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BHIDE J.

I must, therefore, hold that the mortgage in favour of the plaintiffs must have priority over the mortgage in favour of the appellants.

The last point was not ultimately pressed by the learned counsel for the appellants as it was ascertained that the properties at Delhi as well as Karachi had been sold and the total proceeds had been found to be insufficient to satisfy the plaintiff's claim.

On the above findings this appeal fails and must be dismissed with costs.

ADDISON J.—I concur.

ADDISON J.

N. F. E.

Appeal dismissed.

APPELLATE CIVIL.

Before Tek Chand and Agha Haidar JJ.

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Feb. 27.

DYAL DAS-CHANAN DAS (PLAINTIFFS) Appellants

versus

HARKISHAN SINGH AND OTHERS (DEFENDANTS) Respondents

Civil Appeal No. 540 of 1924.

Sale—Promissory note given for part of purchase money—whether vendor has lien on the property for amount due on the promissory note—Mesne profits—Transfer of Property Act, IV of 1882, section 55 (4) (b) and (6) (b)—whether can be departed from when equitable.

The defendant entered into a contract to sell certain mortgaged property to the plaintiffs but, as the mortgagees were not parties to the contract and the amount due to them could not be determined with certainty, Rs. 10,000 of the purchase price was left with the vendees, who also executed a promote in favour of the defendant for Rs. 9,776-14-0 of the purchase price, it being specifically agreed that if anything

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more than Rs. 10,000 had to be paid to the mortgagees, that sum would be deducted from the amount due on the promissory note, the balance to be made over to the vendor. On breach by the defendant the plaintiffs' suit for possession was decreed on payment of a sum including the amount of the pronote.

Held, that in the absence of a stipulation to the contrary the parties must be taken to have contemplated that the so-called promissory note should serve as collateral security for the unpaid part of the purchase money; and, as it was a part of the consideration for the sale, the vendor had a lien for the amount secured by it on the property sold, and was under no obligation to sue separately for the recovery of the amount of the pronote.

Vellayappa Chettiar v. *Narayanan Chettyar* (1), and Gour's *Law of Transfer in British India*, Volume I, page 780, referred to.

Held further, that according to the ordinary rule embodied in section 55 (4) (*b*) and (6) (*b*) of the Transfer of Property Act, the vendor was liable to pay to the vendee *mesne* profits for the period that had elapsed between the date when possession should have been delivered and when it was actually delivered and, as against this, the vendee was bound to pay to the vendor interest on the unpaid purchase money.

But, that the above rule is not one of universal application and that, where it might result in injustice to one or other of the parties, the Courts are free to depart from it and should endeavour to meet the equity of the case by passing such order as might be just and fair in the circumstances.

Burton v. *Todd*, per Plumer M. R. (2), referred to.

First appeal from the decree of Lala *Jaswant Rai*, Taneja, *Senior Subordinate Judge, Lyallpur, dated the 21st January, 1924, decreeing the plaintiffs' suit.*

(1) (1913) 18 I. C. 81. (2) I Swanst, 255.

MOTI SAGAR and RAM CHAND MANCHANDA, for Appellants.

BADRI DAS, KAHAN CHAND and IQBAL SINGH, for Respondents.

TEK CHAND J.—The property in dispute consists of a square of land and 1/4th share in an *ahata*, which was owned originally by Harkishan Singh, defendant, and had been mortgaged by him with Narain Singh and Chela Ram. The possession of the property was with the mortgagees, who were bound, under the terms of the mortgage-deed, to allow redemption on receipt of the mortgage money on the 1st of *Magh* (=13th January) of any year.

By agreement (Exhibit P. 1), dated the 12th of June, 1920, Harkishan Singh agreed to sell the property to the plaintiffs-appellants Dyal Das, Chanan Das and Gurdas Ram for Rs. 28,500 and received from them Rs. 400 as earnest money. On the 21st of June, 1920, he received from the plaintiffs a further sum of Rs. 400 for the purchase of stamp and meeting other expenses in connection with the execution of the sale-deed, and acknowledged its receipt in writing (Exhibit P. 3). On the same day (21st of June, 1920) he executed a regular sale-deed in favour of the plaintiffs, and got it duly registered on the 7th of July, 1920. In this deed the sale-price, Rs. 28,500 was stated to have been received as follows :—

	Rs.	A.	P.
Earnest money received on the 12th June, 1920	400	0	0
To be paid by the vendees to Sukh Dayal-Maya Das on account of a debt payable by the vendor to them...	2,000	0	0
Left in deposit with the vendees for payment to Narain Singh and Chela Ram, mortgagees, on the 1st of *Magh*, 1977	10,000	0	0

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	Rs.	A.	P.
Secured a pronote from the vendees, the amount whereof was to be received from the vendees after the land sold had been redeemed. If more was found due to the mortgagees, the vendees were to deduct the same from the amount due under the promissory note and pay the balance to the vendor	9,776	14	3
Already received in cash on the 6th *Har, Sambat* 1977	17	0	0
Taken for execution and completion of the sale-deed	400	0	0
Given credit to the vendees on account of interest on the various amounts received (approximately Rs. 8,500) at As. 12 per cent. per mensem from the date of sale to 1st *Magh, Sambat* 1977, when possession was to be taken by the vendees from the mortgagees	446	4	0
Paid in cash before the Registrar ...	5,459	14	0
Total ...	28,500	0	0

