
(1940) 09 MAD CK 0066
In the Madras High Court

K.G. Lakshmana Iyer and Another

APPELLANT

Vs

Ramaswami Naicker and Others

RESPONDENT

Date of Decision : 10-09-1940

Acts Referred:

Transfer of Property Act, 1882 — Section 55(4)(b)

Citation : AIR 1941 Mad 119

Hon'ble Judges : Wadsworth, J

Bench : Division Bench

Judgement

Wadsworth, J.—The petitioners obtained a decree in a mortgage suit and they seek to revise the order of the Subordinate Judge scaling down that decree under Sections 8 and 19, Madras Agriculturists Relief Act, at the instance of defendants 1 and 3 to 5. The main ground on which the lower Court's order is attacked, is that the liability under the mortgage is one for which a charge is provided u/s 55(4)(b), T.P. Act, so that by the provisions of Section 10(2)(ii) of Act 4 of 1938 the liability cannot be scaled down. Now we have held in Varadaraj Perumal v. Palanimuthu Goundan reported in ('41) 28 AIR 1941 Mad. 118 that Section 10(2) (ii) must be interpreted as excluding all liabilities falling within the category therein described, whether or not the charge actually subsists at the time of suit. We have therefore to consider whether at its inception the liability covered by this mortgage was one of the class in respect of which Section 55(4)(b) of the T.P. Act, provides a charge. It is common ground that the liability covered by the mortgage originated on 22nd January 1920, as part of a transaction whereby property was sold to defendant 2 and the father of the other defendants, the vendees executing a mortgage for the full amount of the sale price and giving as security not only the property sold but also some other property. The mortgage deed provided that the principal amount should be payable after five years but should carry interest from the date of the bond. On these facts, the lower Court, quoting the case in Krishnaswami v. Subramania ('18) 5 AIR 1918 Mad. 82, held that there was a substitution of a better security and that the vendor's statutory lien was displaced. Now, the decision on which the lower Court relies does not

purport to lay down any principle other than those set forth in the leading case in *Webb v. Macpherson* ('41) 31 Cal. 57, where their Lordships of the Privy Council consider the nature of the vendor's lien u/s 55, T.P. Act, and the circumstances in which it does or does not operate. In considering the question of the existence of a "contract to the contrary," their Lordships observe:

There is no ground whatever for saying that that charge is excluded by a mere personal contract to defer payment of a portion of the purchase money, or to take the purchase money by instalments, nor is it, in their Lordships' opinion, excluded by any contract, covenant or agreement with respect to the purchase money which is not inconsistent with the continuance of the charge.

2. Applying this rule, we find it difficult to hold that the terms of the suit mortgage constitute a "contract to the contrary" so as to exclude the statutory charge. It is true that the mortgage provides additional security and gives five years for payment. But we are not prepared to hold that these terms are necessarily inconsistent with the continuance of the charge. Their Lordships in the same decision go on to deal with the distinction between a sale in consideration for money which the purchaser covenants to pay and a sale in consideration for a mere covenant to pay, in which there would be no purchase price and therefore no statutory charge. We have given careful consideration to the form of the sale deed and the recitals of the contemporaneous mortgage deed in the present case and have come to the conclusion that the sale was for a price and that the mortgage merely provided the way in which that price was to be paid and secured. The form of the sale deed, which recites the amount of the purchase price and the receipt of that price by the execution of the mortgage deed, is the ordinary form commonly used in a conveyance for a price which is not paid in cash. There is nothing to show clearly that the sale was regarded as a sale for a mortgage and not as a sale for a price in respect of which a (mortgage was executed. Moreover, the provision in the mortgage deed that the amount should bear interest from the date of the deed and not from the date fixed for payment, is itself an indication that the principal amount was regarded as the purchase price due on the sale, the payment of which was, by agreement, deferred.

3. We are therefore of opinion that this liability was one in respect of which a charge is provided u/s 55(4)(b), T.P. Act, and that by reason of Section 10(2)(ii) of Act 4 of 1938 the lower Court had no jurisdiction to scale down that liability. On this finding there is no necessity to go into the further question raised regarding the status of defendants 3 to 5 as agriculturists. The civil revision petition is therefore allowed and the application u/s 19 is dismissed with costs here and in the Court below.