

## **Nagammal And Ors. vs Ayyavu Thever And Ors. on 28 July, 1972**

**Equivalent citations: AIR1973MAD353, (1973)1MLJ273, AIR 1973 MADRAS 353, 1986 MADLW 229 (1973) 1 MADLJ273, (1973) 1 MADLJ273**

### **JUDGMENT**

1. Defendants 1 to 3 are the appellants. The question that arise for consideration in the second appeal is whether the plaintiff-purchasers are entitled to a refund of the advance paid in respect of an agreement of sale which fell through due to the defect in title of the defendant-vendors and in case the plaintiffs are entitled to a refund whether a charge could be created on the property covered by the agreement of sale.

2. The facts of the case are as follows: The first defendant through her husband Kesava Naidu, and her brother one Nagasami Naidu negotiated for the sale of the suit property to the plaintiffs and on 26-5-1944 the plaintiff and the first defendant entered in to an agreement of sale in respect of the suit property whereby the first defendant agreed to sell the suit property for Rs. 9085 to the plaintiffs and in pursuance of the said agreement, the plaintiffs paid an advance of Rs. 1500 to the first defendant. Under the terms of the said agreement the sale was to be completed within three months and the first defendant asserted and declared in the said agreement that she was solely and absolutely entitled to the suit property and on the said representations of the first defendant the plaintiffs entered into the agreement of sale. On a scrutiny of the title deeds it became clear that the first defendant was entitled only to a life interest in the suit property. Thereupon the plaintiff called upon the first defendant to return the advance of Rs. 1500/ along with a sum of Rs. 200 by way of damages to which the first defendant sent a reply refusing to return the advance amount and repudiating the claim for damages and putting forward various frivolous objections. The first defendant thereafter sold the suit property to defendants 2 to 4. The present suit is for recovery of the advance amount of Rs. 1500 along with the claim for damages of Rs. 200 with a charge on the suit property in respect of the advance paid. The plaintiff s further claimed interest on the advance amount from the date of agreement.

3. The first defendant filed a written statement admitting the suit agreement, but contending that the suit agreement was entered into after a full scrutiny of the title deeds, that no warranty of title was given to the plaintiff and that the agreement was entered into with the full knowledge of the limited rights which she had in the property and that she was willing to perform her part of the contract within the stipulated period and that the default, if any, was only with the plaintiff and that defendants 2 to 4 are necessary parties to the suit.

4. Defendants 2 and 3 have filed a separate written statement denying knowledge of the agreement of sale and contending that they are unnecessary parties to the suit.

5. The trial Court held that the plaintiff-buyers had entered into the agreement of sale with full knowledge of the defect in the title of the vendor and that there was no implied warranty of the title and that consequently the first defendant is entitled to forfeit the entire amount of Rs. 1500. In the result, the suit was dismissed.

6. On appeal the decision of the trial Court was reversed and the appellate Court held that the sum of Rs.1500 paid by way of advance is part of the purchase price and that the said amount is refundable. As regards the claim for damages, the appellate Court found that the plaintiffs entered into the agreement of sale with knowledge of the imperfect title of the first defendant and therefore are not entitled to claim any damages as such from the first defendant. On the question of charge claimed over the suit property, the appellate Court held that defendants 2 to 4 purchased the suit property on 12-2-1965 long after the agreement of sale and a charge for the amount of Rs. 1500 with interest thereon from December, 1964 till date of payment was created over the suit property.

7. In the second appeal filed against the said judgment the learned counsel for the appellants contends that the plaintiff is not entitled to refund of advance paid and that in any event the decree creating the charge over the suit property is wrong. From a perusal of Ex. A.1 it is clear that the sum of Rs.1500 was paid by way of advance and the balance of the sale price was agreed to be paid within five months. The said sum of Rs. 1500 is not by way of the deposit or earnest money, but part of the price agreed to be paid. It is true that what is called 'advance' may be a deposit and what is termed as 'deposit' may ultimately be proved to be as advance and that mere description by the parties cannot conclude such matters. It is the intention of the parties gatherable from the agreement that has to be looked into. The express terms of the contract leave no room for doubt that the sum of Rs.1500 paid was only by way of advance and that the said sum was not paid either as deposit or earnest money. A reference to the judgment of Ramaprasada Rao, J in *Meena Kshinada Deikshitar v. Murugesu Nadar*, may be made in this connection.

8. Although the vendor in the present case had a life interest in the suit property, she purported to convey an absolute title to the purchaser. Even if the buyer was aware of the defect in title of the vendor at the time of the contract, he will be entitled to claim a return of the purchase money under Section 55(2) of the Transfer of Property Act. The plaintiffs, therefore, are entitled to a refund of the advance paid under the suit agreement.

9. On the question of charge claimed by the plaintiffs, the position is as follows: Under Section 55(6)(b) of the Transfer of Property Act, it is provided that the buyer is entitled, unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, to the extent of the seller's interest in the property, for the amount of any purchase money paid by the buyer in anticipation of the delivery and for interest on such amount. The learned counsel for appellant contends that the purchasers have improperly declined to accept delivery of the property and therefore the buyers are not entitled to the charge under Section 55(6)(b) of the Act. The further contention of the learned counsel is that Section 55(6)(b) of the Act will apply only when the transaction is completed by the execution of a sale deed and in the present case the seller not having executed a sale deed, the above provisions in inapplicable.

