PETITIONER:
V. M. RV. MR. RAMASWAMI CHETTIAR AND ANR.

Vs.

RESPONDENT:
R. MUTHUKRISHNA IYER AND OTHERS

DATE OF JUDGMENT:
16/02/1966

BENCH:
RAMASWAMI, V.
BENCH:
RAMASWAMI, V.
SUBBARAO, K.

CITATION:
1967 AIR 359 1966 SCR (3) 603

ACT:
Indemnity and guarantee-Sale of land by one having a voidable title and putting purchaser in possession-Agreement to indemnity purchaser Sale set aside at the instance of person entitled to avoid-No dispossession of purchaser-Enforceability of indemnity bond.

HEADNOTE:
The second defendant sold property belonging to himself and his minor son the third defendant. and also executed an indemnity bond in favour of the vendee agreeing to indemnify him for any loss that might be caused to him in case the sale of the third defendant's half share should later on be set aside. The. vendee sold the property to the plaintiffs and assigned the indemnity bond in their favour and the plaintiffs took possession of the property. The third defendant, after attaining majority, sued for ,setting aside the sale in respect of his half share and for partition. The plaintiffs contested the suit but the third defendant's suit was decreed. He, however, did not dispossess the plaintiffs. Meanwhile, a creditor of .the third defendant obtained a money decree against him and in execution ,thereof attached and brought to sale the third defendant's half share, and, ,the brother-in-Law of the plaintiffs purchased the property, but ,the plaintiffs continued in possession of the property. The plaintiffs, thereafter, filed the suit for recovery of half the consideration paid by them, on the allegation that they sustained damage by the loss of one half of the property bought by them, and that they were entitled to recover damages from the second defendant. The suit was contested on the ground that the court sale in favour of the brothers-in-law of the plaintiffs was benami for the plaintiffs, and that as the plaintiffs never lost ownership or possession of the halfshare, they did not sustain any loss. .The trial court decreed the suit. The High Court, on appeal, confined the decree to the actual loss sustained, namely, the amount for the court sale and the amount spent for the defence of the third defendant's suit.
In appeal to the Court, on the question of the quantum of damages to which the plaintiffs were entitled,
HELD : High Court was right in granting a decree to, the

plaintiffs only for the sum which was the actual loss sustained by them.
The sale of the half share of the third defendant was not void ab initio but was only voidable. In such a case the indemnity bond becomes enforceable only if the vendee is dispossesed from the properties, because, a breach of the covenant can only occur on the disturbance of the vendees possession. SD long as the vendee remains in possession, he suffers no loss and no suit can be brought for damages either on the basis of the indemnity bond or for the breach of a convenant of the warranty of title. [610 H-611 B]
Subbaroya Reddiar v. Rajagopala Reddiar, (1915) ILR. 38 Mad. 887 Muhammad Siddiq v. Muhammad Nuh, I.L.R. 52 All. 604 and Gulabchand Daulatram v. Suryaji Rao Ganpatrao, A.I.R. 1950 Bom. 401, approved.

