
(1940) 01 CAL CK 0014
In the Calcutta High Court

Tripura Charan Chowdhury

APPELLANT

Vs

Nikunja Behari Chowdhury and Others

RESPONDENT

Date of Decision : 24-01-1940

Acts Referred:

Contract Act, 1872 — Section 19

Letters Patent Act, 1865 — Section 15

Transfer of Property Act, 1882 — Section 55(5)(b)

Citation : AIR 1940 Cal 380

Hon'ble Judges : Lodge, J

Bench : Division Bench

Judgement

Lodge, J.—The facts giving rise to the present appeal are as follows : On 10th February 1929, the plaintiffs executed a deed of sale in respect of four plots of land in favour of the defendant, representing that all four plots were free from incumbrances. The consideration agreed upon was Rs. 1500, out of which Rs. 1067-5-3 was to be paid by the vendee to Nibaran Chaudhury, a creditor of the plaintiffs, and the balance, Rs. 432-10-9 was to be paid by the vendee to another creditor, viz. the Mahalaxmi Bank. The vendee paid Rupees 1067-5-3 to Nibaran Chaudhury in accordance with the agreement. But on 11th February 1929, that is to say on the day following the execution of the deed, he discovered that one of the four plots together with other properties of the plaintiffs had been mortgaged to the Mahalaxmi Bank. On coming to know of this mortgage, the vendee paid Rs. 300 only to the Mahalaxmi Bank, and retained the balance, Rupees 132-10-9, in his own hands. Subsequently the Mahalaxmi Bank instituted a suit on their mortgage, impleading both the plaintiffs and their vendee, the present defendant, as defendants and obtained a decree. In execution of that decree, the mortgaged property was put to sale, and that plot which had been sold to the present defendant and which was covered by the mortgage was purchased by the Bank for the sum of Rs. 21 only.

2. Thereafter, the plaintiffs instituted the present suit claiming from the defendant refund of Rs. 132-10-9 being the balance of the purchase money

together with interest and costs. The Court of first instance came to the conclusion that both parties to the deed of sale were aware that one of the plots was subject to the mortgage in favour of the Mahalaxmi Bank, and decreed the suit for Rs. 132-10-9 and proportionate costs, rejecting plaintiffs' claim for interest on the amount. The Court of Appeal below held that at the time of execution of the deed, the vendee was not aware that one of the plots was subject to a mortgage, but that the vendee came to know this fact on the day following the execution of the deed. The Court of Appeal further held that the non-disclosure of this incumbrance was unintentional, and that therefore there was no fraudulent misrepresentation of facts. The learned Subordinate Judge allowed the appeal in part, holding that the vendee was entitled in equity to deduct from the balance of the purchase money in his hands the value of the plot which was sold in execution of the Bank's mortgage decree. He accordingly decreed the suit for Rs. 111-10-9 with proportionate costs. Against that decree the vendee defendant has brought the present appeal.

3. It must be taken as settled that the vendee had no knowledge of the mortgage at the time of entering into the contract. In the circumstances Section 19, Contract Act, would apply and the contract was voidable at the option of the vendee, or in the alternative the vendee was entitled to insist that he should be put in the position in which he would have been if the representations made had been true. The vendee did not exercise his option of repudiating the contract, but he was entitled to insist that the vendor conveyed to him the property freed from incumbrances. Further, u/s 55(5)(b), T.P. Act, he was entitled to retain a sufficient sum out of the purchase money to pay the amount due to the person entitled under the mortgage. But the amount in his hand was not sufficient for that purpose. In fact as the mortgage debt was apparently about Rs. 4000, it is doubtful whether the whole of the consideration money would have been sufficient to pay off the incumbrances. The questions for consideration are : (1) whether in these circumstances, the vendee was entitled to retain a portion of the consideration until the vendor satisfied the mortgagee and freed the property from the incumbrance, or at least until the vendor furnished the balance of the money necessary for that purpose; and (2) when the vendor failed to satisfy the mortgagee and allowed the property to be sold in execution of the mortgage decree - thus rendering the original contract incapable of execution - whether the vendor was entitled to claim any or all of the balance of the purchase money in the hands of the vendee.

