
Basalingava Revanshiddappa Umbarji Vs Chinnava Karibasappa

Letters Patent Appeal No. 1 of 1929

Court: Bombay High Court

Date of Decision: Oct. 5, 1931

Acts Referred:

Limitation Act, 1908 & Section 28#Transfer of Property Act, 1882 & Section 55(4)(b)

Citation: AIR 1932 Bom 247 : (1932) 34 BOMLR 427 : (1932) ILR (Bom) 556

Hon'ble Judges: Patkar, J; Barlee, J

Bench: Division Bench

Judgement

Patkar, J.

This appeal raises the question whether in a suit by the vendee it is competent to the Court to pass a decree for possession

conditional on the vendee paying the unpaid purchase money.

2. The plaintiff sued to recover possession of the house in suit alleging that it belonged to her father Shivlingappa who sold it to her on December

15, 1920, for Rs. 1,000 and delivered possession, and that during her absence she was dispossessed by the defendants, her sisters. Defendant

No. 3 admitted the plaintiff's claim. Defendants Nos. 1 and 2 alleged that the transaction was hollow and without consideration and denied that the

possession was handed over to the plaintiff.

3. The learned Subordinate Judge held that the transfer was not colourable but was without consideration, and passed a decree ordering

possession of the entire house on condition that if within three months the plaintiff did not pay to defendants Nos. 1 and 2 Rs. 600 the suit shall be

dismissed, and that the plaintiff should recover a half share in the house by partition. The ground on which the decree was based was that the

vendor Shivlingappa was the father of the plaintiff and the defendants, and defendant No. 3 having admitted the plaintiff's claim, defendants Nos. 1

and 2, the contesting defendants, were entitled to the half of the property and the plaintiff was entitled to the other half. On appeal the decree was

confirmed.

4. We must, therefore, accept the findings of the lower Court as conclusive that the sale was a genuine sale and not a colourable one, that the

possession always remained with the father Shivlingappa, and that the consideration was not paid by the plaintiff. Those facts are not challenged

before us in appeal. The only point argued before us in that the Court had no jurisdiction to pass a conditional decree ordering possession to be

given to the vendee on payment of the balance of the purchase money. As the plaintiff was entitled to half of the property, half the consideration

Rs. 500 was ordered to be paid by the lower Courts to defendants Nos. 1 and 2.

5. There is a distinction between a sale where the consideration is intended to be paid and is not paid, and where the consideration is not intended

by both parties to be paid at all. In the former case the title would pass to the purchaser and in the latter case though the vendor was tricked into

going through the form of execution and registration of the document, the sale-deed would be void as a colourable transaction. See the decisions in

the cases of Umedmal Motiram v. Davu bin Dhondiba ILR (1878) Bom. 547 Trimalrav Raghuvendra v. The Municipal Commissioners of Hubli

ILR (1878) Bom. 172 and the judgment of Sir Charles Farran in Tatia v. Babaji ILR (1896) Bom. 176 The finding of both the Courts is that the

sale was genuine, and therefore the title passed to the plaintiff though the consideration was not paid by the plaintiff to her father, but the possession

all along remained with the father since the date of the sale in 1920, The only question is whether the conditional decree passed by the lower Court

is right.

6. Apart from decided cases, the rights and liabilities of the buyer and seller are regulated by Section 55 of the Transfer of Property Act, u/s 55(1)

(f) the seller is bound to give, on being so required, the buyer or such person as he directs, such possession of the property as" its nature admits.

u/s 55(4)(b) the seller is entitled where the ownership of the property has passed to the buyer before payment of the whole of the purchase money,

to a charge upon the property in the hands of the buyer, any transferee without consideration or any transferee with notice of the non-payment, for

the amount of the purchase money or any part thereof remaining unpaid and for interest on such amount or part from the date on which possession

has been delivered. u/s 65(6)(b) the buyer is bound to pay or tender at the time and place of completing the sale the purchase money to the seller

or such person as he directs. It would, therefore, follow from the rights and liabilities of the vendor and the purchaser as determined by the statute

that the buyer must pay the consideration to the seller and is entitled to possession of the property. The terms of the conveyance having been

settled, generally at a meeting between the parties, the conveyance is signed, the money is handed over and possession is given, and so it can be

loosely said that the possession is claimable concurrently with the payment of the purchase money. As held by Fawcett J. in *The Kapadvanj*

Municipality Vs. Ochhavilal Damodar Parikh, the words ""on being so required "" in Clause (f) of Sub-section (1) of Section 55 might be construed

as meaning "" on being properly required."" " Where, however, the consideration is not paid at the time of the conveyance, the seller is entitled u/s

55(4)(b) to a statutory charge on the property in the hands of the buyer. There is no provision in the Transfer of Property Act for the vendor's lien

over the Immovable property sold like the seller's lien provided for by Section 47 of the Indian Sale of Goods Act, 1930, in respect of moveable

property sold.

