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**(1911) 02 MAD CK 0013**  
**In the Madras High Court**

Siva Subramania Mudaliar and Others APPELLANT  
Vs  
Gnanasammanda Pandara Sannadhi RESPONDENT

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**Date of Decision :** 22-02-1911

**Acts Referred:**

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

**Citation :** (1911) 21 MLJ 359

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**Judgement**

1. The plaintiff in this suit is the present Pandara Sannadhi of the Dharmapuram Adhinam. The suit is for the recovery of a portion of the consideration which the plaintiff alleges to be due from the 1st defendant and from the defendants Nos. 16 to 20 for the sale of a village belonging to the Adhinam which was made by his predecessor in office in favour of the 1st. defendant on the 12th July, 1901, for Rs. 1,27,000. The plaintiff alleges that the portion of the consideration now sued for is still due from the vendee and he seeks in this suit to enforce his lien for the unpaid purchase money u/s 55, Sub-section 4, Clause (v) of the Transfer of Property Act. The vendor Pandara Sannidhi died subsequent to the sale and the plaintiff is his successor in the office. The defendants Nos. 16 to 20 are members of the undivided family to which the 1st defendant belongs and have been impleaded on the ground that the property was purchased for the benefit of the family. The defendants Nos. 2 to 15 are purchasers and mortgagees of some of the properties sold to the 1st defendant. The lower court gave a decree in the plaintiff's favour for a portion of the amount sued for. This appeal relates to two of the items which the lower court found to be due to the plaintiff. The first of these items - a sum of Rs. 2,600 - is described in the sale deed, Exhibit A, as "the sum retained for payment to Sankaramurthi Mudaliar, an auction-purchaser of the

lands sold in auction for arrears of revenue of the last Fasli of Pattavilaham being Chidambaram Nataraja (sic)attalai, and for obtaining a sale deed

in my name."" The second item - Rs. 2,842-8-0 - is stated in Exhibit A as received by the vendor in cash, but the 1st defendant admits that it was

not so paid, but was reserved with him for a particular purpose which we shall refer to hereafter.

2. The plaintiff states in his plaint that the amount of the 1st item was not paid to Sankaramurthi Mudaliar as required under the sale deed, and that

the sale was not obtained in favour of the Adhinam. The defence with regard to this item was that the amount was paid to Sankaramurthi Mudaliar

and was utilised by him for purchasing the Pattavilaham land referred to in Exhibit A, the purchase being made benami for the plaintiff's mutt. The

plaintiff's case is that, on account of the defendant's failure to pay the amount to Sankaramurthi Mudaliar and to get a conveyance from him of the

land in favour of the plaintiff's predecessor or the plaintiff, Sankaramurthi Mudaliar sold the lands to one Chidambaranatha Thambiran of the

plaintiff's Adhinam for Rs. 4,000 on the 13th July 1906 (Exhibit F). The defendants pleaded also that the suit was barred by limitation, but the

Subordinate Judge decided this issue in the plaintiff's favour on the ground that, as the suit was to enforce the plaintiff's lien, the period of limitation

applicable was 12 years from the time when the money was payable. On the merits with respect to the first item, the Subordinate Judge held that

Sankaramurthi Mudaliar, the purchaser at the revenue sale, might have been benamidar for the Pandara Sannadhi, and he also held that

Sankaramurthi Mudaliar received the sum of Rs. 2,600 required for the purchase from the 1st defendant, but he was of opinion that the amount

was not paid by the 1st defendant on the plaintiff's account but as part of the sum of Rs. 5,000 which he had agreed to pay to Sankaramurthi as

brokerage for his services in inducing the Pandara Sannadhi to sell the village to the 1st defendant, though the Pandara Sannadhi had already

agreed to sell it to a third person. The Subordinate Judge seems to place considerable reliance on the statement in Exhibit VI, a sale deed executed

on the 15th September 1901, nearly two months after the date of Exhibit A, by the 1st defendant in favour of the 2nd and 3rd defendants of a

portion of the village, that, out of the consideration money for that sale, Rs. 2,600 had been received by the 1st defendant to get back the

Pattavilaham lands which had been sold away at the revenue sale, taking the statement to mean that, so far as the 1st defendant was concerned,

Sankaramurthi Mudaliar was the actual purchaser at the revenue sale, and that ""he took the loan from the 2nd defendant to be paid to the Pandara

Sannadhi to enable him to re-purchase those lands from the Mudaliar."" We are of opinion that the inference drawn by the Subordinate Judge from the statement in Exhibit VI just referred to is erroneous.

