs of this appeal.

(20295) Wt. 8267—24 100 4/54 D.L

In the Privy Council

T. R. M. THEVARAYA PILLAY

v.

MOOKA PILLAY s/o MUTHIAH PILLAY

DELIVERED BY Mr. L. M. D. de SILVA

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