7. According to the decision of the Privy Council in *Webb v. Macpherson* ILR (1903) Cal. 57 : 5 Bom. L.R. 838 though English cases might be

useful for purposes of illustration, the charge which the vendor obtains under the Transfer of Property Act is different in its origin and nature from

the vendor's lien given by the Courts of equity to an unpaid vendor, and the vendor's lien is a creation of the Court of equity and can be modified

to the circumstances of the case by the Court of equity The statutory charge given by a 55 of the Transfer of Property Act stands on a quite

different footing from the vendor's lien. Strictly speaking, the vendor's lien for unpaid purchase money on Immovable property which is sold and

continues to remain in the possession of the vendor is not recognised by statute, and it is difficult to enforce and incorporate it in a decree so as to

make the enforcement of the lien a condition precedent to the recovery of possession in a suit by the purchaser for possession of the property. The

statutory charge recognised by Section 55 is upon the property in the hands of the buyer or any transferee without consideration or any transferee

with notice of the non-payment, for the amount of the purchase money or any part thereof remaining unpaid.

8. In *Subrahmania Ayyar v. Poovan* ILR (1902) Mad. 25 where a sale-deed was executed more than seven years before the suit but the purchase

money was not paid and the vendors continued in possession of the land and a suit was brought by the purchaser to recover possession, it was

held, following the decision in the case of *Umedmal Motiram v. Davu bin Dhondiba*, that the vendors had a charge, by operation of law, on the

property sold, for the purchase money, and though a suit by the vendors to enforce their lien would have been barred by limitation under Article

111, their lien was not extinguished by Section 28 of the Indian Limitation Act, and as the vendors were in possession they had a right to retain

possession until the purchase money was paid and the lien extinguished by such payment. In *Velayutha Chetty v. Govindasawmi Naiken* ILR

(1907) Mad. 524 it was held that the lien of the unpaid vendor of the land u/s 55 of the Transfer of Property Act is non-possessory, and that the

vendor has only a right to retain the title-deeds and to a charge for the unpaid purchase money, but he cannot retain possession of the property

sold against the vendee. In *Velayutha Chetty v. Govindasawmi Naiken* ILR (1910) Mad. 543 it was held that the provisions of the Transfer of

Property Act that the vendee, after the conveyance, is entitled to possession and that the vendor has a statutory charge on the property for the

unpaid purchase money are clear, and it is not competent to the Courts in a suit for possession by the vendee to pass a decree for possession

conditionally on the vendee paying the balance of the purchase money. The decision is based on two grounds: first, that the provisions of the

Transfer of Property Act are clear and that it is not open to the Courts to introduce or enforce equities modifying the provisions of the statute law,

and, secondly, that there is no provision for counter-claims and that the vendor in that case had not in fact counter-claimed for the enforcement of

the charge. The same view was accepted in *Krishnamma v. Mali* ILR (1920) Mad. 712 which dissented from the view taken in *Subrahmania*

Ayyar v. Poovan.

9. The Allahabad High Court, however, has taken a different view. In *Shib Lal v. Bhagwan Das* ILR (1888) All. 244 Mahmood J. expressed the

view that in such a case the equities may exist in favour of the vendor so as to subject the decree for possession to restrictions and conditions

appropriate to the circumstances of each case, but held that no such equities existed in that case. In *Bajnath Singh v. Paltu* ILR (1908) All. 125

the Allahabad High Court, following the obiter dictum of Mahmood J., passed a decree in favour of the purchaser conditionally on the payment of

the purchase money and directed that in default of such payment the purchaser shall forfeit his right to recover the property.

10. The Calcutta High Court, in the case of *Nilmadhab Parhi v. Hara Proshad Parhi* (1913) 17 C.W.N. 1161 held that where the vendor has a

lien for the unpaid balance of the purchase money, and the vendor's lien gives him a right to keep the title-deeds until payment, the right of the

purchaser to obtain possession u/s 55(1)(f) of the Transfer of Property Act and the right of the vendor to realise the unpaid balance of the

purchase money u/s 55(4)(b) may be enforced in one suit.

