

(1944) 12 MAD CK 0018
In the Madras High Court

Thammineni Paparao and Others

APPELLANT

Vs

Dhaval Polinaidu and Another

RESPONDENT

Date of Decision : 04-12-1944

Acts Referred:

Evidence Act, 1872 — Section 92

Citation : AIR 1945 Mad 205 : (1945) 58 LW 121 : (1945) 1 MLJ 323

Hon'ble Judges : Chandrasekhara Ayyar, J; Chandrasekhara Aiyar, J

Bench : Division Bench

Judgement

Chandrasekhara Ayyar, J.—The plaintiffs' father, one Latchayya, purchased certain properties from defendants 1 and 2 under the same deed

Ex. A on 29th October, 1933, for a sum of Rs. 4,500. The properties consist of jeroiti lands and inam lands. The step-mother of the defendants

had obtained a maintenance charge decree against the jeroiti lands in O.S. No. 480 of 1930. In execution of this charge decree, the jeroiti lands

were sought to be brought to sale and it is said that the plaintiffs had to deposit a sum of Rs. 96-6-0 into Court to avoid the sale. It is further

alleged that on a later occasion they had to pay Rs. 170 towards the charge decree and that finally the properties were brought to sale in Court

and were purchased by a third party on the 7th December, 1942, for a sum of Rs. 238 subject to the payment of the annual maintenance

of Rs. 60 to the decree-holder. The purchaser obtained delivery through Court and ejected the plaintiffs. All these are stated in the affidavit in

support of the application to admit the sale certificate and the delivery receipt as additional evidence in this second appeal. In the counter-affidavit

opposing the applications the chief point made is that the purchaser Jagannadha Acharlu is a benamidar for the plaintiff and that the lands despite

the Court, auction sale continue to be in their possession.

2. Relying therefore on the defect in title as regards the jeroiti lands comprised in the sale deed and specified in the B schedule to the plaint, the

plaintiffs brought this suit claiming to recover by way of damages for breach of contract of covenant of title a sum of Rs. 2,658-8-0 said to be the

price of the properties, and a further sum of Rs. 200 said to be the loss suffered by them on account of breach of covenant of title, as well as the

sum of Rs. 96-6-0 which they paid on 20th December, 1939, to avert the sale in execution of the charge decree in O.S. No. 480 of 1930. The

defendants resisted the suit on three grounds. Firstly, there was no representation made to Latchayya that the properties were not subject to any

charge or charges, secondly, that Latchayya knew of the creation of the charge, as it was he that was conducting the suit, O.S. No. 480 of 1930,

on behalf of these defendants, and thirdly, that the sale was for a lower price than the market price because it was made subject to the charge. The

District Munsiff overruled these objections and gave the plaintiffs a decree. But on appeal the District Judge has come to the conclusion that

Latchayya was aware of the charge decree when he purchased the properties under Exhibit A and that after the purchase he was himself paying

for some years the maintenance amount to the step-mother. He has also found that the price of Rs. 4,500 was less than the market value of the

lands on the date of the sale and the low price was agreed to on account of the charge on the B schedule properties. Latchayya's daughter is

married to the second defendant and, according to the District Judge, after quarrels arose between them Latchayya defaulted to pay the amounts

due to the step-mother under the charge decree purposely and with the object of harassing the second defendant with a litigation of this kind. His

final conclusion is stated in paragraph 8 of the judgment in appeal in these words:

So taking all these circumstances into consideration I hold that the buyer as well as the seller were aware of the defect and that for reasons of their

own and concerning which we have no evidence they have agreed not to disclose in the sale deed the maintenance charge.

On this finding the plaintiffs' suit was dismissed.

3. It has been held in several decisions that the fact that the buyer knew of a

defect in title of the seller prior to the purchase does not prevent him from suing for damages for breach of covenant of title. Therefore mere knowledge on the part of Latchayya when he purchased under Ex. A that there was an outstanding charge decree against the B schedule properties is no bar to the present suit. But it is urged that the District Judge has found that the sale was subject to this charge and that this alters the situation in favour of Latchayya, the purchaser. The contention urged against this finding is that u/s 92 of the Evidence Act it was not open to the District Judge to take into account any such oral evidence, as to hold so would be to contradict a term of the contract of sale. Even if there was no express covenant for title, the implied covenant under Sub-clause (2) of Section 55 will have to be taken into account and read as part and parcel of the sale deed between the parties in the absence of any contract to the contrary.

