

(1891) 09 MAD CK 0012
In the Madras High Court

Mahomed and Others

APPELLANT

Vs

Sitaramayyar and Others

RESPONDENT

Date of Decision : 22-09-1891

Acts Referred:

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

Citation : (1892) ILR (Mad) 50

Hon'ble Judges : Handley, J; Arthur J.H. Collins, J

Bench : Division Bench

Judgement

1. The argument addressed to us by the learned vakil for the appellants may be summarised as follows. Accepting the findings of the lower Courts

that there was no fraud, misrepresentation or concealment on the part of defendants as to the title of the properties they professed to sell and

mortgage, the plaintiffs are entitled to succeed because Section 55, clause 2 of the Transfer of Property Act imports into the contract of sale an

absolute covenant for title on the part of the defendants, and the facts as they appear in the judgments of the lower Courts show that the

defendants could not make a proper title to the properties sold and mortgaged.

2. It is to be observed that this was not the case set up for appellants (plaintiffs) in the lower Courts. The plaintiffs sued to set aside the sale and

mortgage in question on the ground of fraudulent misrepresentation and concealment of facts relating to the title by the defendants. Both Courts

found that there was no misrepresentation or concealment, and now the plaintiffs seek to fall back upon another ground of relief, viz., their rights

under the covenant for title given them by the Transfer of Property Act. We think that they should not be allowed to do this in second appeal. No

issue was raised upon this point and defendants had no opportunity of meeting it or of adducing evidence as they might have done, to show that

there was a contract to the contrary which would prevent the incident of a covenant for title attaching to the transaction. Plaintiffs chose to go to

trial upon the ground of fraudulent concealment and misrepresentation and having failed on that ground cannot at this stage be allowed to start a

new case which would involve new issues and a fresh inquiry.

3. We think this appeal ought to be dismissed on this ground alone, but we are also of opinion that upon the facts found the plaintiffs' case would

fail even if it were based upon the covenant for title conferred by the Transfer of Property Act.

4. The defects of title alleged as ground for the rescission of the sale are two: first, that as to one-fourth of the village of Kottiyarkottai it was not

the absolute property of the defendants 1 to 4 but was charity property dedicated to the support of a chuttrum; second, that defendant No. 5

purchased the properties which he professed to sell to defendants Nos. 1 to 4 as agent for other persons and, therefore, could not sell without the

consent of those persons. The second objection to the title may be disposed of at once by saying that there is nothing to show that the fifth

defendant's principals ever objected to his selling. On the contrary, one of them was the defendant's second witness and stated that he did not

object. The other is dead, and the lower Courts disbelieve the rights of the person who claims as his representative to object to the transaction.

Moreover, we agree with the District Judge that it is not shown that the act of the defendant No. 5 in selling to defendants Nos. 1 to 4 was beyond

the scope of the authority given him by the power of attorney, Exhibit B, to recover the debts due to his principals. As against defendant No. 5 it is

to be noticed that the plaintiffs can have no cause of action except on the ground of fraud, for their contract for sale was with defendants Nos. 1 to

4 who purchased from defendant No. 5.

5. As to the first objection to the title the conduct of the first plaintiff at the time of, and since the contract for, sale, in our opinion, amounted to a

waiver of the defect in the title even if it existed, which is more than doubtful. The District Judge finds that "the probability and the evidence is

overwhelming that everything about this one-fourth village and all the papers

connected with it were explained by the first and fifth defendants to

the first plaintiff in the negotiations which ended in the sale and mortgage now sought to be cancelled." It is not shown to us that there is no

evidence to support this finding, and, on the contrary, we see in some of the documents and evidence brought to our notice much to lead us to

think that it is well founded.

6. With this knowledge, then, of the alleged defect in the title plaintiff No. 1 paid the consideration and entered into possession of the property, and

we think he must be taken to have waived the defect in the title, a defect which, it may be observed, even if it exists, does not go to the root of the

title but merely saddles one part of the property sold with a burden in favour of a charity. That there is any real danger of any disturbance to the

plaintiff's enjoyment of the property by reason of the supposed claims of this charity we do not believe. The proceedings taken by the Local Fund

Board on behalf of the charity appear to have been abandoned and there is nothing to show that the claim of charity, if it ever existed, has been

recognized or enforced for a considerable period of time.

7. On the whole, we agree with the lower Courts that no case has been made out for setting aside the sale and mortgage in question and we must

dismiss this second appeal with costs. A separate set for first and fifth respondents respectively.