

APPELLATE CIVIL—FULL BENCH.

Before Mr. Abdur Rahim, the Officiating Chief Justice, Mr. Justice Seshagiri Ayyar and Mr. Justice Phillips.

SIVASUBRAMANIA AYYAR (PLAINTIFF), APPELLANT,

v.

SUBRAMANIA AYYAR (DEFENDANT), RESPONDENT.*

1916.
April
5 and 18
and August
3 and 15.

31 M.L.J. 530

Transfer of Property Act (IV of 1882), sec. 55 (4)—Sale of land—Vendor and purchaser—Vendor's direction to pay purchase money to a third party on his behalf—Existence of vendor's lien, in spite of.

A contract to forego the vendor's charge for unpaid purchase money is not to be necessarily inferred when the whole or part of the consideration for the purchase of immoveable property is to be paid by the purchaser to a third party on behalf of the vendor.

Abdulla Beary v. Mammali Beary (1910) L.L.R., 33 Mad., 446 and *Sivasubramania Mudaliar v. Gnana Sambanda Pandara Sannadhi* (1911) 21 M.L.J., 359 overruled.

Webb v. Macpherson (1904) L.L.R., 31 Calc., 57 (P.C.), referred to.

SECOND APPEAL against the decree of M. R. NARAYANASWAMI AYYAR, the Subordinate Judge of Trichinopoly, in Appeal No. 417 of 1913, preferred against the decree of S. SUBBAYYA SASTRIYAR, the District Munsif of Namakkal, in Original Suit No. 37 of 1913.

The facts of the case are set out in the first paragraph of the ORDER OF REFERENCE TO THE FULL BENCH.

A. V. Visvanatha Sastriyar for G. S. Ramachandra Ayyar for the appellant.

N. Rajagopalachariar for the respondent.

This Second Appeal coming on for hearing in the first instance before KUMARASWAMI SASTRIYAR and PHILLIPS, JJ., the following ORDER OF REFERENCE TO A FULL BENCH was delivered by

PHILLIPS, J.—The appellant sold certain lands to the respondent, for Rs. 2,700 and the sale-deed recited that the amount was left with the vendee for payment to the mortgagee of other lands belonging to the appellant—the words used being “to pay off the principal and interest due to Mr. T. V. Seshagiri Ayyar on his mortgage.”

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* Second Appeal No. 2062 of 1914.

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This was on 7th January 1901, but the respondent paid nothing to the mortgagee until 26th November 1903, by which time the mortgage debt amounted to Rs. 3,401-4-0. The respondent paid only Rs. 3,000 and the appellant had subsequently to discharge the balance due, and seeks to enforce his claim for Rs. 401-4-0 and interest thereon from 26th November 1903, and to charge it upon the property sold to the respondent under section 55 of the Transfer of Property Act. The lower Courts have held that no charge exists and have dismissed the suit as barred by limitation on the authority of the decision in *Abdulla Beary v. Mammali Beary*(1). Under section 55 (4) of the Transfer of Property Act a vendor has a charge upon the property sold for the balance of unpaid purchase money in the absence of a contract to the contrary and this, as pointed out by their Lordships of the Privy Council in *Webb v. Macpherson*(2) is a statutory charge and different in origin and nature from the vendor's lien given by Courts of Equity in England to an unpaid vendor, and consequently the number of English cases cited are to be regarded as useful only for the purpose of illustration, and it was held that an express contract, or at least something from which an express contract can be implied, must be found in order to exclude the charge given by the statute, and further that the charge is not excluded by any contract, covenant or agreement with respect to the purchase money which is not inconsistent with the continuance of the charge. In *Abdulla Beary v. Mammali Beary*(1) it was held that, when the sale was in consideration of a promise to pay to a stranger, it was 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. *Webb v. Macpherson*(2) was considered, but the Judge remarked "notwithstanding that decision . . . we may on the authority of the English cases [see also *Earl of Jersey v. Briton Ferry Floating Dock Company*(3) and *In re Bentwood Brick and Coal Company*(4)] 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

(1) (1910) I.L.R., 33 Mad., 446.
(3) (1869) L.R., 7 Eq., 402.

