**(1917) 11 MAD CK 0013**

**In the Madras High Court**

Krishnaswami Aiyangar and Another APPELLANT

Vs

Subramania Ganapatigal and Others RESPONDENT

**Date of Decision :** 22-11-1917

**Acts Referred:**
Transfer of Property Act, 1882 — Section 55(4)

**Citation :** (1918) 35 MLJ 304

**Hon'ble Judges :** Phillips, J;Ayling, J

**Bench :** Full Bench

## Judgement

Phillips, J.—In this case the plaintiff and another jointly soid certaia lands to defendants 1 and 4 for Rs. 10,000 under Ex. A. The document

recites the receipt of Rs. 10,000 in cash and at the end of the document the particulars for the receipt of Es. 10,000 are given as follows :-"" Rs.

8,650 received in cash,Rs.,1,350 received as per two bonds executed separately in our favour by the aforesaid T.Krishnaswami Iyengar (the 1st

defendant)"". One bond was executed in favour of the present plaintiff and the other in favour of his co-vendor Srinivasa Varadachariar. The

plaintiff now sues to recover the amount due to him on account of this sale, namely Rs. 675 with interest. He also makes other claims with which

we are not concerned now. The lower courts have given him a decree for the amount due and have also given him a charge on the plaint property,

treating the amount as unpaid purchase money.

2. It is now contended in appeal that this charge ought not to be given because the whole of the purchase money had been paid. This plea is based

on two grounds (1) that the two promissory notes constituted part of the consideration to be paid for the land and were not merely collateral security for the unpaid purchase money and (2) that the vendors accepted the sole liability of the 1st defendant in respect of those two promissory notes and exonerated the other vendee the 4th defendant. The appellant has quoted a large number of English cases in support of his plea, but it must be observed that the vendor''s lien for unpaid purchase money is of a somewhat different nature in English law from the statutory lien granted u/s 55(4) of the Transfer of Property Act, for in England the lien is an equitable lien and is based on the assumption that although the legal estate, passes at the time of sale, the equitable estate does not pass until the purchase money has been completely paid.

3. For this reason the two cases quoted, viz., Earl of Jersey v. Briton Ferry Floating Dock Company (1869) 7 Eq. 409, and Winter v. Lord Anson (1823) 57 E.R. 174, have no application here. Three other cases have been cited, viz., Dixon v. Gayfere (1857) 44 E.P. 878, Parrott v. Sweetland (1835) 40 E.P. 250, and In re Brentwood Brick and Goal Company (1877) 4 Ch. D. 562. In two of those cases, the consideration for the sale was the payment of an annuity to the vendor or his relations, and it was held that the vendor had no lien on the property in respect of the amount so secured. The third case was one where a consideration of ï¿½6,000 was agreed to be paid out of shares which were to be subsequently allotted by the vendee Company. It was there held that the consideration had actually passed and that the balance which was due was secured by an agreement which was accepted in lieu of cash. The details of the cases are not of very much importance here except as authority for the proposition that it is open to a vendor to accept security from the vendee for part of the purchase money in lieu of the actual cash and thus to lose his lien for unpaid purchase money. But whether he actually does so or whether he accepts the agreement merely as collateral security for future payment, is a question of the intention of the parties. Similarly in other English cases where a creditor accepted the liability of one of two or more joint debtors, it was held to discharge the other debtors in respect of the original debt due. Vide Lythe v. Ault (1834) 7 Ex. 669, and Thompson v. Percival (1834) 110 E.R. 1033.

4. We, therefore, have to consider in this case what was the intention of the parties when the sale was made When a vendor takes a promissory

 

note from the vendee, it does not necessarily follow that he has given up his statutory lien u/s 55 of the Transfer of Property Act. Vide Vellayapa

Chettiar v. Narayana Chettiar (1918) M.W.N. 826. And even when the promissory note is given by a third person it. has been held in Karuppiah

Pillai Vs. T.R. Hari Row and Another, that that fact raises no presumption that the lien has been abandoned.

