

(1924) 04 AHC CK 0011
In the Allahabad High Court

Ram Chander and Another

APPELLANT

Vs

Musammat Bhagwati alias Bhagwan Dei and Another and
Lachmi Narain alias Lachhman Das and Others

RESPONDENT

Date of Decision : 08-04-1924

Acts Referred:

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

Citation : AIR 1924 All 937 : 79 Ind. Cas. 590

Hon'ble Judges : Mukerji, J; Dalal, J

Bench : Division Bench

Judgement

1. The sole question involved in this appeal is the interpretation of a clause of the sale-deed.

2. The facts are these: The predecessors-in-title of the plaintiffs obtained a sale-deed from some of the defendants and the pre-decessors-in-title of others on 24th January 1907 for a sum of Rs. 6,500. It was stated in the sale-deed that the property was subject to only one encumbrance of Rs. 4,000. It was further stated that there was no other encumbrance, and if any party either as a co-sharer or as an encumbrancer laid a claim and if, as the result of such a claim, any portion of the property was lost, the vendors would indemnify the vendees to the extent of the whole of the purchase-money in case the whole of the property was lost, or in the case of a partial loss, to the extent of a proportionate amount of the purchase-money.

3. What happened later on was this: A certain lady, Musammat Parbati, brought a suit for the recovery of a large sum of money by sale of the property sold on foot of a mortgage, dated 3rd December 1882. It is stated in one of the grounds of appeal, and it is not denied by the other side, that the suit was dismissed by the Court of first instance on the ground that this ancient mortgage had been paid off. On appeal, however, this Court held that the mortgage subsisted and a decree was made for sale of the property. The result was that the plaintiffs had to pay a large sum of money amounting to Rs. 13,000 and odd. They,

accordingly, instituted the suit out of which this appeal has arisen for the recovery of the amount paid by them with interest and interest pendente lite.

4. For the defendants it was urged in the Court below, and it is urged in this Court, that the vendees took an express contract in place of the statutory contract to be found in Section 55(1)(g) of the Transfer of Property Act and that they are not entitled to recover anything.

5. As we have stated, the sole question for determination is whether the express contract in the sale-deed excludes the statutory contract mentioned above.

6. We have already stated what the contract was. The Contract has been translated in the paper book as follows:

We, our heirs and representatives have no sort of claim or title left to the property sold. If, God forbid, any person comes forward as partner or co sharer and brings a claim, or if ,an encumbrance, etc., is found in respect of the whole, or part of the property sold, and as a result of the claim the property passes out of the possession of the vendees, we, the vendors shall, under that circumstance, pay to the vendees aforesaid the consideration of this sale-deed to the extent the property sold passes out of their possession, together with the costs which may be incurred by them.

7. There can be no doubt that, at the time of the sale contract, the question did arise as to what would happen if a prior encumbrance, not mentioned in the sale-deed, was discovered. There can be no doubt that the parties tried to solve the question. It was agreed that the vendors would pay a proportionate amount, not exceeding the total sale price, if any portion of the property was lost on account of a claim on a prior encumbrance. It appears to us that this express covenant excluded the statutory covenant already referred to. It has been urged on behalf of the plaintiffs-respondents that the parties really did not contemplate the position which has now arisen, that is to say, they did not contemplate that there would be a decree for sale under a prior encumbrance and the vendees would pay off that mortgage. But, in our opinion, this and many other contingencies could have arisen on account of a prior encumbrance. For example, a prior encumbrance might have been by way of conditional sale. It could have been argued with equal force, that such a contingency was not contemplated by the parties. But we have clearly in the sale-deed, the covenant that in the case of a prior encumbrance being discovered what would happen. The parties substituted a written contract for the statutory contract and, in our opinion, they cannot throw away the written contract and rely on the statutory contract.

8. The result is that, in the circumstances that have happened, the plaintiffs are not entitled to any relief at all. No portion of the property has passed out of the hands of the vendees; therefore, the circumstances in which alone they could claim damages have not arisen.

9. It seems to us that the vendors never contemplated that they would be called

upon to pay anything more than the purchase price. This clearly shows that they never contemplated that they would be called upon to pay such a large sum as has been claimed.

10. The result is that we set aside the decree of the Court below and dismiss the suit of the plaintiffs with costs in both Courts. The costs in this Court will include Counsel's fees on the higher scale.