

Privy Council Appeal No. 91 of 1926.

Allahabad Appeal No. 38 of 1924.

Musammat Bhagwati *alias* Bhagwan Dei and another - - *Appellants*

v.

Banarsi Das and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 23RD JANUARY, 1928.

Present at the Hearing :

LORD SHAW.

LORD CARSON.

SIR LANCELOT SANDERSON.

[*Delivered by* LORD SHAW.]

This is an appeal from a decree of the High Court of Judicature at Allahabad which reversed a judgment and decree of the Subordinate Judge of Aligarh.

The question is a short and simple one. It arises under Section 55 of the Transfer of Property Act, Clause 1, sub-section (g), and the bearing thereon of the terms of a particular contract of sale.

The parties were vendor and vendee of a certain piece of immovable property. Section 55 is expressed in terms of a very absolute and clear character. It provides, the irrelevant parts of the section being omitted, that in the absence of "a contract to the contrary," the buyer and the seller of immovable property are subject to liabilities and have rights, in the enumeration of the elementary proposition that the seller is bound to discharge all incumbrances then existing on the property. It is said, however, that this statutory obligation was negatived in the particular circumstances of this case by reason of the terms of the contract of sale.

The fact is that there had been more than one mortgage existing on the property prior to the transaction of sale. But the language of the deed of sale recognises only one of those mortgages and makes no mention of the others. "The said property" (says the sale deed) "is mortgaged to Parshadi Lal, son of Tika Ram . . . under a mortgage deed for Rs. 4,000." *Quoad ultra* this deed is an absolute and unreserved disposal by sale of the property, unencumbered and free from all mortgage. The language of the deed of sale is that, apart from the Parshadi Lal mortgage, "the property is up to this date free from all rights of transfer by sale, mortgage," etc. There is an absolute declaration by the vendor to the vendee that he is buying the property free from all mortgages and covenants, except the one that has just been named.

It may reasonably be asked: Up to that point is there any "contract to the contrary" of the terms of the statute? There is none.

But it is said that "If, God forbid, any person comes forward as partner or co-sharer and brings a claim, or if an encumbrance, etc., is found in respect of the whole, or part of the property sold, and as a result of his claim the property pass out of the possession of the vendees," then the vendor shall have certain obligations, and that is exclusive of all other rights on the part of the vendee.

It is sufficient in their Lordships' opinion to point out that no such event ever happened. The property did not pass out of the possession of the vendee. The vendee stuck to his property, but he was forced in a court of law to answer the rights of the mortgage holder, and to meet another mortgage of a very considerable amount. Certain legal proceedings were taken, and a decree of the High Court was granted putting in execution this other mortgage and the vendees, that is to say, the present appellants, were compelled to pay the sum of Rs. 13,204. In their Lordships' opinion that sum was paid under compulsion, and, secondly, it was undoubtedly a payment for which they were, and are, entitled to be recouped from the vendor of the property for a payment so made.

It is of no use reciting the law to this effect: the law is plain. Under Section 69 of the Contract Act it is clear this was payment of money which another was bound to pay by law and, therefore, the person who paid it is entitled to be re-imbursed by the other party.

With regard to the last portion of the sale deed, which states what is to ensue in the event of the vendees being put out of possession, it may, of course, be an additional safeguard, it may have been a thing suggested by the parties to cover contingencies which were not yet wholly foreseen, but that it contradicts or restricts the wider language of the contract of sale or that it either narrows or wipes out the obligations under the statute cannot be maintained.

On those grounds their Lordships see no reason for upholding the judgment under appeal, and they think that the Subordinate Judge was right and his judgment should be restored and that the appellants should be awarded costs from the date of that judgment, including the costs of this appeal. Their Lordships will humbly advise His Majesty accordingly.

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DELIVERED BY LORD SHAW.

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