(2) (1904) I.L.R., 31 Calc., 57 (P.C.).
(4) (1870) 1 Ch. D., 562.

created by the statute can attach." Finally the learned Judges say that upon the finding that there was no purchase money payable to the vendor, the plaintiff had no charge. So far as we understand the judgment, the finding that, when the vendor gets in return for his conveyance a promise to pay the purchase money or a part thereof to a third person to whom the vendor is under an obligation to pay, it is perfectly safe to say that there is a contract to the contrary negating the charge in the vendor's favour, is based on the authority of English cases which treat of a vendor's equitable lien in England, and the basis of the inference of implied contract to the contrary is that there was no purchase money payable to the vendor, the consideration of the contract being a covenant and not purchase money. It is however significant that in section 55 (4) of the Transfer of Property Act the charge is said to be in respect of the purchase money, and not of purchase money payable to the vendor. There would apparently be a charge whether the purchase money was payable to the vendor or to a third party, *i.e.*, so long as anything which can properly be called purchase money remains unpaid. Can it be said that money to be paid to a third party as consideration for the contract is not purchase money? If, as we think, it is so, then under section 55 of the Transfer of Property Act the vendor has a charge for any balance unpaid, and this cannot be excluded except by a contract to the contrary. *Abdulla Beary v. Mammali Beary*(1) was followed in *Sivasubramania Mudaliar v. Guana Sambanda Pandara Sannadhi*(2) where BENSON and SUNDARA AYYAR, JJ., held that a vendor who has directed the purchase money or a part thereof to be paid to a third party must be taken to have waived by a contract necessarily implied from his conduct the right to a lien for any portion of the money to be paid to the third party under the agreement. No reason is given as to why such a condition as to payment should be considered to amount to a waiver of lien, and with all deference it appears to me that a vendor would usually wish to retain his statutory charge, whether the money was to be paid direct to him and then by him to a creditor, or whether it was to be paid direct by the vendee to the creditor. There being no contract between the creditor and the vendee, the

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(1) (1910) I.L.R., 83 Mad., 446.

(2) (1911) 21 M.L.J., 359.

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vendor's liability to the creditor continues and he would naturally wish to retain in his power a right given to him to enforce the payment of the money by the vendee, and therefore as pointed out by the Privy Council in *Webb v. Macpherson*(1), in order to exclude the charge there must be a contract which is inconsistent with the existence of the charge and as pointed out in *Karuppiah Pillai v. Hari Row*(2) the intention of the vendor must be considered in ascertaining whether the charge still exists. As against the authority of these two cases we have *Ramakrishna Ayyar v. Subrahmania Ayyar*(3), a case very similar to the one now under discussion and there it was held that the purchaser had a charge for unpaid purchase money. The charge was taken for granted in a similar case—*Sheonandan Lal v. Zainal Abdin*(4)—and it was further held that the charge was not personal to the seller, but could be transferred with the debt. In *Meghraj v. Abdullah*(5), a charge for purchase money payable to creditors was enforced not only against the purchaser but also against a transferee with notice. In *Gur Dayal Singh v. Karam Singh*(6), on the other hand, it was observed that the agreement of the vendee to pay a creditor was the consideration, and that the amount payable to the creditor was not part of the purchase money, but the case was mainly decided on the ground that the property was not in the hands of a buyer but of his transferee. In view of these conflicting decisions we think it advisable to refer to a Full Bench the following question :—

“Is a contract to forego the vendor's charge for unpaid purchase money to be necessarily inferred when the whole or part of the consideration for the purchase of immoveable property is agreed to be paid by the purchaser to a third party on behalf of the vendor ?”

As the Order of Reference was in favour of the appellant their Lordships asked the respondent's vakil to begin.

N. Rajagopalachariar for the respondent.—The charge is impliedly taken away by the direction of the vendor to pay to a stranger. I rely fully on all the reasons given in *Abdulla*

(1) (1904) I.L.R., 31 Calc., 57 (P.C.).

(2) (1911) 21 M.L.J., 849.

(3) (1906) I.L.R., 29 Mad., 305.

(4) (1914) I.L.R., 41 Calc., 849.

(5) (1914) 12 A.L.J., 1034.

(6) (1916) I.L.R., 38 All., 254.

Beary v. Mammali Beary(1) and the English cases therein quoted fully support that decision. I rely also on *Sivasubramania Mudaliar v. Gnanasambanda Pandura Sannadhi*(2). One additional reason I give is that after such agreement with the vendee on the faith of which alone the vendee agreed to buy, the vendor has no right to change the manner of payment, as that would be substituting a new contract between them. If the vendee breaks his promise to pay to the stranger and the vendor is damnified, the vendor's remedy is only a suit for damages. That in cases of this kind the vendor's only right is to be indemnified is laid down by *Izaat-un-Nisa Begam v. Partab Singh*(3). See also *In re Albert Life Assurance Company v. Western Life Assurance Society*(4).