10. Section 55 of the Act deals with rights and liabilities of buyer and seller both before completion and after completion.

11. The principle laid down in Section 55(6)(b) of the Transfer of Property Act is based upon the English law that a purchaser has got a lien for the money paid by him on the vendor's interest when the contract goes off. In *Wythes v. Lee* (1855) 61 ER 954. Vice-Chancellor Kindersley observed as follows-

" Suppose a person, absolute beneficial owner in fee of an estate, contracts to sell it, and the purchaser pays the deposit in part payment of the purchase-money, and by reason of the vendor being unable to make a title or from any other reason, not being misconduct on either side, the contract goes off and cannot be completed ; has the purchaser a lien on the estate for his deposit".

12. This question was examined by the learned Vice-Chancellor from three different points of view:

" 1. With reference to natural justice, irrespective of any specific rule of law; and it does appear to me that it is consistent with natural justice, that if a purchaser, on the faith of the contract being completed, and the estate becoming his, has advanced moneys in payment or part payment for the purchase, he has advanced it under circumstances which entitle him to say 'if you cannot complete, not only are you bound to give me back my money, but I have a right to a lien on the estate.'

2. with reference to the general law of this Court I do not mean with reference to decided cases, but to the general law and principles of this Court: This is clear, that is unquestionable. Now, does the right of the purchaser, before he has got his money, has a lien for it on the estate; that is unquestionable. Now, does the right of the purchaser, if the contract goes off, stand in principle on the same footing as that of the vendors ?. The only distinction that occurs to me is this : the vendor when he contracts to sell his estate is owner ; he has the estate in his own possession, at least under his own control, and when he contracts to sell., his right is to say, 'I will convey the estate when the purchase-money is paid, but till that is done I will not convey it; that creates a lien of itself very analogous to the common law lien, and the lien, which exists before conveyance, still continues; it is not a new, but the same lien. But with regard to the purchaser, he has not the estate in his possession, and his lien is not in its origin the same sort of lien of the vendor. But when a contract is made and then goes off, it appears to me that in principle to a lien on the estate ought to stand on a footing as the lien of the vendor after conveyance.....; and

3. The third with reference to the authorities and it appears to me that they are in favor of the lien".

Some authorities were referred to by the learned Vice-Chancellor.

13. In *M. K. Sunderaramier v. C. M. V. Krishnamachari, Venkataraman, J.*, dealing with Section 55(6)(b) of the Act observed as follows-

" The provisions of Section 55(6)(b) of the Act can be availed of by the buyer before the sale deed is executed and cannot be availed of by him after the sale deed is executed because if the sale deed is executed, the title would pass to the buyer and there is no point in giving a charge over the purchaser money on the property which has become that of the buyer. The provision can have meaning only in case where the title has not yet passed to the buyer in respect of the purchase money or any portion thereof paid by him."

The learned Judge referred to the earlier decisions of this Court, viz, *Adikesavan Naidu v. Gurunatha* ILR 40 Mad 338 = (AIR 1918 Mad 1315) (FB) ; *Kathamuthu Pillai v. Subramania Chettiar*, AIR 1926 Mad 569 and *Krishnaswami Rao, v. Srinivasa Desikan* 71 Mad LJ 850 = (AIR 1937 Mad 261) I have, therefore, no hesitation in coming to the conclusion that the plaintiff-buyer is entitled to a charge on the seller's interest in the property agreed to be sold. I am of opinion that Section 55(6) has application only to the rights of the parties prior to the execution of the sale deed.

14. The further contention of the learned counsel for the appellants is that the words 'unless he has improperly declined to accept the delivery of the property' occurring in the first part of sub-clause (b) of S. 56 of the Act negative the buyer's claim for a charge, as he has improperly declined to accept the delivery of the property. Where the seller fails to make out a marketable title at the time fixed for completion of the contract of sale resulting in the buyer putting an end to the contract, it cannot be said that the buyer has improperly declined to accept the delivery and therefore deprive the buyer of the charge under this clause. In other words, where the contract goes off by reason of the default of the seller and without any default on the part of the buyer, the buyer does not lose his charge.

15. The next question for consideration is whether the charge could be enforced against defendants 2 to 4, who are purchasers of the suit property. The contention is that they are purchasers without notice of the prior agreement of sale in favor of the plaintiff and therefore the plaintiff is not entitled to the charge. Section 55(6)(b) of the Act creates a charge on the property as against his seller and all persons claiming under him. The amendment in 1929 in clause 55(6)(b) omits the words ' with notice of the payment' occurring in Section after the words " persons claiming under him". Before that amendment the buyer's charge could not be enforced against transferees with out notice. After the amendment the charge can be enforced not only against the seller but against all persons claiming under him irrespective of notice. I am. therefore, of opinion that the charges can be enforced against the vendor's interest in the suit property notwithstanding the sales in favor of defendants 2 to 4. This will be made clear in the decree.

16. The result is that there is no substance in any of the contention put forward by the appellants. The judgment and decree of the lower appellate Court is confirmed subject to making the decree clear regarding the charge. The second appeal fails and the same is dismissed. There will be no order as to costs.No leave.

17. Appeal dismissed.