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son into the list of bandhus so as to effect a breach in the order of persons named is no reason for repudiating the notion of order amongst the persons *inter se* who have been named.

We are, therefore, inclined to hold that the mother's sister's son should be preferred to the maternal uncle's son. In rejecting the notion of superiority by reason of the religious efficacy of oblations we have felt ourselves more at liberty in this case in consequence of the fact that the parties to the suit are Jains and that though the Hindu Law is *primâ facie* held applicable to them, its religious developments should not have unrestricted operation; see Mayne, section 516.

The second appeal is dismissed with costs.

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## APPELLATE CIVIL.

*Before Sir Arnold White, Chief Justice, and Mr. Justice Krishnaswami Ayyar.*

1910. December 2, 9.

ABDULLA BEARY (DEFENDANT), APPELLANT,

*v.*

MAMMALI BEARY AND ANOTHER (PLAINTIFF AND SUPPLEMENTAL RESPONDENT IN THE LOWER APPELLATE COURT. PLAINTIFF'S ATTACHING CREDITOR), RESPONDENTS.*

*Transfer of Property Act IV of 1882, s. 55, cl. 4 (b)—Sale—Consideration therefor—Covenant by purchaser to discharge liabilities of seller—Breach of covenant gives rise to action for damages only—Statutory charge under cl. 4 (b) negatived by contract to the contrary arising by implication.*

When a purchaser of immoveable property covenants, in consideration of the transfer of such property to him, to discharge certain liabilities of the seller and further stipulates that, upon his failure to do so, he shall be liable for any damages resulting from such default:

*Held*, that upon breach of such a covenant the seller is entitled to be compensated in damages but has no charge upon the property in the hands of the purchaser under section 55, cl. 4 (*b*) of Act IV of 1882.

To negative the statutory charge afforded by section 55 it is sufficient if 'a contract to the contrary' arises by implication.

*Webb* v. *Macpherson*, [(1903), 30 I.A., 238], referred to.

*In re Albert Life Assurance Company* v. *Western Life Assurance Society*, [(1870), 11 Eq., 164], followed.

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* Second Appeal No. 1475 of 1907.

*Ramakrishna Ayyar* v. *Subrahmania Ayyar*, [(1906), I.L.R., 29 Mad., 305], distinguished.

SECOND APPEAL against the degree of H. O. D. Harding, District Judge of South Canara, in Appeal Suit No. 307 of 1906, presented against the decree of M. Narasinga Rao, District Munsif of Kasaragod, in Original Suit No. 40 of 1906.

Suit to recover the price of certain property sold by the plaintiff to the defendant on the liability of the properties conveyed.

The plaintiff alleged that he executed an instrument of sale, Exhibit A, of certain immoveable properties in favour of the defendant for Rs. 1,650; that the defendant agreed to pay Rs. 1,350 from and out of the purchase-price to certain creditors of the plaintiff. That the defendant failed to pay the said amounts.

The plaintiff prayed for a decree for the abovementioned sum on the liability of the property conveyed.

The defendant pleaded *inter alia* that the plaintiff was not entitled to a charge upon the properties for the unpaid purchase-money; that his remedy, if any, was by way of damages and that the suit was barred by limitation.

The material terms of Exhibit A, the sale deed, were as follows:—

Deed of sale of land executed on 22nd of January 1894, in favour of Abdulla Beary by Mammali Beary is as follows: Having sold to you this day the undermentioned property, Rs. 1,650 (one thousand six hundred and fifty), the price settled hereof have been received by me, as per undermentioned particulars. Therefore, I have delivered the said properties to you even now. Henceforward neither myself nor my descendants as well, have any right whatever to the said property.

