

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Reilly.

1927,
December 19.

NATESA VANNIYAN (3rd DEFENDANT), APPELLANT,

v.

GOPALASWAMI MUDALIAR (PLAINTIFF), RESPONDENT.*

Sale of land—Contract of Indemnity—Covenant for title, express or implied—Contract by a third party to the vendee to compensate latter with other lands in case of dispossession of vendee—Auction purchaser of vendee's interest, dispossessed—Suit by purchaser from auction-purchaser, to enforce indemnity bond—Cause of action—Contract of indemnity, not a covenant running with land or a covenant for title—Transfer of Property Act (IV of 1882)—ss. 14 and 55 (2) (d).

Where, on a sale of certain lands, a security bond was executed by a third party to the vendee undertaking to compensate the latter with equivalent lands in case the vendee or his representatives should be deprived of possession of the land, sold to him, and an auction-purchaser in execution of a decree against the vendee sold them to the plaintiff, and the latter, being deprived of his possession in execution of a decree obtained by a person who claimed adversely to the original vendor, sued on the security bond for the recovery of equivalent lands from a purchaser of the same from the surety,

Held, that the covenant under the security bond was only a covenant for indemnity, and not a covenant for title; that a covenant for indemnity is not one running with the land; and that, consequently, the plaintiff was not entitled to enforce the bond against the defendant and recover possession of equivalent lands.

APPEAL against the order of the Court of the Subordinate Judge of Tiruvalur in Appeal No. 57 of 1925, preferred against the decree of the Court of the District Munsif of Nannilam in O.S. No. 538 of 1923.

* Civil Miscellaneous Appeal No. 90 of 1927.

The material facts appear from the judgment.

C. S. Venkatachari for appellant.—The security bond does not create a covenant for title but only a contract of indemnity. A covenant for indemnity is not a covenant running with the land. Indemnity is dealt with in the Indian Contract Act, and not in the Transfer of Property Act. The indemnity was given by a third party, the plaintiff, as the auction-purchaser's vendee, cannot have the benefit of the contract of indemnity; the right under the security bond was not sold in auction and did not pass to the auction-purchaser. The plaintiff is a stranger to the contract of indemnity and he cannot take advantage of the covenant under the bond. An auction-purchaser cannot have the benefit of any implied covenant for title or quiet enjoyment under section 55, clause (2), and section 2 of the Transfer of Property Act. The suit is against the obligor under the bond. *Sundara Gopalan v. Venkatarada Ayyangar*(1), *Muthukumaraswami Pillai v. Muthuswamy Thevan*(2). A covenant for indemnity given by a third person is not one running with land.

It is a contract vitiated by the rule against perpetuities under section 14, Transfer of Property Act; see also *Chandichurn Barna v. Sidheswari Devi*(3), *London and South Western Railway Company v. Gomm*(4).

K. Bashyam for respondent.—This is a covenant for title running with the land. Collateral covenants are defined in *Doughty v. Bowman*(5); see Cuthbert Brown's "Covenants running with the land", pages 6, 7 and 8.

A covenant to insure against fire is a covenant running with land. The Transfer of Property Act only says that, as against the vendor, there is an implied covenant for title. It does not say that no other person can give an express covenant for title. There is here, under the security bond, a covenant for title. Though the Transfer of Property Act does not pass the vendor's covenant for title, it does not negative the passing of other people's covenant for title. The principle of section 8 of the Transfer of Property Act applies to this case. Easement rights pass to the auction-purchaser; See *Huree Mahub Lahiree v. Hemchunder Goswamee*(6). The objection as to the rule against perpetuities was not raised in the lower Court.

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(1) (1894) I.L.R., 17 Mad., 228. (2) (1927) I.L.R., 50 Mad., 639 (642).
(3) (1889) I.L.R., 16 Cal., 71 (P.C.). (4) (1882) 20 Ch. D., 562.
(5) (1848) 11 Q.B., 446; 116 E.R., 648. (6) (1874) 22 W.R., 522.

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C. S. Venkatachariar in reply.—Exhibit F (security bond) was not sold in auction. If there is an express covenant in the security bond it was not sold in auction. If there is only an implied covenant under section 55 (2), Transfer of Property Act it does not pass by reason of section 2 of the Act.