3. Their Lordships, after dealing with the evidence on this question, said:

We are of opinion that Sankaramurthi made the purchase of Pattavilaham land benami for the Pandara Sannadhi with the monies paid by the 1st defendant as part of the consideration for Exhibit A. We therefore reverse the finding of the Subordinate Judge with regard to this item.

4. The second item in the appeal relates, as already mentioned, to an amount stated in Exhibit A to have been paid in cash to the vendor on the date of the sale. As the 1st defendant admits that the amount was not paid then, the onus is on him to show that it was subsequently discharged.

His case is that it was retained with him to be paid to the 2nd and 3rd defendants in the suit, who are prior mortgagees of some lands included in

Exhibit A, on account of damages due to them from the Pandara Sannadhi in consequence of the irrigation facilities of the lands having been

rendered defective by some works done by the Government. The Subordinate Judge finds that the Pandara Sannadhi had entered into an

agreement with the 2nd and 3rd defendants to pay a sum of Rs. 1,500 a year on account of damages accruing to them in consequence of the

change in the condition of the properties mortgaged to them. Exhibit A was executed on the 29th of Ani of Pilava year. The 1st defendant contends

that, as the Chithrai Kalavathi of the previous year had then expired and two months of the Pilava year had run, the mortgagees (defendants Nos 2

and 3) claimed damages at the rate of Rs. 1,500-0-0 a year, both for the previous year and for the current year Pilava, that Rs. 3,000-0-0 was

thus due to them, and that the sum of Rs. 2,842-8-0 was to be paid for the purpose, a small deduction being made as the damages for the Pilava

year would be paid in advance before they were due. The Subordinate Judge decreed a sum of Rs. 1,492-8-0 in the plaintiff's favour for this item,

holding that it was not likely that the 2nd and 3rd defendants, who had already

an agreement from the 1st defendant for the sale to them of the mortgaged property, would have insisted, in the circumstances, on the payment of the amount of damages due to them; but that the other persons, who were co-mortgagees with them to the extent of  $\frac{1}{2}$ th share of the mortgage, were likely to have insisted on the payment of their share of the damages. The 1st defendant having admitted that he was able to compound the mortgagees' claim for damages by payment, of a sum of Rs 2,250-0-0, the Subordinate Judge held that the plaintiff was entitled to recover  $\frac{1}{2}$ th of that amount which he took not to have been paid by the 1st defendant. His view, therefore, must be taken to be that the Pandara Sannadhi agreed that the 1st defendant should pay the sum of Rs. 2,842-8-0 to the mortgagees towards their claim for damages, but, as the 1st defendant did not actually pay a portion of the sum to them, the plaintiff is entitled to recover that portion. He does not consider the question whether the 2nd and 3rd defendants ever agreed with the Pandara Sannadhi directly that a sum of Rs. 1,492 8-0 need not be paid. If they did not do so but remitted the amount in favour of the 1st defendant, the plaintiff would have no title to recover the amount from him. A person, who directs another to pay money to a third person, is no doubt entitled to countermand that order before that person has entered into direct relations with the third person and agreed to pay it to him. But as stated in BOWSTEAD on Agency, 4th Edn., p. 414, "where an agent is directed or authorised by his principal to pay to a third person money existing or accruing in his hands to the use of the principal, and he expressly or impliedly contracts with such third person to pay to him, or to receive or hold the money on his behalf, or for his use, he is personally liable to pay such third person, or to receive or hold the money on his behalf, or for his use, as the case may be, even if he had fresh instructions from the principal not to pay to such third person." See Griffin v. Weatherby (1868) L.R. 3 Q.B. 753 And if the person entitled to the payment excuses a portion of the amount in favour of the person directed to pay to him, that is a benefit derived by the latter from the creditor for which he is not bound to account to the person by whom he is directed to make the payment. The 1st defendant swears that he paid a sum of Rs, 2,250, and that the rest was remitted in his favour by the mortgagees. There is no evidence to