* * * *

The particulars of the receipt of Rs. 1,650, the price fixed for the abovesaid properties, are received being kept with you in consideration of the agreement of your paying one thousand three hundred and fifty to these three persons, viz., (1) Kasaragod Patnasetty Achutaya, (2) Venketesha Kamthi's son Shesu Kamthi and (3) Subraya Bhatta, and obtain receipt therefor to whom it was settled that I should pay the said sum in accordance with the provisions of the registered sale-deed for Rs. 10,500 obtained on 9th June 1892, . . . . in all Rs. 1,650, as per particulars have been received. The Rupees one thousand six

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hundred shown to be paid to the aforesaid persons should be paid to the respective persons within eight days from this date, and receipts obtained. In case receipts are not obtained accordingly, you are responsible to pay not only the interest due by me to them from the date of this deed but for the damages that may result therefrom.

The District Munsif passed a decree in favour of the plaintiff in terms of the prayers contained in the plaint.

On appeal this decree was confirmed by the District Court.

The defendant appealed to the High Court.

*K. Bashyam Ayyangar* for *K. P. Madhava Rao* for appellant.

*H. Balakrishna Rao* for *K. Naraina Rao* for second respondent.

JUDGMENT.—The Courts below have given a decree to the plaintiff for the purchase-money of certain property conveyed by him to the defendant on the liability of the properties conveyed. Exhibit A, dated the 22nd of January 1894, is the conveyance executed by the plaintiff. The price is fixed thereby at Rs. 1,650. It is stated to be kept with the purchaser in consideration of an agreement by him to discharge certain liabilities of the plaintiff. It is further stipulated that the money so reserved with the purchaser should be paid to the respective persons to whom the plaintiff was liable within eight days from the date of the sale and that the purchaser should, in default of payment, be liable for interest due to them from the date of sale and any damages resulting from such default. The defendant (the purchaser) having made default in payment, the plaintiff is entitled to sue for damages for the breach of contract. The Courts below have treated the suit as one for the purchase-money. They have held the plaintiff to be entitled to a charge upon the property in the hands of the buyer under section 55, clause 4 (*b*) of the Transfer of Property Act. If this were correct, the plaintiff's suit would of course be in time under article 132 of the Limitation Act. But if the damages claimed by the plaintiff are not purchase-money due to him and he is entitled to no charge it is clear that the suit is barred by lapse of time. Has the plaintiff then a charge in this case? By the terms of the contract the purchase money is not payable to the plaintiff. He has no right of action to recover it. How then can he have a charge upon the property conveyed when no money is due to him under the conveyance? Section 55 says he has, in the absence of a contract to the contrary, and the Judicial

Committee of the Privy Council say in *Webb* v. *Macpherson*(1) that to displace the statutory charge "it must be shown that there was a clear contract to the contrary between the parties." It is true there is no express contract in this case against a charge, but is there not, to use the language of the Privy Council "at least something from which it is a necessary implication that such a contract exists." When it is argued that the purchase money is to be paid to another, is that agreement consistent with the vendor retaining a charge? The purchaser no doubt is under a duty to the plaintiff to perform the covenant to pay the plaintiff's obligees. But he is under no *obligation to* pay the plaintiff any purchase money. The charge created by the statute in favour of the vendor is only security for purchase money payable to him. We are therefore inclined to hold that a contract to the contrary arises by implication to negative the statutory charge. It is no doubt pointed out by the Privy Council that the statutory charge in India is "different in origin and nature from the vendor's lien given by Courts of Equity to an unpaid vendor". See also the notes to *Mackreth* v. *Symmons*(2). But exclusion of such charge by contract express or implied being contemplated it is clearly open to us to negative it if we find as in this case a contract by necessary implication to the contrary. It is perhaps not easy to define what circumstances may give rise to a necessary implication. The intention of the parties must be gathered from a variety of facts. But when the vendor gets in return for his conveyance a promise to pay the purchase money or a part thereof to a third person whom the vendor is under obligation to pay it is perfectly safe to say that there is a contract to the contrary negativing a charge in the vendor's favour. If in England such a contract has been inferred under like circumstances to exclude the equitable lien of the unpaid vendor, we shall not be acting wrongly in making use of English decisions for purposes of illustration. *In re Albert Life Assurance Company* v. *Western Life Assurance Society*(3) in consideration of the Albert Company undertaking the liabilities and engagements of the Western Society, the latter conveyed a lease and mortgages belonging to it and when on failure of the former the Society claimed a lien on the lease and mortgages conveyed.