11. Coming to the decisions of the Bombay High Court, it was held in *Umedmal Motiram v. Davi bin Dhondiba* that a vendor had a lien for the

amount of the unpaid purchase money and the purchaser cannot obtain possession without paying off the charge. That decision was passed before

the Transfer of Property Act was enacted and made applicable to the Bombay Presidency. The case of *Kevaldas v. Nagindas* (1909) 11 Bom.

L.R. 383 does not deal with the point arising in this case, but it was held, following the decision in the case of *Bajnath Singh v. Paltu*, that the fact

that part of the consideration money for a sale has not been paid does not make it void wholly or partially, and that all that the vendor is legally

entitled to in that case is a lien on the property sold to the extent of the amount not paid. The case related to the question whether the decree-

holder against the purchaser had a right to attach the property sold when the consideration was not paid, and did not deal with the question arising

in this case as to whether a Court is competent to pass a conditional decree ordering payment of the purchase money in a suit by the purchaser to

obtain possession of the property on the strength of the sale-deed. In *Sagaji v. Namdev* ILR (1899) Bom. 525 it was held that the sale was a

completed transaction though the consideration was not paid, and the only remedy of the defendant was to sue for the amount. The judgment

appears to be inconsistent with the decree eventually passed restoring the decree of the Subordinate Judge who had passed a conditional decree

ordering the purchaser to obtain possession on payment of the consideration to the vendor. It appears, therefore, that in none of these cases the

precise point now under consideration was considered after the Transfer of Property Act was made applicable to the Bombay Presidency.

12. There appears, therefore, to be a conflict of opinion between the Madras High Court on the one hand and the Allahabad and the Calcutta High

Courts on the other. There is no clear decision of the Bombay High Court on this point after the Transfer of Property Act came into force. The

view of the Calcutta High Court can be supported on the ground of convenience and also on equitable considerations.

13. The decisions of the Madras High Court are based principally on two grounds. The first is that the provisions of the Transfer of Property Act

are clear. The purchaser is entitled to possession of the property and the vendor has only a statutory charge on the property in the hands of the

purchaser. There is no provision in the Transfer of Property Act for a vendor's lien, and it is not permissible for a Court to invoke equitable

principles to modify the provisions of the statute law. The equitable doctrine of part performance has been applied in order to modify the statute

law in the decisions of this Court, but it was held in a recent decision of the Privy Council in *G.F.C. Ariff Vs. Rai Jadunath Majumdar Bahadur*,

that a lessee could not rely upon the English equitable doctrine of part performance as his right to enforce the verbal contract had become barred

by limitation long before the commencement of the suit, and that the English equitable doctrine of part performance could not be applied by

analogy so as to modify or override the mandatory provisions of an Indian statute such as the Transfer of Property Act. In the present case the

sale-deed was passed in 1920 and the suit was brought in 1921, and under Article 111 of the Indian Limitation Act which prescribes the limitation

period of three years, the suit for personal payment of the unpaid purchase money would be barred. The statutory charge in favour of the

defendants would, however, be within time under Article 132 of the Indian Limitation Act, The equitable doctrine of vendor's lien not being clearly

and specifically recognised by the Transfer of Property Act, it is difficult to apply the equitable principle in modification of the statute law.

14. The second ground underlying the decisions of the Madras High Court is that the vendor not being able to set up a counter-claim, nor having,

as a matter of fact, made a counter-claim, a decree could not be passed enforcing the vendor's lien. This ground merely relates to a matter of

procedure rather than substantive law.

15. I think it is more convenient to recognise the rights of the parties in one decree instead of driving the parties to a separate suit to enforce a right

to which there is no defence. I am inclined to agree with the view of the Calcutta High Court in Nil madhab v. Hara Prashad Purhi, where it was

observed as follows (p. 1164):-

If we accept the contention of the Respondents the result will be that the plaintiffs will obtain an unconditional decree for possession, the vendor

will be driven to institute a suit to enforce the lien which he possesses over the property for the unpaid purchase money...It is obviously

undesirable that the matter in controversy which may be settled without disadvantage to any of the parties, in a single litigation, should be

repeatedly agitated in a succession of suits.

