
(1925) 08 MAD CK 0073
In the Madras High Court

Venkataranga Aiyar and Another		APPELLANT
	Vs	
C.S. Ramasamy Aiyar and Others		RESPONDENT

Date of Decision : 07-08-1925

Acts Referred:

Citation : AIR 1926 Mad 173 : (1925) 22 LW 786

Hon'ble Judges : Spencer, O.C.J.; Visvanatha Sastri, J

Bench : Full Bench

Judgement

Spencer, O.C.J.

1. This is a suit for specific performance of a written and registered agreement, dated 26th October, 1917, to sell Immovable property entered into by the 1st and 2nd defendants and their brother, Velusamy Goundan. Defendants 3 and 4, who appeal put forward an anterior oral agreement on 15th October, 1917, to sell the lands to them. The existence of this prior agreement formed the subject of the 2nd issue which the trial Court found against these defendants. The correctness of this finding is the main question argued in appeal. When we are asked to disturb findings of fact based entirely upon oral evidence, we must always feel some hesitation before coming to a different conclusion from that of the Judge who heard and saw the witnesses deposing. This is additionally so, when that course would involve giving credit to witnesses who have been disbelieved in the Court below, and when it involves accepting a story which, judged merely upon probabilities, sounds hard to accept. The story told by D. Ws. 8 and 9 is that they went from Darapuram to Kolinjivadi to ask a creditor to remit penal interest on a mortgage debt due by the brother of D.W. 8 and were accompanied to the creditor's house by the Assistant Karnam of the village, D.W. 6. When passing the 4th defendant's house, the Karnam was called in and they went in too and witnessed the oral agreement to sell the plaint lands and advance of Rs. 100. The date of this transaction is fixed by the endorsement of payment on Ex. VIII A which is October 16th, the difference of one day being accounted for by saying that on October 15th the creditor obstinately refused to

make any remission but that he relented on the following day. I think it is probable that October 16th was the real date of these witnesses' visit to the money-lender and that the story that they followed Sami Sastri to his bath asking about the remission of interest and that the document was not referred to, nor was any account of interest taken till the next day, was introduced to make the story, that they went on the 15th, credible. The fact that D.W. 6 once owned considerable property, does not in my opinion, enhance the value of his testimony or make the story more credible. If the contracting parties wanted witnesses of their contract and went to the length of calling strangers in for that purpose for fear that one or the other party would go back on the agreement, it would have been just as easy to get the terms reduced to writing. In this ease," there are not even receipts produced for delivery of the title deeds or for payment of the advance said to have been made at the time. The finding of the lower Court upon this issue must, therefore, be confirmed.

2. On November 10th, the appellants obtained sale deeds which are Exs. III-B and III-C, knowing at the time as found by the trial Court, that defendants 1 and 2 had agreed to sell their lands to the plaintiff. Their brother, Yelusami, sold his one-third share to the plaintiff for Rs. 3,66610-8 under Ex. E, (i.e.) for one-third of the price agreed upon in Ex. A, the written agreement of 26th October.

3. The second point argued in this appeal is that the decree for payment of Rs. 750 as damages cannot stand. Section 19 of the Specific Relief Act provides that if specific performance ought to be granted but is not sufficient to satisfy the justice of the case, compensation for breach of the contract may also be given to the plaintiff. The present is not such an extreme case as to give further relief in addition to the relief of specific performance. The plaintiff will be sufficiently compensated by getting a decree for specific performance together with costs. The direction that defendants should pay Rs. 750 as damages will, therefore, be excluded from the decree.