On the 13th of January, 1921, the plaintiffs applied under the Punjab Redemption of Mortgages Act, II of 1913, for redemption of the land on payment of Rs. 10,300 odd and actually deposited that amount with the Collector. In this petition they also stated that if any further sum was found due on foot of the mortgage, they would be prepared to pay it to the mortgagees. In these proceedings Harkishan Singh filed a written statement repudiating the sale in favour of the plaintiffs. On this, the Collector refused to take action under Act II of 1913 and dismissed the petition on 16th December, 1921. On 22nd December, 1921, he ordered that the sum of Rs. 10,340 which the plaintiffs had deposited for payment to the mortgagees be refunded to them.

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Shortly afterwards Harkishan Singh came to an arrangement with the mortgagees behind the back of the vendees, and on payment of the mortgage money to them obtained possession of the property. The plaintiffs were thus compelled to seek redress in the Civil Court and on the 19th of December, 1922, they instituted the present suit for possession of the property in dispute on payment of Rs. 9,200 or any additional sum which might be found due.

The defendant in his written statement denied the sale or receipt of any part of the consideration, and boldly asserted that if the plaintiffs had secured any document from him, it must have been at a time when he was in a state of intoxication. He also averred that if any money was paid to him before the Sub-Registrar it must have been taken back by the plaintiffs. He, further, denied his liability to account for the mesne profits to the plaintiffs for the period that had elapsed since the redemption of the mortgage by him from Narain Singh and Chela Ram. He repeated these allegations in his statement in Court made before the issues were framed, and stated that he could not say whether the signatures on the agreement to sell (*Exhibit* P. 1), the sale-deed (*Exhibit* P. 2), and the receipt (*Exhibit* P. 3), were his. He also alleged that he could not remember if he ever went before the Sub-Registrar and received any money from the plaintiffs there. On these pleadings the following issues were framed :—

(1) Did the defendants sell the land in dispute to the plaintiffs for consideration?

(2) If so, are not the plaintiffs entitled to the land by reason of their not having paid any money or a part of the sale-money?

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(3) Are the plaintiffs entitled to any mesne profits, and, if so, to what amount?

(4) Are the plaintiffs liable to pay interest on the unpaid sale-money. If so, at what rate?

(5) To what relief are the plaintiffs entitled and on what terms?

The learned Subordinate Judge has found the first two issues in favour of the plaintiffs, and holding that the mesne profits equalised the interest due on the unpaid portion of the sale-price has passed a decree in favour of the plaintiffs for possession of the property in dispute on payment of Rs. 10,003-14-0, leaving the parties to bear their own costs.

From this decision the plaintiffs have preferred a first appeal, and the first contention raised on their behalf is that the lower Court should not have ordered them to pay to the defendant the amount of the promissory note, before delivery of possession of the property sold. It was urged that the promissory note created an independent obligation on the part of the plaintiffs to pay the amount secured by it, and that the defendant could and should have, if so advised, sued separately for recovery of that amount. In my opinion this contention is devoid of force and must be rejected. There can be no doubt that the parties clearly contemplated that the so-called 'promissory note' should serve as collateral security for a part of the unpaid purchase money. As stated already, the property in question was under mortgage with Narain Singh and Chela Ram. These persons were not parties to the sale transaction and the amount due to them could not be determined with certainty. For this reason the sum of Rs. 10,000 was left with the plaintiffs for payment to the mortgagees,

and it was specifically agreed that if anything more had to be paid by the vendees to the mortgagees, that sum would be deducted from the amount due on the 'promissory note' and the balance would be made over to the vendor. Clearly the promissory note in question was a part of the consideration for the sale, and there can be no doubt that the vendor had a lien for the amount secured by it on the property sold. As pointed out by Dr. Gour at page 780 of Volume I of his *Law of Transfer in British India*, if a promissory note or a mortgage executed by the vendee at or before sale is accepted as a part of the price of the property sold, the vendor has a charge for the amount due under the promissory note or the mortgage as representing the unpaid purchase money, and, in the absence of a stipulation to the contrary, the unpaid vendor's lien is not lost by the mere acceptance of a collateral security in the form of a promissory note or mortgage. In this connection see also *Vellayappa Chettiar* v. *Narayanan Chettyar* (1).

It was, however, pointed out by the learned counsel for the appellants that before the present suit was instituted the promissory note in question had been attached by a third party, who had obtained a decree against the defendant, and that the plaintiffs had to pay Rs. 773 to satisfy that decree. In my opinion this circumstance does not affect the liability of the plaintiffs to pay to the defendant the amount due on the promissory note *less* Rs. 773 which they had to pay on his behalf. The plaintiffs are clearly bound to pay the balance to the defendant before they can obtain possession, and there is no doubt that the decision of the lower Court on this point is correct.