5. After a careful consideration of all these cases it appears to me that we are thrown back upon the facts of each particular case, and must infer

the intention of the parties from the document itself and the surrounding circumstances giving due weight to the fact that the vendor has a statutory

lien for unpaid purchase money which he can enforce in the absence of an agreement to the contrary. In the present case both courts have found

that the plaintiff had not lost his lien. But the District Judge has not discussed the ciruumstances of the case in any way, than by merely saying that it

has been repeatedly held that a vendor does not lose his lien by taking a promissory note as part of his purchase money. But he omits to add that if

he takes a security as part of the consideration there is no unpaid purchase money for which he can have a lien. The language of the document

supports the appellant''s plea that the promissory notes were taken as part of the consideration, for the sale deed expressly recites receipt of the

whole purchase money. It is also significant that the promissory notes were executed by only ope vendee in favour of the two vendors separately,

one promissory note in favour of each and in '' the notes there is a stipulation for a fixed rate of interest. It also appears that money has been paid

towards the discharge of these promissory notes and the payments endorsed on the notes. It is also significant that the plaintiff has brought this suit

without impleading his co-vendor. He does not allege in the plaint to what share of the property sold he is entitled. But it is alleged now on his

behalf that inasmuch as one promissory note was executed in his favour for. one-half of the purchase money not ''paid in cash, he must be deemed

to be entitled to one-half of the property. There is however no evidence that the actual cash was received by the two vendors in equal shares, and

consequently there could be no presumption that the plaintiff is entitled to a lien for one-half the unpaid purchase money. In the absence of the co-

vendor, it would be inequitable to determine the shares to which he and the plaintiff are respectively entitled, for possibly the co-Vendor might have owned a very large fraction of the property sold, in which case the plaintiff would not; be entitled to. a lien for one-half of the unpaid consideration.

6. No doubt the plaintiff is entitled to the amount specified in the promissory note. But I am of opinion that he cannot enforce his lien without

impleading his co-vendor. No doubt in Clause (2) of Section 55, Transfer of Property Act, the benefit of a contract of sale ""is annexed to, and

goes with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof

from time to time vested"", and it has been held in Chidambaram Pillai and Others Vs. Sivathasamy Thever, ,that one of two co-vendees can bring a

suit without impleading the other. But in that case it was found as a fact that each of the purchasers had contributed half of the purchase money.

There is no provision in Clause (4) of Section 55 similar to that in Clause (2) and I have not been referred to any case in which it has been held that

one of several vendors of Immovable property is entitled to enforce his charge upon the property, without making his co-vendor a party to to suit.

Objection as to non-joinder of the plaintiffs co-vendor was taken in the 1st defendant''s written statement, and an issue was framed as to whether

the plaintiff was entitled to claim a charge.

7. In a case of this kind where the meaning of the parties is not exactly obvious, I should be reluctant to interfere with the concurrent findings of

two courts, if it were not for the fact that the lower appellate court has not at all discussed the question on which the case really turns. I am of

opinion on a consideration of the language of the document, of the subsequent payments upon the promissory notes, and of the plaintiff''s aqtion in

bringing this suit separately from his co-vendor, that it was the intention of the parties that the two promissory notes should form part of the

consideration for the sale, In that view, there is no unpaid purchase money for which the plaintiff can have a lien. Put in this way, the question at

issue would seem to be one of fact, as is often the case when a document has to be interpreted, but it has always been held by this Court that the

interpretation of a document is a point of law which can be taken in second appeal. In this case, moreover, the District Judge has altogether failed

to take into consideration the law on the subject when determining what was the intention of the parties and therefore I think the question is one of mixed law and of fact which can be dealt with here. And I may add that the learned vakil for the respondent has not taken any objection.

8. I would therefore allow this appeal with costs and modify the lower court''s decree by disallowing the plaintiff''s charge upon the land.

Ayling, J.

9. I agree.

 