

(1961) 01 MP CK 0023

In the Madhya Pradesh High Court

Case No : Civil Revision No. 423 of 1959

Ganpat Ranglal Mahajan

APPELLANT

Vs

Mangilal Hiralal and Another

RESPONDENT

Date of Decision : 19-01-1961

Acts Referred:

Contract Act, 1872 — Section 17, 19

Transfer of Property Act, 1882 — Section 55(1), 55(2)

Citation : AIR 1962 MP 144 : (1962) 7 MPLJ 40

Hon'ble Judges : T.C. Shrivastava, J

Bench : Single Bench

Advocate : D.C. Bharucha, for the Appellant; L.N. Agarwal, for the Respondent

Final Decision : Dismissed

Judgement

T.C. Shrivastava, J.

This petition for revision has been filed by the defendant against the decree of the lower appellate Court accepting the claim of the respondents for refund of Rs. 325/- as sale consideration.

The house to which the contract of sale related originally belonged to one Ahmad, who had mortgaged it with Motilal on 2-1.2-1939. Thereafter on 5-10-1944 Ahmad sold the house to one Babu & Babu mortgaged it in favour of Misrilal & others. In the year 1947-48 Motilal, the first mortgagee, brought a suit on the basis of his mortgage & obtained a decree for sale, in execution of which the house was sold and was purchased by the applicant Ganpat on 15-3-1948. The defendant Ganpat sold the house to the plaintiff by a registered sale deed on 18-6-1948. In the meantime, Misrilal and others, the second mortgagees, had brought a suit on 18-3-1948 for the enforcement of their mortgage and Ganpat was also impleaded as one of the defendants in this suit. The claim was decreed and the property was sold with the result that the respondents were dispossessed from the house. Accordingly they brought the present suit for

recovery of Rs. 325/- which had been paid by them as the sale price and also claimed Rs. 75/- as damages partly for costs incurred in defending the mortgage suit and partly for repairs made to the house.

The trial court decreed the full claim, but the lower appellate court dismissed the claim for damages and confined the decree only to Rs. 325/-, that is, for the refund of the sale price. As the amount decreed is less than Rs. 1,000/-, no appeal lies and the defendant has come up in revision.

The sale deed contains a recital by Ganpat that the mortgaged property is not encumbered. This statement is obviously false to the knowledge of Ganpat, as at the time of the sale deed the mortgage suit brought by Mishrilal and others was pending and Ganpat was impleaded as a party therein. Shri Bharucha, however, contends that as the mortgage deed in favour of Mishrilal was registered, it was possible for the buyer to find out the existence of the mortgage with ordinary care and further that as the registration of the deed amounted to a constructive notice to the plaintiffs, u/s 3 of the Transfer of Property Act, they should be deemed to have known about the mortgage. Reliance is placed upon Harilal Dalsukhram Sahiba Vs. Mulchand Asharam, in support of this contention. Accordingly, he contends that Section 55(1)(a) of the Transfer of Property Act did not apply to the case. He has further argued that the contract was not voidable as the vendors could have discovered the existence of the mortgage and the case fell within the Exception to Section 19 Of the Indian Contract Act.

So far as the applicability of Section 55(1)(a) of the transfer of Property Act is concerned, the contention of the applicant appears to be correct. Although there is an express recital, in the sale deed that the property is free from mortgage etc., this is not enough. To attract the provisions of Section 55(1)(a) two conditions are necessary : firstly, that the buyer should not be aware of the existence of the defect in title; and, secondly, that he could not with ordinary care discover the defect. So far as the first condition is concerned, although the applicant vendor in his written statement pleaded that the buyer was aware of the existence of the mortgage, there is no proof of this fact and it must be assumed that the buyer was not aware of the defect. However, the second condition is not satisfied inasmuch as the buyer could have known about the encumbrance by making inquiries in the office of the Registrar. Section 55(1)(a) of the Transfer of Property Act has, therefore, no application to the present case,