JUDGMENT.

JACKSON, J.

JACKSON, J.—Appeal against the order of the Subordinate Judge, Tiruvalur, in Appeal No. 57 of 1925 from the decree in O.S. No. 528 of 1923, District Munsif, Nannilam. One Narayani Ammal sold certain property, described now as the A schedule property, in 1890, to one Subramania Sastri. Her husband Swaminatha Ayyar executed a security bond, Exhibit F, undertaking that if Subramania Sastri, the vendee, should be deprived of any of the property for various reasons he would compensate him with equivalent property, now described as the B schedule property. Subsequently Subramania Sastri mortgaged the A schedule property, the mortgagee sued and brought the property to sale, and it was bought in court auction by one Namasivaya Pillai, who sold the property to the present plaintiff. Meanwhile Muthusami Ayyar, the second son of Narayani Ammal, sued to cancel the original sale, succeeded and then dispossessed Namasivaya Pillai, and his vendee the plaintiff. The plaintiff now sues to enforce the security bond Exhibit F, on the ground that it is a covenant running with the A schedule land which enures to the successors to the title of Subramania Sastri. The third defendant the present appellant is a purchaser of certain items of the B schedule property and contends that the plaintiff has no right to enforce the bond against the property in his possession. The District Munsif dismissed the suit and the Subordinate Judge finding that the bond was enforceable remanded it for disposal upon the remaining issues.

The learned District Munsif dismissed the suit on the short ground that no warranty of title could pass in a Court-sale, and therefore whatever rights the successors to the title of Subramania Sastri might have claimed before the mortgagee brought the property to sale, had gone when Namasivaya Pillai bought the property at that sale. This argues a certain confusion of thought.

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No doubt the Transfer of Property Act does not apply to any transfer by operation of law (section 2 (d)) and therefore the implied covenant for title in section 55 (2) is not annexed to the interest of a transferee by Court-sale. But supposing the right and interest of a judgment-debtor, which is sold by auction of the Court, should happen to include an interest which the transferor was capable of passing, then that interest could be purchased at the Court-sale along with the property to which it was attached and, if such interest were a covenant running with the land, as for instance the covenant for title provided in section 55 (2), that interest could be transferred at a Court-sale. This appears to be the view taken by the learned Subordinate Judge in his 6th paragraph, and in my opinion that view is correct.

But Mr. Venkatachariar rests his appeal upon two other grounds. He contends that the indemnity bond in that it creates a perpetual interest in the B schedule property, is opposed to section 14 of the Transfer of Property Act and he also contends that this indemnity bond is not a covenant running with the land, and therefore it could not have passed at the Court-sale to plaintiff's predecessor in title. There appears to be much force in both of these contentions but the first was not raised in either of the lower Courts and it is unnecessary to discuss it unless the second ground proves to be invalid.

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A covenant running with the land must be one that touches or concerns the thing demised. The distinction is no doubt subtle, but if this definition is kept in mind, it seems clear that a covenant for title, does, in this sense, touch the property demised, while a covenant for indemnity is just so remote as not to touch it. Shepard's Touchstone "On Common Assurances" puts the point as follows: page 161 "And these are some of them said to be inherent;" i.e., such as are conversant about the land (and knit to "the estate in the land;") as that the thing demised shall be quietly enjoyed And some of them are said to be collateral or not so immediately concern the thing granted as to give other security to perform the covenants." This is quoted in Cuthbert Brown's "Covenants running with land," where (page 25) covenants to give security for the performance of covenants are classed as personal or collateral, i.e., not such as run with the land (page 7).

To the same effect are the observations of Parke B in *Doughty v. Bowman*(1).

"Again if the covenant declared upon presents an alternative, it is merely a covenant to indemnify. Is that then *ad idem* with a covenant for quiet enjoyment, assuming that that covenant would pass? It is not It must be considered as an undertaking to perform or, in default of performance, to indemnify: and therefrom it cannot pass with the reversion. I think the Judgment given by my brother PATTESON is quite right." PATTESON, J. had said (page 545). "If it be considered as a covenant of indemnity, then it is conceded that the assignee is not bound."

(1) (1848) 11 Q.B., 444; 116 E.R., 548.