contradict his statement. There is, no doubt, some force in the argument for the respondent that this matter would then probably have been referred

to in the sale-deed, Exhibit VI, executed by the 1st defendant in favour of the 2nd and 3rd defendants, and that it would have been appropriated

as part of the consideration for that sale. But, on the other hand, it is improbable that the mortgagees, having an agreement in their favour entered

into by the Pandara Sannadhi promising to them Rs. 1,500-0-0 as damages every year, would have agreed to waive the claim altogether. On the

whole, we feel inclined to accept the statement of the 1st defendant that he did pay the amount of Rs. 2,250-0-0 to the mortgagees. But it is

unnecessary to decide this question as, in our opinion, the plaintiff cannot claim a lien for the amount which, according to the finding of the lower

court (and we concur in that finding) the plaintiff directed the vendee, the 1st defendant, to pay to the 2nd and 3rd defendants. A vendor's right of

lien for unpaid purchase-money was considered at length by the Judicial Committee of the Privy Council in *Webb v. Macpherson* ILR (1903) C.

57. As laid down in that case, the lien no doubt can be lost only by an express or implied contract of waiver. But it seems to us that a vendor, who

has directed the purchase money or a portion thereof to be paid to a third party, must be taken to have waived by a contract, necessarily implied

from his conduct, the right to a lien for any portion of the money to be paid to the third party under the agreement. This question has been very

recently decided in this court after full consideration by the Chief Justice and Krishnaswami Aiyar J. in Second Appeal No. 1475 of 1907 *Abdulla*

*Beary v. Mammali Beary* (1910) 7 M.L.T. 376. As stated in that case, "'a promise to pay to a stranger is a mere covenant the breach of which

must be compensated in damages, and there is no occasion for the statutory charge in favour of unpaid vendor to arise.'" No doubt in *Ramakrishna*

*Ayyar v. Subramania Ayyen* ILR (1905) M. 305 a decree was passed on the footing of the existence of a lien for purchase money ordered to be

paid to a stranger. But as pointed out in *Abdulla Beary v. Mammali Beary* (1910) 7 M.L.T. 376 the question, whether the lien would subsist in

such cases, was not raised or decided in that case. Mr. Srinivasa Aiyangar attempted to argue that the amount of Rs. 2,842-8-0 must be regarded

as the plaintiff's money deposited with or paid to the 1st defendant as his agent to be paid to the mortgagees. But we are unable to accept this

contention. There is a clear legal distinction, though c a fine one, between a vendee owing money to the vendor being directed to pay it to a

stranger and a person being entrusted ; with another's money to be paid to a stranger. In the one case the money is received and kept by the

person who is to make the payment as an agent. In the other, it is merely an obligation that he is bound to render and which he has been authorised

to render to a third person. Even if any idea of agency on the part of the 1st defendant could be imported, the present suit cannot be regarded as

one for an account; and the plaintiff, by ignoring in his plaint the real facts of the case, precluded himself from asserting that his so-called agent was

guilty of any misconduct and when such misconduct took place. We are of opinion that the plaintiff has no lien with regard to the second item and

that his right to recover the money from the 1st defendant, if it could be held to exist, is barred by limitation. The respondent contended that, as the

defendant failed to obtain a conveyance of the land in the plaintiff's favour as promised by him, the plaintiff is entitled to recover the amount

claimed by him. But the suit is not framed as one for damages for non-execution of the conveyance. To such a suit the 1st defendant might have

defences not open to him in the present suit. We must reverse the finding of the Subordinate Judge with regard to this item also.

5. In the result we allow the appeal with costs in this Court and in the court below, and the decree of the Subordinate Judge must be modified

accordingly.