

(1924) 10 MAD CK 0065
In the Madras High Court

Gondur Ramasubba Iyer

APPELLANT

Vs

Muthiah Kone and Others

RESPONDENT

Date of Decision : 08-10-1924

Acts Referred:

Evidence Act, 1872 — Section 92

Citation : AIR 1925 Mad 968

Hon'ble Judges : Devadoss, J

Bench : Division Bench

Judgement

Devadoss, J.—The plaintiff sues for the recovery of money due under a hypothecation bond executed by the 1st defendant. The defence is that the debt due under the hypothecation bond was discharged by the sale of property belonging to the 1st defendant. The plaintiff's case is that a fraud was perpetrated on him by the 1st defendant which makes the sale-deed void and he is therefore, entitled to sue for the recovery of the debt due under the hypothecation bond. Both the lower Courts have found that there was no fraud committed by the 1st defendant, that the plaintiff purchased with full knowledge of all the circumstances and that he is not entitled to sue on the hypothecation bond. The plaintiff has preferred this second appeal.

2. The first point raised by Mr. Venkatachariar, is that the evidence to vary the terms of the sale-deed, Exhibit A, should not have been admitted. Though this point was not taken in the Courts below, I allowed him to raise the point as it went into the root of the case. The evidence complained of is the defendant's written statement that the plaintiff was aware of an encumbrance in favour of one Karuppan Ambalam not mentioned in the sale-deed. In the sale-deed the recital is : "I declare so as to make you believe that excepting the encumbrance on the said property which has been discharged hereby and this sale which has been effected, I have not effected any kind of encumbrance in favour of any one else." It is admitted that at the time of the sale there was an encumbrance in favour of one Karuppan Ambalam.

3. The defendant's case is that the plaintiff was aware of that encumbrance, that he agreed to discharge it and that, it should not be mentioned in the document. The argument of Mr. Venkatachariar is that the evidence to the effect that the plaintiff was aware of the existence of an encumbrance is opposed to the clear recital in the document and such evidence should not have been admitted as it was inadmissible u/s 92 of the Evidence Act. His argument is that the declaration that there was no other encumbrance on the property than the one mentioned in it is an important term of the sale-deed and any agreement to vary the terms of the sale-deed could not be proved u/s 92. Section 92 says : "When the terms of any such contract, grant, or other disposition of property or any matter required by law to be reduced to the form of a document, have been proved, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives-in-interest for the purpose of contradicting, varying, adding to, or subtracting from its term." The defendant's plea that there was an oral agreement whereby the plaintiff undertook to discharge the debt in favour of Karuppan Ambalam cannot be proved by parol evidence. Mr. Venkatachariar addressed an elaborate argument on the point. He mainly relied upon *Adityam Iyer v. Ramakrishna Iyer* (1913) 38 Mad. 514 In that case it was held that if the consideration for sale is recited as Rs. 35,000 it could not be proved that the real consideration was Rs. 36,000. The facts in that case were that there were two sale-deeds for Rs. 35,000. The vendor wanted to prove : that the real amount of consideration was Rs. 36,000 and Rs. 1,000 went in discharge of a debt. It was held that parol evidence to prove that the amount of consideration was Rs. 36,000 and not Rs. 35,000 was inadmissible as the amount of the consideration was an important term of the contract and it could not be varied by an oral agreement. In that case the learned Judges held if a certain amount is mentioned in a document as the consideration it was not open to the parties to show that the amount of consideration was something different from that which is mentioned in the document. That does not prevent a vendor from showing that the vendee was aware of an encumbrance which he did not want to be mentioned in the sale-deed. The existence of an encumbrance undisclosed to the vendee which he could not have discovered by the exercise of reasonable care would no doubt make the sale voidable. u/s 55 of the Transfer of Property Act, in the absence of a contract to the contrary, the seller is bound to disclose to the buyer any material defect in the property of which the seller is, and the buyer is not aware, and which the buyer could not with ordinary care discover. It has been held that the material defect in the property would also include a defect of title and encumbrance in the property. Mr. Justice Shephard and Mr. Brown in their *Commentary on the Transfer of Property Act*, 6th Edition, page 202 make the following observation : "It is apprehended, however, that the terra "any material defect" in the property is not to be so restricted and that omission to disclose flaws in the title or encumbrance which the purchaser has no apparent means of discovering may equally be fraudulent under the section." This passage was quoted with approval in *Haji Essa Sulleman v. Dayabhai Parmanandas* (1896) 20 Bom. 522. The question here is whether the vendor