4. In Ex. A we have an express covenant for title in these terms:

Having assured you that these lands belong to us only and that they are in our enjoyment and that we never effected any alienations, etc., previously we have sold the same to you.

In the face of this express covenant, it is difficult to see how evidence can be adduced to show that the purchase was subject to any encumbrance

or encumbrances. The decision of Devadoss, J., in *Gondur Ramasubbayya Iyer v. Muthia Kone* was relied on by Mr. Parthasarathi in support of the

view that a declaration as to title or the absence of an encumbrance is not one of the terms of the contract for sale and evidence can be adduced to

show that the buyer was aware of the defect in title even when there is a definite recital in the sale deed that there is no encumbrance. The decision

no doubt supports the view, but with great respect I am unable to agree with it. An express covenant for title or for freedom from encumbrances

such as we find in this case cannot be regarded as a mere recital which can be contradicted by oral evidence. Such covenants are terms of the

contract itself, and any oral evidence to contradict them falls within the mischief of Section 92 of the Evidence Act. Even the statutory covenant for

title which is implied in every contract for sale of immovable property must, according to *Muhammad Siddique v. Muhammad Nuh* ILR (1930)

All. 604, be deemed to be embodied in the deed of sale. So I cannot accept the

finding of the learned District Judge that the sale was subject to this maintenance charge as a valid one operating as against the express covenant found in the sale deed.

5. The argument that Latchayya paid the maintenance due under the charge decree for some years is not of much avail to the respondents. A

person who buys properties which are subject to a charge will have to make the payments due under the charge whether he likes it or not; and

from the fact that he pays, the inference need not necessarily be drawn that he paid because he agreed with the seller to do so and purchased the

properties subject to such an agreement. So far as the charge-holder is concerned, the properties in the hands of Latchayya was liable and he

could not avoid paying him if he wanted to retain the properties. The course adopted by him is not inconsistent with a right in him to ask the seller

to make good his representation or arrange for the clearing up the encumbrance.

6. Mr. Parthasarathi next urged that to allow the plaintiffs to take up the position that they have done, is really tantamount to permitting them to

affirm the sale in part and disaffirm it in part. This again is not a tenable contention. Several items of properties were sold under the sale deed in

question and it is now found that with reference to the jeroiti lands there is a charge. As regards those properties therefore the purchaser is entitled

to have the contract rescinded and to get damages for its breach. He need not surrender the items about which there is no such defect. The real

complaint is that it is not open to the plaintiffs to value the jeroiti lands as they please and ask for the recovery of the sum named by them when the

sale deed comprised these lands and inam lands also and the price was a single one for all the properties together. This is a legitimate complaint.

But it only means an objection to the amount claimed as and by way of damages. It is always open to the Court to assess the real value of the

properties with reference to which there is this defect in title by reason of the existence of the charge decree for maintenance and award the amount

so ascertained as damages directing delivery of properties back to the seller, if the vendee is in possession. The jeroiti lands were brought to, sale

in execution of the charge decree and they were purchased by one Kunukette Jagannatha Acharlu. The sale certificate and delivery receipt have

been sought to be filed as additional evidence in the second appeal. There can be

no objection to their reception in evidence but the plea has been raised for the respondent that the purchaser Jagannadha Acharlu is a mere benamidar for the plaintiffs and that there has therefore been really no dispossession. This points about a purchase by a third party and consequent dispossession of jeroiti lands was not raised before the District Judge and so he did not go into the question whether the purchaser was in truth a name lender for the plaintiffs. This is a question on which we must have a finding whether it will be of use to, the respondents. Even if it is held that the purchase is a benami one, it may not affect the plaintiffs very much, as it might be still contended by them that it is the duty of the seller under the statutory obligation as well as by what was expressly undertaken by him in this sale deed to discharge the encumbrance.

7. The learned District Judge did not address himself to the question of damages as he took the view that the plaintiffs were not entitled to the reliefs claimed by them inasmuch as the sale was subject to the maintenance charge. As this view of his is now set aside, he must give a finding on the amount of damages.

8. The case will go back to the District Judge for submission of the two findings referred to above in six weeks from the date of the receipt of records by him. Additional evidence may be adduced and the Judge can have it taken by the District Munsiff, if he considers such a course convenient. Time for objections ten days.