(1) (1903) 30 I.A., 238 at p. 244. (2) 2 W. & T. Eq. C., 935.
(3) (1870) L.R. 11 Equity, 164.

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Sir James Bacon, Vice-Chancellor, refused to allow it. In *Webb* v. *Macpherson*(1), the Privy Council point out "that a conveyance or sale in consideration of a covenant to pay a sum of money in the future is different from a sale in consideration of money which the purchaser covenants to pay. "The distinction," they say, "may seem fine but it is a real distinction and it is one which if made out *might have had* the effect which the High Court have given to it." In that case the price was fixed at Rs. 81,000, Rs. 30,000 was paid down and the balance of Rs. 51,000 was agreed to be paid to the vendor in certain instalments. The sum of Rs. 51,000 was part of the purchase money payable to the vendor though payment was deferred. It was therefore distinguishable from cases in which to use the language of Vice-Chancellor Bacon, "the engagement to do the thing was the consideration for the transfer and the vendor having accepted that engagement has the very thing he bargained for and cannot say the consideration has not passed to him? The English Courts do not recognize a lien in such a case. Lord St. Leonards states the distinction in these words "There is a marked distinction between a conveyance as for money paid with a separate security for the price whether by covenant bond or note and a conveyance expressed to be in consideration of covenants which the purchaser enters into by the deed itself," Sugdens "Vendors and purchasers" page 554. Notwithstanding the decision of the Privy Council in *Webb and another* v. *Macpherson*, we may on the authority of the English cases (see also *Earl of Jersey* v. *Briton Ferry Floating Dock Company*(2), *In re Brentwood Brick and Coal Company*(3) whose weight is still left unimpaired hold that the conveyance was in consideration of covenants to pay in the future and not for purchase money payable to the vendor in which latter case alone the charge created by the statute can attach. But however this may be, it is enough for the purpose of this case to say that a promise to pay a stranger is a mere covenant, the breach of which must be compensated in damages and that there is no occasion for the statutory charge in favour of the unpaid vendor to arise.

Stress was laid for the appellant on the provision in exhibit A that the vendor and his descendants have no right to the property

(1) (1903) 30 I.A., 238 at p. 244. (2) (1869) L.R. 7 Eq. 409.
(3) (1876) 4 Ch. D. 562.

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conveyed. But this in our opinion is nothing more than the common declaration in conveyances that the vendor does not reserve to himself and to his heirs any right in the property conveyed and has no reference to the unpaid vendor's lien or charge in the event of non-payment.

It was also contended that according to the instrument the receipt of the purchase money was acknowledged and no question of the right of the unpaid vendor could arise. But as pointed out in Dart's "Vendors and Purchasers" volume 2, pages 739 and 740 the vendors's lien (and we conceive the statutory charge in India as well) is not lost by such acknowledgment, see also sections 54 and 55 of the Conveyance Act, 1881.

Upon the finding however that there was no purchase money payable to the vendor, the plaintiff had no charge. This view is not in accordance with the actual decision in *Ramakrishna Aiyar* v. *Subrahmania Ayyar*(1), the facts of which are similar to those of the present. No question was raised or considered in that case as to whether any purchase money was due to the plaintiff. The sole point decided was that there was a statutory charge as distinguished from a vendor's lien. The authority of that case therefore does not preclude us from holding that the plaintiff in this case is not entitled to a charge. The decrees of the Courts below must be reversed and the suit dismissed with costs throughout.

(1) (1906) I.L.R., 29 Mad., 305.