JUDGMENT:
CIVIL APPELLATE JURISDICTION: Civil Appeal No. 7 of 1964.
Appeal from the judgment and decree dated January 7, 1955 -of the Madras High Court in Appeal Suit No. 371 of 1959.
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R. Ganapathy Iyer and R. Thiagarajan, for appellants.
M. S. K. Sastri and M. S. Narasimhan, for respondent No. 2
The Judgment of the Court was delivered by
Ramaswami. J. In the suit which is the subject-matter of this appeal the plaintiffs alleged that Plaint 'A' Schedule properties belonged to the second defendant and his son, the third defendant. The second defendant sold the village for Rs. 28,000/- to one Swaminatha Sarma by a sale deed Ex. A dated December 12, 1912 which he executed for himself and as guardian of the third defendant who was then a minor. The second defendant also agreed to indemnify any loss that might be caused to his vendee in case the sale of his minor son's half share should later on be set aside. Accordingly the second defendant executed the Indemnity Bond-Ex. B in favour of Swaminatha Sarma. The sons of Swaminatha Sarma sold Plaint 'A' Schedule village to the father of the Plaintiffs for a sum of Rs. 53,000/-. On the same date they assigned the Indemnity Bond-Ex. B to the father of the plaintiffs under an Assignment Deed-Ex. D. The third defendant after attaining majority filed O.S. no. 640 of 1923 in the Chief Court of Pudukottai for setting aside the sale deed-Ex. A in respect of his share and for partition of joint family properties. The plaintiffs were impleaded as defendants 108 and 109 in that suit. The suit was decreed in favour of the third defendant and the sale of his share was set aside on condition of his paying a sum of Rs. 7,000/- to defendants 108 and 109, and a preliminary decree for partition was also granted. In further proceedings, the village was divided by metes and bounds and a final decree-Ex. F was passed on October 6, 1936.
Meanwhile, a creditor of the third defendant obtained a money decree and in execution thereof, attached and brought to sale the third defendant's half-share in the 'A' Schedule village. In the auction-sale Subbaiah Chettiar, the plaintiff 's brother-in-law purchased the property for a sum of Rs. 736/- subject to the liability for payment of Rs. 7,000/- under the decree in O.S. no. 640 of 1923. Thereafter, the plaintiffs have brought the present suit on the allegation that they have sustained damage by the loss of one half of the 'A' Schedule village and are entitled to recover the same from the second defendant personally and out of the 'B' Schedule properties. The plaintiffs have

claimed damages to the extent of half of the consideration for the sale deed-Ex. C. minus Rs. 7,000/-withdrawn by them. The plaintiffs claimed a further sum of Rs. 500/as Court expenses making a total of Rs. 20,000. The suit was contested on the ground that the Court sale in favour of Subbaiah Chettiar was benami for the plaintiffs and the latter never lost ownership or possession of a half-share of the 'A' Schedule village and consequently the plaintiffs did not sustain any loss. The trial court held that Subbaiah Chettiar-P.W. I was benamidar of

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the plaintiffs who continued to remain in possession of the whole village. The trial court was, however, of the opinion that though the plaintiffs had, in fact, purchased the third defendant's halfshare in the Court sale, they were not bound to do so and they could claim damages on the assumption that third parties had purchased the same. The trial court accordingly gave a decree to the plaintiffs for the entire amount claimed and made the payment of the amount as charge on 'B' Schedule properties. The second defendant took the matter in appeal to the Madras High Court which found that the only loss actually sustained by the plaintiffs was the sum of Rs. 736/- paid for the Court sale and the sum of Rs. 500/- spent for the defence of O.S. no. 640 of 1923. The High Court accordingly modified the decree of the trial court and limited the quantum of damages to a sum of Rs. 1236/- and interest at 6 per cent p.a. from the date of the suit.

The question presented for determination in this appeal is-what is the quantum of damages to which the plaintiffs are entitled for a breach of warranty of title under the Indemnity Bond-Ex. B dated December 19, 1912.

It was contended by Mr. Ganapathy Iyer on behalf of the appellants that in O.S. no. 640 of 1923, defendant no. 3 obtained a partition decree and a declaration that defendant no. 2 was not entitled to allenate his share in the 'A' Schedule properties. It was submitted that on account of this decree the appellants lost title to half-share of 'A' Schedule properties and accordingly the appellants were entitled to get back half the amount of consideration under the Indemnity Bond-Ex. B. The argument was stressed on behalf of the appellants that the circumstance that the plaintiffs had a title of benamidar to the half-share of the third defendant in Court auction, was not a relevant factor so far as the claim for damages was concerned. It was suggested that the purchase in court auction was an independent transaction and the defendants ,could not take the benefit of that transaction. We are unable to accept the contention of the appellants as correct. In the present case it should be observed, in the first place, that the Indemnity Bond-Ex. B states that defendant no. 2 shall be liable to pay the amount of loss "in case the sale of the share of the said minor son Chidambaram-is set aside and you are made to sustain any loss". In the second place, it is important to notice that the sale deed-Ex. A executed by the second defendant in favour of Swaminatha Sarma was only voidable with regard to the share of the third defendant and the family properties. The sale of the half-share of defendant no. 3 was not void ab initio but it was only voidable if defendant no. 3 chose to avoid it and proved in Court that the alienation was not for legal necessity. In a case of this description the Indemnity Bond becomes enforceable only if the vendee is dispossessed from the properties in dispute. A breach of the