4. The next question is as to the form of the decree given in the Lower Court. The decree directs:

That plaintiff do pay the sale price of Rs. 7,000 for the shares of defendants 1 and 2 to the mortgagees in discharge of the mortgage debts secured by the properties...and that the defendants do pay the said mortgagees, the balance, if any, under the mortgages aforesaid

5. Mr. Alladi Krishnaswami Aiyar objects to the provision that his clients defendants 3 and 4 should pay the balance, if any, under the mortgages. This objection has not been made a ground of appeal ; but as the decree is before us, we trust see that it is not only a just decree but one that; is executable. u/s 18(c) of the Specific Relief Act, a purchaser has a right to compel his vendor to redeem encumbrances in cases where the vendor professes to sell the property unencumbered and the property is mortgaged for an amount not exceeding the purchase money. u/s 27(b) the specific performance of a contract may be

enforced not only against parties to the contract but also against any other persons claiming under them by a title arising subsequently to the contract, except transferees for value who have paid their money in good faith and without notice of the original contract. Under these provisions the plaintiff can compel the defendants 3 and 4 who have purchased the rights of defendants 1 and 2 with notice to perform the contract entered into by defendants 1 and 2. Ex. A, which embodies the terms of the agreement between the plaintiff and his vendors, entitles the vendors to receive the balance remaining after deducting the debts due under the mortgages upon the lands conveyed, but does not specifically impose any liability upon the vendors to convey the lands to the purchasers free of encumbrances. At that time, it was probably thought that the price agreed upon would be sufficient to discharge all the mortgages existing at the time. Since then, interest has been running and although the mortgagees are not made parties to this suit and the amount of the encumbrances now existing has not been ascertained, it is probable that that money will not be sufficient to discharge these debts. There is, in this case, no express covenant that the vendors should themselves clear off the encumbrances before executing the sale deed and, therefore, it cannot be enforced against any transferees from those vendors as part of the contract which they have become liable to perform. Section 55, Clause 1, Sub-clause (g) of the Transfer of Property Act imposes a statutory liability upon all vendors of Immovable property to discharge all encumbrances on the property existing at the time of sale except where the property is sold subject to encumbrances. Clause 2 which provides for the benefit of contracts mentioned in that rule passing to every person to whom the interest is transferred, relates only to the implied contracts mentioned in that particular rule, viz., that the transferor has a subsisting transferable title and, if the vendor is in a position of trust to the buyer, that he has not encumbered the property. There is no similar provision for the benefit of implied contracts in Clause 1 passing to transferees.

6. In *Srinivasa Chari v. Gnanaprakasa, Mudaliar* (1907) 30 Mad. 67, it was held that the purchaser of the equity of redemption from a mortgagor not being a party to the covenant, was not entitled to the benefit of the implied covenant in respect of payment of public charges, which are some of the obligations referred to in Sub-clause (g) of Section 55(1).

7. Section 27 of the Specific Relief Act does not provide for the specific enforcement of personal covenants against persons who claim under the original vendor, even though such covenants may arise out of the original contract of sale. For these reasons, the liability of defendants 3 and 4 to pay off the mortgages upon the suit property cannot be declared by the decree in the present suit.

8. The Lower Court's decree will therefore have to be amended and redrafted in the following form:

1. That plaintiff do pay into Court on or before the 1st day of November, 1935,

the sum of Rs. 3,500 towards the sale deed to be executed by defendants 1, 3 and 4 and a farther sum of Rs. 3.500 towards the sale deed to be executed by defendants 3, 3 and 4.

2. That these sums do go towards the discharge of the mortgage debts referred to in Exs. III-B and III-C respectively,

3. That upon such payments being made, defendants 1. 3 and 4 do execute in favour of the plaintiff a sale deed in respect of the lands comprised in Ex- III-C and defendants 2, 3 and 4 do execute a sale deed in respect of the lands comprised in Ex. III-B.

4. That defendants do deliver possession of the properties to the plaintiff, the delivery by defendants 1 and 2 being free from all encumbrances ; and 5. That defendants do pay the plaintiff his costs in the suit and bear their own.

9. With this modification the appeal is dismissed with costs.

10. After the plaintiff obtains a sale deed in his name for the suit lands, he will be entitled to redeem any encumbrances existing upon the properties so belonging to him. We decide nothing as to his right to recover the cost of redemption from any persons who may be liable to reimburse him.

Visvanatha Sastri, J.

11. I agree with what has fallen from my Lord.