16. Though I feel difficulty in giving effect to the equitable principle of vendor's lien which is not recognised in the Transfer of Property Act, I do

not think that there is any insuperable objection to recognise the statutory charge provided for in Section 55(4)(b) of the Transfer of Property Act,

and to incorporate the statutory charge in the decree in the suit brought by the purchaser for recovery of possession. If the purchaser obtains

unconditional possession of the property, it would be open to him either to sell or mortgage the property, and the transferee for value without

notice of the non-payment would not be bound by the charge of the vendor for the unpaid purchase-money. So long as the vendor has not parted

with the possession of the property, the transferee for consideration would have constructive notice of the possession of the vendor, and also of the

non payment of the purchase money and the statutory charge recognised by the Transfer of Property Act. On the purchaser getting unconditional

possession of the property a transferee for value from the purchaser will have no notice of the charge and will not be bound to discharge the debt

creating the statutory charge unless the charge is recognised in the decree awarding possession to the purchaser.

17. I would, therefore, while decreeing possession to the plaintiff-purchaser, incorporate in the decree the charge in favour of the vendors who are

the defendants in the suit. According to the decision in Yellawa v. Bhimangavda ILR (1893) Bom. 452 the Court will not allow the heir to recover

family property from a widow entitled to the maintained out of it without first securing a proper maintenance for her, and the maintenance in such a

case is declared a charge on the property is a suit by the heir to recover family property though maintenance may not have been counter-claimed in

the suit. I think that in the interest of justice and to avoid multiplicity of suits the statutory charge can be declared in favour of the vendor in a suit

brought by the purchaser for recovery of possession of the property.

18. I would, therefore, pass a decree in favour of the plaintiff to recover possession of the entire house, I would also declare the statutory charge in

favour of defendants Nos. 1 and 2 for Rs. 500, the amount of the purchase money due to defendants Nos. 1 and 2, and order that the plaintiffs

should pay the amount of Rs. 500 within six months from this date and in default defendants Nos. 1 and 2 should, on payment of the Court-fees on

a claim of Rs. 500, recover the amount of Rs. 500 by sale of the property in suit. I would order each party to bear her own costs throughout,

Barlee, J.

19. Plaintiff", one of the four daughters of one Shivlingapa, sued on a sale-deed executed by her father in her favour for possession of his house.

She pleaded that she had been given possession by him at the date of the sale-deed but had been dispossessed by her three sisters after his death,

20. The defence of two sisters was that the transaction was colourable, designed to protect the property from his brothers. They pleaded that their

father had been in possession till his death and subsequently their mother, and defendant No. 1, till the former's death. The latter is now, they

plead, in possession.

21. The Judge of the first Court held that the transaction was genuine. He held that the father had intended to transfer ownership, but that the

vendee had never paid the price nor had she ever taken possession. Accordingly, he made a decree for possession, but relying on the Allahabad

rulings in Shib Lal v. Bhagwan Das ILR (1888) All. 244 and in Baijnath Singh v. Paltu ILR (1908) All. 123 and on a decision in Kevaldas v.

Nagindas (1909) 11 Bom. L.R. 583 he made the decree conditional on the payment of the price.

22. In first appeal the only question argued was whether consideration had been paid. The learned District Judge held that it had not been paid

since ""it is difficult to believe that the vendee would have parted with so much money without the consent of her husband.

23. In second appeal the defendants for the first time challenged the finding of law of the trying Court and contended that as the sale had been held

to be a genuine transaction the vendee was entitled to possession and the Court should not have passed conditional decree. They failed and have

appealed under the Letters Patent.

24. The question argued before us is whether there is or is not an equity in favour of a vendor which justifies a Court in refusing to decree

unconditional possession to a vendee when the purchase money has not been paid. We have been referred to a number of cases on the point. The

earliest is in Umedmal Motiram v. Davabin Dhondiba ILR (1878) Bom. 647 where it was held that a vendor of Immovable property had a lien for

unpaid purchase money and that the purchaser was not entitled to obtain possession until he had paid off the vendor's charge. That decision was

before the Transfer of Property Act, and it is indisputable that at that time Courts in India could and did give effect to the equitable doctrines is the

English Courts of Chancery. But an equitable lien never justified the retaining of possession. What was meant by an equitable lien was no more than

a charge on the property sold which commences only when the possession is parted with to the purchaser (see Snell, 10th Ed., p. 142 and