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A. V. Viswanatha Sastri for G. S. Ramachandra Ayyar for the appellant.—The charge exists unless a contract to the contrary is proved. See *Webb v. Macpherson*(5). The English decisions cannot apply in the face of the charge given by the Transfer of Property Act. The absence of a charge does not necessarily arise by implication from a direction to pay to a stranger, for under section 55 (5) (b), Transfer of Property Act, the vendor is entitled to direct the buyer to pay the price either to himself or to his nominee. I respectfully submit that the two Madras decisions relied on against me are wrong and I adopt the reasons given in favour of my position, in the Order of Reference. In addition to that I rely on the observations of Lord ELTON, L.C., in *Muckreth v. Symmons*(6). Even *Abdulla Beary v. Mammali Beary*(1) may be said to be not against me, as there the vendor expressly agreed to have recourse to a suit for damages in case of breach of contract by the vendee.

This Second Appeal coming on for hearing on the question referred for the decision of the Full Bench, the Court expressed the following OPINIONS:—

ABDUR RAHIM, OFFG. C.J.—The question referred to us must be answered in the negative. Section 55, sub-section 4, clause (b) of the Transfer of Property Act, says that in the absence of a

ABDUR
 RAHIM,
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(1) (1910) I.L.R., 33 Mad., 446.

(2) (1911) 21 M.L.J., 359.

(3) (1909) I.L.R., 31 All., 583 (P.C.).

(4) (1870) L.R., 11 Eq., 184.

(5) (1904) I.L.R., 31 Calc., 57 (r.C.).

(6) (1808) 2 White and Tudor's Leading Cases (VIII edn.), 946.

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contract to the contrary, the vendor shall have a charge upon the property in the hands of the buyer for the amount of the purchase money or any part thereof remaining unpaid. In this case the vendor has asked the purchaser to pay the unpaid purchase money to a certain creditor of his. It is not alleged that the creditor accepted the liability of the purchaser of the property in substitution of the vendor's own liability. But the purchaser as between himself and the vendor has accepted the obligation to pay the purchase money according to the vendor's direction. It has been held by the Privy Council in *Webb v. Macpherson*(1) that the statutory charge created by section 55 of the Transfer of Property Act is not to be negatived except where there is a contract to the contrary, either express or arising by necessary implication. They point out that this charge is different, in its origin and nature, from the vendor's equitable lien under the English law. They also observe that "the charge is not excluded by a mere personal contract to defer payment of a portion of the purchase money, or to take the purchase money by instalments, nor is it excluded by any contract, covenant or agreement with respect to the purchase money which is not inconsistent with the continuance of the charge." It is difficult to see how a direction to the purchaser to pay the purchase money to the vendor's creditor is inconsistent with the existence of the charge. This is the view taken by the Allahabad High Court in *Har Chand v. Kishori Singh*(2) and in *Meghraj v. Abdullah*(3). It is argued, however, that in this Court the contrary view has prevailed in *Abdulla Beary v. Mammali Beary*(4), which has been followed in *Sivasubramania Mudaliar v. Gnana Sambanda Pandara Sanadhi*(5). The learned Judges who decided the former case state in their judgment that, by the terms of the contract under their consideration, the purchase money was not payable to the plaintiff and he had no right of action to recover it. That is, however, not the position involved in the present case. It has been held in *Sheonandan Lal v. Zainal Abdin*(6) that the vendor's charge for unpaid purchase money is not a mere personal right but is capable of being transferred to a third

(1) (1903) I.L.R., 31 Cal., 57 (P.C.).

(3) (1914) 12 A.L.J., 1034.

(5) (1911) 21 M.L.J., 359.

(2) (1910) 7 I.C., 639.

(4) (1910) I.L.R., 33 Mad., 446.

(6) (1914) I.L.R., 41 Cal., 849.

person and in *Ramakrishna Ayyar v. Subrahmania Ayyen*(1), it has been ruled that a suit to enforce the charge is governed by twelve years' limitation. A vendor's lien or charge is not lost by the mere taking of personal security. See *Karuppiah Pillai v. Hari Row*(2) and *Mackreth v. Symmons*(3). There is no doubt a distinction, on principle as well as authority, as pointed out by the Privy Council in *Webb v. Macpherson*(4), between a conveyance or sale in consideration of a covenant to pay a sum of money in the future, and a sale in consideration of money which the purchaser covenants to pay. Here the consideration for the sale is money, payable by the purchaser, only he has agreed with the vendor to pay it to a third person.

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The learned Judges who decided *Abdulla Beary v. Mammali Beary*(5) seem to hold in one part of their judgment that where the purchase money is to be paid to another, that is necessarily inconsistent with the vendor retaining the charge. There is nothing in section 55, sub-section (4), clause (b), to suggest that for the charge to arise or to subsist, the purchase money must be payable to the vendor himself and not, by his direction, to a third person. If the above case holds otherwise, I am of opinion that it was wrongly decided. I may mention that the decisions in *Ramakrishna Ayyar v. Subrahmania Ayyen*(1) and *Gopala Aiyar v. Ramaswamy Sastrigal*(6) are in accordance with the view I have expressed.