The alternative argument that the case falls within the Exception to Section 19 of the Indian Contract Act is, however, without any force. The express recital in the sale deed about the non-existence of the mortgage, as I have already said, was to the knowledge of the vendor applicant false. It was, therefore, not a case of mere, misrepresentation but a case of "fraud" as defined in Section 17 of the Contract Act because it was a "suggestion, as to a fact, of that which is not true, by one who does not believe it to be true" and "an active concealment of a fact by one having knowledge or belief of the fact". It will be observed that the Exception to Section 19 applies only to "misrepresentation" or to "silence,

fraudulent within the meaning of Section 17". Thus, only one type of fraud falls within the Exception to Section 19. An express statement about the existence of a fact by one having knowledge or belief of the fact does not fall within the Exception. Section 19 has, therefore, no application and the contract is voidable at the instance of the vendee on account of the fraud committed by the vendor.

In *Harilal Dalsukhram Sahiba Vs. Mulchand Asharam*, (supra), it was expressly found that the vendee had knowledge of the defective title of the vendor and it was on that, ground held that the contract could not be avoided. However, at the same time, it was held that the vendee was entitled to compensation for the defective quality of the title. Although I have held above that Section 55(1)(a) of the Transfer of Property Act is not applicable to the present case in terms, that does not affect the right of the vendees to claim compensation for the defective title. The appropriate provision applicable to the present case is contained in Section 55(1)(a), according to which the seller is liable to discharge all encumbrances on the property raising on the date of sale except where the property is sold subject to encumbrances. In the present case. the property was not sold subject to encumbrances. On the contrary, an assurance was given that no such encumbrances existed. Therefore, the seller was bound to discharge the encumbrance in favour of Misrilal which was existing on the date of sale.

The liability of the seller to discharge the encumbrance is absolute and can be avoided only under one circumstance viz., that the buyer has expressly agreed to purchase the property subject to encumbrances. It is immaterial that the buyer was aware of the encumbrance. (See *Podapati Chendrayya Vs. Manduva Hanumayya and Others*,). That being the position the applicant was bound to discharge the encumbrance and he having failed to do so, the non-applicants would have been entitled to reimbursement u/s 69 of the Indian Contract Act if they had paid the amount to the mortgagees. As the amount was more than the sale price and as the non-applicants did not consider it worthwhile redeeming the mortgage, they are entitled to the refund of the sale price as damages. Their claims can be supported u/s 55(1) of the Transfer of Property Act! according to which the seller is 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.

The obligation of the vendor u/s 55(1)(a) of the Transfer of Property Act was considered in *Mt. Bhagwati v. Banarsi Das*, 55 Ind App 135: (AIR 1928 PC 98). It was held in that case that a vendee who had to make a payment to the mortgagee in discharge of an undisclosed encumbrance was entitled to reimbursement u/s 69 of the Indian Contract Act, as the vendor was obliged u/s 55(1)(a) of the Transfer of property Act to discharge the encumbrance. In *Nand Ram Vs. (Seth) Purshotam Das and Others*, the sale was by a Hindu widow and daughter of the last male holder. The vendor was subsequently dispossessed by the reversioners. It was held that u/s 55(1) of the Transfer of Property Act the purchaser was entitled to recover the sale consideration with interest and the

costs he had incurred in the litigation with the reversioners. In Mt. Nanhi Vs. Mt. Ketki, it was held that the vendee who was dispossessed from a part of the property by a donee of the vendor was entitled to refund of proportionate consideration.

I have no doubt that u/s 55(1)(g) of the Transfer of Property Act the duty of discharging the encumbrance lay on the applicant and he is responsible for the consequences flowing from his failure to discharge this duty. The non-applicants were dispossessed of the property in enforcement of the mortgage which existed on the date of sale. The applicant was, therefore, liable for refund of the purchase price which is coincident with the damage caused on account of the omission of the applicant to do his duty.

Shri Bharucha has also argued that the non-applicants were not entitled to any damages for costs of defending the litigation or for repairs made by them to the property. This argument is based on a misconception as the lower appellate court has not allowed these two items at all. The question therefore, does not arise.

The decree of the lower appellate court ordering the applicant to pay Rs. 325/- is correct. The petition for revision is dismissed with costs. Hearing fee is fixed at Rs. 25/- only.