(1) (1913) 18 I. C. 81.

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The next question for consideration is as to how the equities between the plaintiffs and the defendant are to be adjusted in reference to the delay which has occurred in putting the vendees into possession. Now it is beyond dispute, that this delay is due solely to the dishonest and contumacious conduct of the defendant. The plaintiffs took the earliest possible opportunity to pay off the mortgage-money to the prior mortgagees, in accordance with the terms of the deed, and they actually deposited with the Collector the amount due on the stipulated day, and prayed for action under Act II of 1913. But the defendant falsely denied the sale-transaction or receipt of any part of the consideration and persisted in the denial even after the present suit had been instituted. In the meantime he wrongfully took possession of the land and all along retained with him the large sum of Rs. 8,276-14-0, which he had received from the vendees in cash or caused to be paid to his creditors. He also allowed the promissory note for Rs. 9,776-14-0 to be attached in execution of a decree for the paltry sum of Rs. 684-6-0 and dragged the plaintiffs into litigation with his decree-holder. Further, in the course of this suit, he refused to produce the promissory note until the very last stage, and it was only when it was apprehended that the amount of the promissory note might be disallowed altogether that he suddenly placed it on the record.

These being the facts, the question arises whether the equities between the parties are to be adjusted by the ordinary rule, according to which the vendor is made liable to pay to the vendee mesne profits for the period that has elapsed between the date when possession should have been delivered and the date when it

is actually delivered to him, and as against this, the vendee is held bound to pay to the vendor interest on the unpaid purchase money. This rule is embodied in section 55 (4) (*b*) and (6) (*b*) of the Transfer of Property Act, and is followed in this province in ordinary cases. But the rule is not one of universal application, and cases may arise in which its application may result in great injustice to one or other of the parties. In such a case the Courts, at least in provinces like the Punjab where there is no statutory law on the subject, will be free to depart from it and will endeavour to meet the equity of the case by passing such orders as might be just and fair in the circumstances. As observed by Plumer M. R. in *Burton* v. *Todd* (1), if in such a case "the common rule were adopted the effect would be to give to the vendors, who from the issue of the suit stand as aggressors, a double advantage, and to subject the innocent purchaser to a double loss, namely, a loss of the benefit to be derived from an annual receipt of the rents and of such profit as a continued use of his £5,600 (the amount which had already been paid to the vendors) would have given to him, beyond the interest for which he would now have been accountable to the vendors. *That rule would bestow on the wrong-doer all the benefit of his own delay, and inflict all the evil on the rightful suitor.* In these circumstances equity demands that some mode should be adopted by which the purchaser may be placed in the same situation as if no part of the purchase money had been paid." That case was very similar to the present one and there, as here, the vendor had retained possession of the whole of the estate and of 1/3rd of the purchase

(1) 1 Swanst. 255.

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money for a long number of years, and it was found that the delay was due entirely to his wrongful conduct. On this finding, the Master of the Rolls felt himself justified in departing from the ordinary rule and held that in strict justice and conscientious dealing, the more equitable course was to pass an order which would compensate the vendee for the anticipatory payment by him of a large part of the purchase price to the vendor.

That the parties themselves contemplated a departure from the ordinary rule in this case is further clear from the fact that in the sale-deed itself interest at Rs. 0-12-0 *per cent. per mensem* on the amount paid by the vendee was allowed to him from the date of sale to the 1st of *Magh* 1977 when possession was intended to be delivered.

For the foregoing reasons. I am of opinion that the only just and equitable order in this case is to ignore the mesne profits and the interest on the unpaid portion of the money for the period anterior to the date of the lower Court's decree, and to make the defendant pay to the plaintiffs interest on the part of purchase price received by him, *i.e.*, Rs. 8,276-14-0, at Rs. 0-12-0 *per cent. per mensem* from the 13th of January 1921, when possession should have been delivered, to the 21st January, 1924, when the lower Court's decree was passed. This amounts to Rs. 2,233-14-0 approximately and the plaintiffs are entitled to deduct it from Rs. 19,003-14-0 which the lower Court had found due by them to the defendant. In other words the amount payable by the plaintiffs is Rs. 16,770.

As the defendant had raised several dishonest pleas in the lower Court there is no reason why he should not have been ordered to pay to the plaintiffs

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their costs in that Court. In this Court, however, the plaintiffs were not justified in denying their liability to pay the amount due on the promissory note, and as neither side has succeeded in full, I would leave the parties to bear their own costs here.

TEK CHAND J.

I would, therefore, accept the appeal and in lieu of the decree of the lower Court pass a decree for possession of the property in dispute in favour of the plaintiffs against the defendant on payment of Rs. 16,770 (*less* the plaintiffs' costs in the trial Court) within three months from this day; failing which the plaintiff's suit shall stand dismissed with costs.

The parties shall bear their own costs in this Court.

AGHA HAIDAR J.

AGHA HAIDAR J.—I agree.

N. F. E.

Appeal accepted.