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convenant can only occur on the disturbance of the vendee's possession and so long as the vendee remains in possession, he suffers no loss and no suit can be brought for damages either on the basis of the Indemnity Bond or for the breach of a convenant of the warranty of title. The view that we have expressed is borne out by the decision of the Madras High Court in Subbaroya Reddiar v. Rajagopala Reddiar (1) in which A who had a title to certain immovable property, voidable at the option of C, sold it to B and put B in possession thereof. C then brought a suit against A and B, got a decree and obtained possession thereof in execution. In this state of facts it was held by Seshagiri Ayyar, J. that B's cause of action for the return of the purchase money arose not on the date of the sale but on the date of his dispossession when alone there was a failure of consideration and the article applicable was article 97 of the Limitation Act. At page 889 of the Report Seshagiri Ayyar, J. states:

"The cases can roughly speaking be classified under three heads: (a) where from the inception the vendor had no title to convey and the vendee has not been put in possession of the property; (b) where the sale is only voidable on the objection of third parties and possession is taken under the voidable sale; and (c) where though the title is known to be imperfect, the contract is in part carrried out by giving possession of the properties. In the first class of cases, the starting point of limitation will be the date of the sale. That is Mr. Justice Bakewell's view in [Ramanatha Iyer v. Ozhapoor Pathiriseri Raman Namburdripad (1913) 14 M.L.T. 524]; and I do not think Mr. Justice Miller dissents from it. However, the present case is quite. different. In the second class of cases the cause of action can arise only when it is found that there is no good title. The party is in possession and that is what at the outset under a contract of sale a purchaser is entitled to, and so long as his possession is not disturbed, he is not damnified. The cause of action will therefore arise when his right to continue in possession is disturbed. The decisions of the Judicial Committee of the Privy Council in Hanuman Kamat v. Hanuman Mandur (I 892) I.L.R. 19 Cal. 123 (P.C.) and in Bassu Kuar v. Dhum Singh (I 889) I.L.R. II All. 47 (P.C.) are authorities for this position."

A similar view has been expressed by the Allahabad High Court in Muhammad Siddiq v. Muhammad Nuh (2) and the Bombay High Court in Gulabchand Daulatram v. Survajirao Ganpatrao.(3) In the present case it has been found by the High Court that P.W. 1, the auction-purchaser was the brother-in-law of the plaintiffs

(1) I.L.R. 38 Mad. 887.
(2) I.L.R. 52 All. 604.
(3) A.I.R. 1950 Bom. 401.

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and that he was managing the estate of the plaintiffs and defending O.S. 640 of 1923 on their behalf It has also been found that P.W. I did not take possession at any time and plaintiffs have been cultivating and enjoying the whole village all along and at no time were the plaintiffs dispossessed of the property. The only loss sustained by the plaintiffs was a sum of Rs. 736/- paid at the Court sale and a sum of Rs. 5001- spent for the defence of O.S. no. 640 of 1923 which the plaintiffs had to incur for protecting the continuance of their possession over the disputed share of land. Accordingly the High Court was right in granting a decree to the plaintiffs only for a sum of Rs. 1236/- which was the actual loss sustained by them and they are not

entitled to any further amount.
For these reasons we hold that there is no merit in this appeal which is dismissed with costs.
Appeal dismissed.
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