

(1925) 11 MAD CK 0023
In the Madras High Court

Kathamuthu Pillai

APPELLANT

Vs

Subramaniam Chettiar

RESPONDENT

Date of Decision : 02-11-1925

Acts Referred:

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

Citation : AIR 1926 Mad 569 : (1926) 50 MLJ 228

Hon'ble Judges : Devadoss, J

Bench : Division Bench

Judgement

Devadoss, J.—The plaintiff's suit is for specific performance of a contract of sale entered into with him by the 1st defendant. The District

Munsif gave a decree for specific performance and the Subordinate Judge dismissed the appeal of the 1st defendant. He has preferred this second appeal.

2. The contention of the appellant is that the direction in the decree "that 1st defendant do draw the above amount on discharging the decree in

O.S. No. 185 of 1910 of the Principal District Munsif's Court of Madura and filing a copy of the record of satisfaction" is bad in law. The

argument of Mr. Rajah Aiyar is that when a decree for specific performance is given against the vendor he should not be directed to redeem any

encumbrance on the property which was not disclosed to the vendee. The agreement, dated the 18th day of October, 1909, does not mention the

existence of any encumbrance on the property contracted to be sold, nor is there any recital in it that there are no encumbrances on the property.

The finding of the learned Subordinate Judge is that the 1st defendant did undertake to free the property from two encumbrances which were

mentioned in the certificate of sale, Ex. C. The 1st defendant purchased the property in Court auction in execution of his decree in O.S. No. 141

of 1902. In the sale proclamation he stated that the encumbrances had been discharged. In Ex. C, which was drawn up by the Court, there is a

recital that the encumbrances have been discharged. The finding is that the 1st defendant knew that these encumbrances had not been discharged

and that he undertook to discharge them when the agreement, Ex. A, was entered into. The question is, when a vendor undertakes to discharge the

encumbrances on the property, whether the Court decreeing specific performance can direct him to discharge the encumbrances before he is paid

the consideration for the sale? The contention of Mr. Rajah Aiyar is that the Court should decree specific performance and if the vendee finds that

there are encumbrances on the property, he should bring a suit for damages against the seller. u/s 55, Clauses (1) & (g) of the Transfer of Property

Act, a seller is bound to discharge all the encumbrances on the property then existing. If the vendee is not aware of the existence of any

encumbrance on the property when the contract of sale is entered into, and he comes to know of the existence of any encumbrances he can ask

the seller to discharge those encumbrances before a sale is effected, and when he sues for specific performance of the contract of sale could it be

said that he is not entitled to have a direction in the decree that the seller should discharge the encumbrances on the property before he is paid the

consideration for the sale? The provisions contained in Section 18(c) of the Specific Relief Act apply to this case: where the vendor professes to

sell unincumbered property and if it is afterwards found that the property is mortgaged for an amount not exceeding the purchase money, the

purchaser may then compel the seller to obtain a conveyance from the mortgagee, or himself pay off the encumbrances out of the unpaid purchase

money. Here, on the finding of fact that the vendor undertook to discharge the encumbrances, the purchaser was. entitled to insist upon his

discharging them before a conveyance is effected through Court. He is entitled to ask the Court to give a direction in the decree that the

encumbrances should be discharged before the consideration for the sale is paid to him.

3. Considerable argument was advanced by Mr. Rajah Aiyar that the provisions of Section 55 do not apply to executory contracts; in other

words, the covenants contained in Section 55 of the Transfer of Property Act apply only to completed sales and not to agreements of sales. u/s 55

the seller is bound to do certain things. One of them is to answer to the best of his information all relevant questions which may be put to him by the

buyer in respect of the property and the title thereto, and the other is to produce before the buyer on his request for examination all documents of

title relating to the property which are in the seller's possession. It cannot be said that these two things should be done after the sale is effected.

The covenants contained in Section 55 apply to contracts of sale as well as to completed contracts. In this connection, with great respect, I am

unable to agree with the reasoning of Sadasiva Aiyar, J. in *Adikesavalu Naidu v. Guruntha Chetty* (1916) 32 MLJ 180. *Abdur Rahim, J.* was of

opinion that the covenants contained in Section 55 apply to contracts of sale as well.

4. It is argued for the appellant that it was open to the plaintiff to repudiate the contract and to claim damages as the vendor was not able to give

him a clean title. No doubt the vendee can repudiate the contract of sale if he finds that the vendor has no title to convey or that the property is

encumbered. Vide *Reeve v. Berridge* (1888) 20 QBD.523. The case in *Eastern Mortgage and Agency Company, Ltd. v. Fazlul Karim* (1925) 41

CLJ 571 does not apply to the facts of this case. There it was held that it was open to a vendee to resist a suit for specific performance on the

ground that the defects in the property were not disclosed by the vendor. But here the 1st defendant did undertake to discharge the encumbrances

on the property and the plaintiff is entitled to enforce the terms of that agreement. The argument that Section 18(c) applies only to undisclosed

encumbrances and does not apply to cases where the vendor undertakes to discharge the encumbrances on the property before the sale cannot be

accepted. When the vendor undertakes to discharge the encumbrances on the property, he contracts to sell the property unencumbered and

therefore Clause (c) applies to a case like this. The Court granting specific relief is entitled to direct the vendor to discharge the encumbrances

which he undertook to do before he is paid the consideration for the sale. The clause in the decree objected to is perfectly legal. In this connection

I may refer to a recent decision of *Spencer and Viswanatha Sastri, JJ.* in *Venkatarama Aiyar v. C.S. Ramaswami Aiyar* Appeal No. 252 of 1922

in which a similar direction was given by them.

5. It is stated that the amount secured by the two mortgages on the property which the vendor undertook to discharge is about Rs. 300 or Rs.

400. As the consideration for the sale is Rs. 1,950, the direction in the decree may be varied by directing that the amount which would be

necessary to discharge the encumbrances be kept in deposit and the balance be drawn by the 1st defendant. This would be an equitable

arrangement as the plaintiff cannot be damnified to a larger extent than the amount of the two mortgages. If the mortgagees try to enforce their

mortgages the amount in Court would be sufficient to meet their demands and the 1st defendant need not be kept out of a large sum of money by

reason of a portion thereof being necessary to meet the demands of the mortgagees.

6. With this modification I dismiss the second appeal with costs.