SESHAGIRI AYYAR, J.—I agree with the conclusions of the learned Judges who made the reference that the vendor's lien is not lost by a direction to pay the purchase money to a third person. The charge is for the purchase money and it is immaterial that that money is not directly payable to the purchaser. As was pointed out by the learned vakil for the respondent, the statute itself, by section 55 (5) (b), enables the vendor to direct it to be paid to any person he names. The obvious inference is that the purchase money does not lose its character by the direction to pay another.

SESHAGIRI
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(1) (1903) I.L.R., 29 Mad., 305.

(2) (1911) 21 M.L.J., 849.

(3) (1808) 2 White and Tudor's Leading Cases, (VII edn.), 946.

(4) (1904) I.L.R., 31 Calc., 57 at p. 73 (P.O.).

(5) (1910) I.L.R., 33 Mad., 446.

(6) (1911) 22 M.L.J., 207.

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The main argument of Mr. Rajagopalachariyar was that where there is a breach of the direction to pay a third person, the right of the vendor, who is compelled to pay himself, is only to sue for damages for breach of contract, and that consequently it must be deemed that there is a contract to the contrary when the direction to pay a third person was given. It cannot be contended that the lien is personal: see *Sheemandan Lal v. Zainul Abidin*(1). The right to the unpaid money as well as the charge therefore can be validly assigned to a stranger. It is not clear therefore why the direction to pay a third person should deprive the vendor of his charge. The decision of the Judicial Committee in *Izaat-un-Nisa Begam v. Partab Singh*(2) was strongly relied upon. In that case the auction purchaser bought the property subject to encumbrances. The encumbrances were found to be invalid. Thereupon the judgment-debtor sued to recover the amount of the encumbrances by which the purchaser was benefited, and claimed a charge for it on the lands sold. Their Lordships held that when property is sold subject to encumbrances, the vendor whether in a private or Court-sale retains to himself only a claim to be indemnified against the encumbrancers proceeding against him. It was also held that the vendor was not entitled to the benefit of the finding that the encumbrances were invalid. The purchaser took the risk and was consequently entitled solely to the advantage. I fail to see how this pronouncement is an authority against the plain provisions of section 55 (4) (b).

The learned Judges of this Court in *Abdulla Beary v. Mammali Beary*(3) based their conclusion largely upon English decisions notwithstanding the caution of the Judicial Committee in *Webb v. Macpherson*(4), that the charge under the Transfer of Property Act "is different in origin and nature from the vendor's lien given by Courts of Equity to an unpaid vendor." There are three classes of charges known to English law: (a) equitable charge founded on contract; (b) equitable lien enforced by Courts of Equity; and (c) the common law lien which enables the vendor to keep back possession until he is paid (19 Halsbury's Laws of England, paragraph 20). The legislature in

(1) (1914) I.L.R., 41 Calc., 849.

(2) (1909) I.L.R., 31 All., 583.

(3) (1910) I.L.R., 33 Mad., 446.

(4) (1904) I.L.R., 31 Calc., 57 (P.C.).

India, in order to avoid these confusions, has enacted a simple rule of law ; and with all deference to the learned Judges who decided *Abdulla Beary v. Mammali Beary*(1), it seems to me it would be introducing an unnecessary element of uncertainty into this country, if the interpretation of an unambiguous section were made to depend upon English decisions. I do not therefore think that the English cases quoted for the respondent as showing that the rule of law in England is not as stated in *Abdulla Beary v. Mammali Beary*(1) need be considered.

Only one other argument need be noticed. It was broadly contended that after giving the direction to the purchaser to pay the money to a third person, the vendor had no right to countermand it. Of course, if the direction had been communicated to the proposed payee, a completed contract may arise between the purchaser and the third party which may preclude the vendor from claiming the money before payment. I do not think that *Gopala Aiyar v. Ramaswamy Sastrigal*(2) lays down that an uncommunicated direction to a third party disables the vendor from claiming the money. On the other hand, *Sivasubramania Mudaliar v. Gnana Sambanda Pandara Sannadhi*(3) is a direct authority to the contrary.

In the present case, it is not shown that the third person looked to the vendee for payment. *A fortiori*, therefore, when the vendor had to pay the third party himself, the lien attached to the property to the extent of that payment. I answer the question in the negative and hold that *Abdulla Beary v. Mammali Beary*(1) was not rightly decided.

PHILLIPS, J.—In this case, I have already expressed my views in the Order of Reference and I have heard nothing in the arguments which have now been addressed to us to induce me to change my opinion. I agree therefore in answering the question in the negative.

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(1) (1910) I.L.R., 33 Mad., 446.

(2) (1911) 22 M.L.J., 207.

(3) (1911) 21 M.L.J., 359.