Strahan, Ed. 8, pages 354-356). "It is a right in equity to have a claim satisfied out of the property of another. -It does not transfer any title at law

or in equity." With respect, then, I find it difficult to understand the justification for the final order that the vendor was entitled to possession as if he

had a lien such as was given by the common law to the vendor of chattels. I cannot find that the Court of Chancery ever gave such a right to a

vendor of land after the conveyance had been executed. On the contrary that Court never interfered directly with legal titles or the rights of owners

of property. Equity followed the law; but as a Court of conscience the Chancery Court treated a purchaser who had not paid the price as a trustee,

and gave merely equitable reliefs" to the seller. In any case the decision is not now binding Since the English equitable lien has now been embodied

in the Transfer of Property Act (Section 55, Sub-clause (4)(b)).

25. This case, then, does not help the defendant. The next case off which the learned advocate relies is in *Shib Lal v. Bhagwan Das* ILR (1888)

All. 244 which contains a dictum of Mahmood J. that an equity may exist in favour of a seller, and this dictum has been followed by the Allahabad

Court in *Bajinath Singh v. Paltu* ILR (1908) All. 125 The learned Judge (Mahmood J.) amplified this dictum by the further remark (p. 252):-

The ruling in *Goor Pershad v. Nunda Singh* (1866) 1 Agra H.C. 160 so far as it declares that a decree for possession in favour of a vendee, who

has paid only a portion of the purchase-money, cannot be subjected to a condition of payment of balance of the purchase-money, is...scarcely

consistent with the procedure and rules of the Courts of equity and the rulings which I have cited.

But the learned Judge did not indicate what were the rules of the Courts of equity which he had in mind ; and, for the reasons which I have already

stated, I am respectfully of opinion that the only equity which was recognized by the Chancery Court in favour of an unpaid vendor was the charge,

misnamed a lien, which, as far as I can discover, was nothing but a charge such as has been given by Section 55 of the Transfer of Property Act.

In any case I agree with the decision of the Madras High Court in *Velayutha Chetty v. Govindasawmi Naiken* ILR (1907) Mad. 524 : ILR (1910)

Mad. 543 that it is not open to the Courts of this country to introduce and enforce equities modifying the provisions of the statute law. The remarks

of their Lordships of the Privy Council in the recent case of *G.F.C. Ariff Vs. Rai Jadunath Majumdar Bahadur*, are explicit on the point.

26. It is said that this Court has adopted the Allahabad view, but I can find no ruling of our own High Court on the point. Two cases have been

cited, *Sayaji v. Namdev* ILR (1899) Bom. 525 and *Kevaldas v. Nagin das* (1909) 11 Bom. L.R. 383 But the former is rather against the

defendants than for them, and I can find nothing in the latter to help them. The head-note is to the effect that the fact that part of the consideration

for a sale has not been paid does not make it void and that all that the vendor is entitled to is a lien on the property sold. This is admitted. The

cases of *Umedmal Motiram v. Davu bin Dhondiba* and *Bajinath Singh v. Paltu* are cited as authorities for this proposition, but the Court did not

touch on the question now before us.

27. The question of real importance in this appeal is whether we must leave the defendants to file a suit to enforce their charge, or can give them

appropriate relief in this suit.

28. In a similar case (*Nilmadhab v. Hara Prashad Parhi* (1913) 17 C.W.N. 1161) a bench of the Calcutta High Court have adopted the Allahabad

rule on the score of convenience so as to avoid multiplicity of suits; and, though I cannot agree to the adoption of that rule, I am willing to agree to

any course which may save poor litigants, such as the parties in this suit, from unnecessary litigation, so long as we do not deny statutory rights.

This is desirable when" defendants are not to be blamed for laches. The present defendants were not the parties to the sale. Their father who knew

the facts is dead, and it cannot be presumed that their defence was dishonest. This being so, the course which we propose to take is to give them a

declaration, with leave to apply for sale, on their paying the proper court-fees. Strictly speaking, this is not justified by the Code. They should file a

separate suit. But, as Mr. Justice Baker points out, the questions in dispute have all been decided in this suit and the filing of a separate plaint and

the starting of a fresh litigation would cause unnecessary trouble and expense to both parties. I agree, then, that we are justified in acting on the

fiction that they have filed a suit which has been consolidated with the present suit. The relaxation of a rule of procedure is on a different footing to

the course adopted by the Allahabad High Court of creating an equitable right in derogation of the statute law.