It may be observed that though the Transfer of Property Act mentions certain contracts, the benefit of which shall be annexed to and go with the interest of the transferee, there is no such mention of a covenant of indemnity. The learned Subordinate Judge has rather assumed that a covenant of indemnity is identical with a covenant for title, but that is not so.

I find, therefore, that Exhibit F is not a covenant running with the land and plaintiff has no right by virtue of its provisions to dispossess the appellant.

The Appeal is accordingly allowed with costs throughout to third defendant.

The Plaintiff's suit is dismissed.

REILLY, J.—When Narayani Ammal sold the A schedule land, in which she had only a daughter's estate, to Subramania Sastri in 1890, her husband and one of her sons executed Exhibit F in favour of Subramania Sastri, by which they undertook that, if Subramania Sastri was deprived of any part of the A schedule land by reason of any incumbrance, sale, security, exchange, claim for maintenance or right of a minor or by a decree of any Court or in consequence of any interest created by the executants themselves or by Narayani Ammal or of any claim put forward by others, they would give him an equal extent of the B schedule land. That is, they agreed that, if Subramania Sastri in the specified circumstances lost any part of the A schedule property, which he was buying from Narayani Ammal, they would indemnify him in a particular way. It appears to me impossible to regard that as a covenant for title in respect of the land which Narayani Ammal was selling. It has been argued before us for the plaintiff that, because a covenant for title in respect of that land would have had the result among other things

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that Subramania Sastri and his assignees could have sued the covenantor for damages to indemnify themselves for the loss of any part of the property through defect in Narayani Ammal's title, therefore the contract by which her husband and son promised indemnification in a particular form was a covenant for title. That argument appears to me to call for no discussion. The fact that that common feature of contracts is to be found in a covenant for title is obviously not enough to make this contract a covenant for title. A covenant to indemnify a transferee for the loss of the land transferred, even when made by the transferor, is not a covenant which runs with the land. See *Doughty v. Bowman*(1). Mr. Venkatachariar for the third defendant has argued that, even if Exhibit F embodied a covenant for title, the benefit of it would not pass to the plaintiff because he is the assignee not of a purchaser from Subramania Sastri but only of a purchaser at a Court-sale in execution of Subramania Sastri's right, title and interest in the A schedule property. On principle I see no reason why the benefit of an *express* covenant for title, of which the judgment-debtor can take advantage, should not pass by a Court-sale in execution, though, with respect, I doubt whether in this country the benefit of an *implied* covenant for title arising only out of the provisions of section 55 (2) of the Transfer of Property Act could pass by such a sale. However it appears to me unnecessary to discuss that question, as in my opinion Subramania Sastri got no covenant for title by Exhibit F. I agree that the benefit of the contract under Exhibit F does not run with the land and that, as it has not been assigned, the plaintiff's suit must fail.

I agree also with Mr. Venkatachariar's further contention that, if it was intended by Exhibit F to make

the B schedule property permanently liable to Subramania Sastri's assignees and representatives in interest, it would be unenforceable as violating the rule against perpetuities. Compare the *London and South Western Railway Company v. Gomm*(1). On that ground also the plaintiff cannot enforce Exhibit F.

I agree that this Appeal must be allowed and the plaintiff's suit dismissed with the third defendant costs throughout.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Devadoss.

GANDHAM CHINA BRAHMAYYA (THIRD DEFENDANT),
APPELLANT,

1921,
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v.

PAPPASETTY GANGULU AND OTHERS (PLAINTIFF AND
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Madras Revenue Recovery Act (II of 1864), ss. 37 (A) and 38 and Madras Regulation VII of 1828—Madras Act (I of 1891), sec. 3 (6)—Revenue Divisional Officer—Collector—Revenue auction sale, confirmed by Revenue Divisional Officer—Jurisdiction of Collector or Board of Revenue to set aside sale.

A. Revenue Divisional Officer is a Collector within the meaning of section 37 (A) and 38 of the Madras Revenue Recovery Act (II of 1864); and where such officer confirmed a sale, and did not choose to exercise his power under the proviso to section 38 (3) of the Act to set aside the sale, neither the District Collector, acting under the general powers of revision

(1) (1882) 20 Ch. D., 562.

* Appeal against order No. 198 of 1920.