could prove that the plaintiff was aware of a defect in the title. Where the vendee buys property with the full knowledge that the vendor has not got a good title he cannot be said to have been defrauded by the vendor. The 1st clause of Section 55 makes only omissions to make such disclosures as are mentioned in the Section, para. 1, Clause (a) and para. 5, Clause (a) fraudulent. Paragraph 1(a) casts the duty on the seller to disclose material defects in the property which the buyer could not with ordinary care discover, but where the vendee is perfectly aware of the defect in title or existence of an encumbrance, there is no duty on the part of the seller to inform the buyer of that which the latter is perfectly aware. What is contended before me is that no evidence can be adduced to show that the buyer was aware of the defect in title when there is a definite recital in the sale-deed that there is no encumbrance. The evidence to prove the knowledge of the buyer of the existence of an encumbrance not disclosed in the sale-deed does not offend against Section 92, for such evidence does not contradict, vary, add to or subtract from its terms. A declaration as to title or the absence of an encumbrance is not one of the terms of the contract of sale. The existence of an undisclosed encumbrance might vitiate the transaction. A declaration that there is no encumbrance or that the vendor has a good title to convey is not one of the terms of the contract and evidence to prove that the vendee was aware of such defect cannot be said to vary or contradict the terms of the contract. The decision in *Rajaram Rao v. Tuljaram Rao* (1912) 17 I.C. 43 does not help the appellant. It was held in the case that where the parties specifically state that all the disputes between them have been settled it was not open to any of the parties to show that some matters were not settled. If a person sells all the pictures in his house he cannot be allowed to prove that *Millais* was excepted. But there is no fraud if a vendor sells a picture which he describes as *Millais* which in fact is not by the famous painter but by somebody else, and if the buyer knowing that the picture was not by *Millais* but by somebody else buys it, it cannot be said that the vendor has defrauded the vendee. It might be that both of them with the object of defrauding third persons have consented to enter a recital in the document which is false to the knowledge of both. In this case the evidence is that the plaintiff was aware of the existence of the encumbrance in favour of *Karuppan Ambalam* and his knowledge of that fact and that he consented to omit all reference to that encumbrance in the document, can be proved by parol evidence, and such evidence is not against the terms of Section 92 of the Evidence Act. I disallow this contention.

4. The second contention is that the defendant is not solely entitled to Survey No. 27/2 and there are other persons entitled to the property. Here again the plaintiff's knowledge is important. Two of the *Pangalis* of the 1st defendant attested the sale-deed and the plaintiff himself presented it for registration. The plaintiff wanted to make out that he was not aware of the terms of the sale deed, Exhibit I and that it was sent to him after registration. This allegation was found to be false. Both the lower Courts have found that the plaintiff was not defrauded with regard to this item of property and it is a finding of fact which is supported

by evidence on record, and such a finding should not be disturbed in second appeal.

5. The third point urged is that the plaintiff should have been allowed to amend his plaint so as to include a prayer for cancellation of the sale-deed, Exhibit 1. The plaintiffs Vakil applied for amendment at a very late stage of the case and the District Munsif refused to allow the plaintiff to amend his plaint, by inserting a prayer for the cancellation of Exhibit 1. The suit is for recovery of money due under a hypothecation bond. The plea is that it was discharged by the sale of the 1st defendant's property. It was open to the plaintiff to have sued for cancellation of the sale-deed in which case he could have asked for the return of the consideration for the sale. But he has chosen to sue on the hypothecation bond. Though the question of discharge would depend upon the question whether the sale-deed is voidable or not, yet I think the reliefs are so different that it cannot be said that the District Munsif did not exercise his discretion in a judicial manner. The District Munsif having exercised his discretion which in the circumstances cannot be said to be an improper exercise of discretion. I do not think the plaintiff could be allowed to amend his plaint at this late stage when on the evidence on record he has failed to make out his case that Exhibit I was vitiated by the fraud of the 1st defendant.

6. In the result the second appeal fails and is dismissed with costs.