4. None of the cases cited before me deals directly with these problems. In *Muhammad Siddiq Khan v. Muhammad Nasirullah Khan* (1899) 21 All. 223 it appears that the amount of the purchase money left in the hands of the vendee was insufficient to satisfy the mortgage debt, and that there was an agreement between the parties that the vendor should provide the balance of the money required to satisfy the mortgage debt and free the property from the incumbrance. In that case the mortgage was disclosed at the time of the contract, and there was a definite agreement that the vendor would provide the

balance of the sum necessary to free the property from the incumbrance. In the present case the mortgage was not disclosed and consequently there could not be such an agreement. But if u/s 19, Contract Act, the vendee was entitled to have the property sold free from incumbrances, the parties should I think be treated as on the same footing as if the mortgage had been disclosed and there had been such an agreement. If this view is correct then according to the decision cited above, the balance of the purchase money in the vendee's hands should not be regarded simply as a deposit of the money of the vendor, but it was a sum which the vendee was entitled to retain as security that the property sold should be freed from the incumbrances, and therefore the vendee was entitled to retain it until the vendor provided the rest of the money necessary for this purpose.

5. In *Badri Das v. Jivan Lal* (1912) 10 A.L.J. 480 it was held that where the amount left by the vendor in the hands of the vendee in order to pay off a prior mortgage on the property sold, was insufficient to free the property from the incumbrance, the vendee could not be required to pay any further sum to free the property, and further that if the prior mortgagee refused to accept the amount in deposit with the vendee in full satisfaction of his claim under the mortgage, the vendee was entitled to retain that sum until the vendor provided the rest of the money required to free the property from the incumbrance. This decision supports the view that the vendee in the present case was entitled to retain some of the purchase money until the vendor provided the funds necessary to free the property from incumbrance. The learned advocate for the respondents referred to the case in *Clarke v. Dickson* (1858) Ex. 223 in support of his contention that the defendant was not entitled to retain the purchased property and still refuse to pay the price either to the vendor or the vendor's nominee. But this decision merely lays down that where one party to a contract has taken a benefit under the contract, and the circumstances are such that the parties cannot be restored to their original positions, that party is not entitled to repudiate the contract. But according to the view of Lord Campbell C.J. that does not mean that the party aggrieved has no remedy if he was induced by fraudulent misrepresentation to enter into the contract. As the defendant in the present case was not seeking to repudiate the contract in its entirety, this decision is of no assistance. In *Kasi Vasi Chokkalinga Tambiran Vs. Ramanadan and Others*, the facts were essentially different. In that case "it was clearly understood between the parties that these mortgages were subsisting and that the payment by the vendee would not fully discharge the liability," and on this ground, the case in *Muhammad Siddiq Khan v. Muhammad Nasirullah Khan* (1899) 21 All. 223 was distinguished. In *Mt. Naima Khatun Vs. Basant Singh* also, the facts were essentially different. The money left in the vendee's hands was to have been paid to a prior mortgagee but was known to be insufficient to satisfy that mortgage debt. This decision does not carry us any further than the decision in *Kasi Vasi Chokkalinga Tambiran Vs. Ramanadan and Others*, though there is a passage in the judgment which seems to support the respondent's

contention. That passage reads:

It follows that where property is sold free from encumbrances and yet there are encumbrances outstanding on the property, the buyer may retain in his hands a sufficient amount to pay off the encumbrances but it is his duty to pay the amount so retained to the prior encumbrancer. The vendee cannot be allowed to retain the amount and neither pay it to the seller nor to the encumbrancer (p. 775).

6. In my opinion this explanation is subject to the qualification that the amount left in the hands of the vendee is sufficient to free the property from the encumbrance. I hold therefore that the defendant in the present case was entitled to retain the balance of the purchase money until the vendor provided funds necessary to free the property from encumbrance. However ignorant the vendor may have been at the time of entering into the contract regarding the misrepresentation that the property was free from incumbrance, he must have been aware of all the material facts when the prior mortgagee instituted the suit on the mortgage and impleaded both vendor and vendee as defendants. The vendor had then an opportunity of paying the mortgage debt and freeing the property from incumbrance. It was owing to the vendor's default that a portion of the property was sold and it be. came impossible either to restore the parties to their original position, or to place them in the position they would have held if the representation had been true. In these circumstances I do not consider that the vendor was entitled to recover the balance of the purchase money from the vendee. Hence ordered that the appeal be allowed with costs, the judgments and decrees of the lower Courts be set aside and the suit dismissed with costs. Leave to appeal u/s 15, Letters Patent Act, is refused.