

P. S. S. M. K. T. Cathiresan Chettiar - - - - *Appellant*

v.

N. S. Natchiappa Chettiar - - - - *Respondent*

FROM

THE SUPREME COURT OF THE ISLAND OF CEYLON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 4TH MAY, 1933.

Present at the Hearing :

LORD ATKIN.

LORD RUSSELL OF KILLOWEN.

LORD MACMILLAN.

[*Delivered by* LORD RUSSELL OF KILLOWEN.]

This is an appeal from a decree of the Supreme Court of the Island of Ceylon which set aside a decree in favour of the appellant made by the District Court of Colombo in an action wherein the respondent was the plaintiff and the appellant was a defendant.

The parties to this appeal are two moneylenders, and the story concerns their dealings with a building contractor named Barnabas who was also a defendant to the action. By the action (commenced on the 2nd October, 1925), the plaintiff sought to recover from Barnabas Rs. 13,027, the principal and interest due in respect of two promissory notes (dated the 20th and 29th January, 1925), representing moneys lent to him by the plaintiff and alleged to be secured by a bond (No. 229) dated the 26th May, 1923, and registered on that day. By that bond, for securing the payment of all moneys due thereon, Barnabas mortgaged and hypothecated to and with the plaintiff as a first or primary mortgage, certain lands described in the first schedule, and as a secondary mortgage certain lands described in the second schedule.

The appellant was joined as a defendant to the action because by a bond (No. 372) dated the 7th June, 1923, and signed by Barnabas and one David Daniel, the lands comprised in the first schedule to the plaintiff's bond had been mortgaged and hypothecated to and with the appellant as a first or primary mortgage free from all encumbrances for securing moneys advanced by him to Barnabas. The relief claimed in the action as against the appellant was claimed upon the footing of his being a subsequent incumbrancer on the lands in the said first schedule, and consisted of a claim that these lands be declared specially bound and executable for the payment of the said sum of Rs. 13,027 interest and costs of suit on the footing of the plaintiff's bond.

By a summons in the action the defendants were summoned to appear in Court on the 2nd December, 1925, to answer the plaintiff, with a notification that in default of appearance the action would be proceeded with and heard and determined in their absence.

On the 16th October, 1925, a decree was entered against Barnabas directing him to pay to the plaintiff a sum of Rs. 13,027 with interest and costs, and against him and the appellant directing a sale of the mortgaged property. This decree was clearly irregular as against the appellant who took various steps with the object of protecting his interests. He commenced an action against the respondent and Barnabas asking that the decree be set aside. In this action he applied to have the sale of the lands stayed pending the hearing of his action. A stay was granted on terms, but the action was ultimately dismissed by order of the Supreme Court, principally upon the ground that the appellant should have proceeded by an application made in the original action. This decision was pronounced in the month of May, 1928.

Upon application in the original action made by the appellant on the 23rd May, 1928, an order was made on the 10th September, 1928, vacating so much of the decree of the 16th October, 1925, as ordered a sale of the mortgaged property, and allowing the appellant to file his answer in the action. The answer was duly filed on the 1st October, 1928.

By his answer the appellant claimed to have priority over the plaintiff as mortgagee of the lands described in the said first schedule, and prayed that the said lands be released from the mortgage created by bond No. 229, and that they be declared not liable to be sold in execution of any decree obtained upon bond No. 229. This claim was based according to the answer upon an agreement between the plaintiff and the appellant by which the appellant agreed with the plaintiff to pay to him the moneys (Rs. 2,602.50) then due by Barnabas under bond No. 229 and the plaintiff agreed to receive that sum and hand over the said bond duly discharged.

The action proceeded to trial and issues were framed, those which related to the alleged agreement being in the following terms :—

“ 1. Did the plaintiff on or about 5th June, 1923, agree with the second defendant to cancel bond No. 229 on the receipt of Rs. 2,602·50 from the second defendant ?

“ 2. If so, by what date was it agreed that the Rs. 2,602·50 was to be paid.”

The evidence of the witnesses called by the respective parties was in acute conflict. The agreement as alleged at the trial was a verbal one, at the making of which only two persons were present, viz., one Karuppiah (who represented, and for this purpose may be treated as, the plaintiff) and the appellant. It would be idle to pretend that the evidence of either was entirely satisfactory. No document or other independent testimony exists in the case which can be pointed to as clearly corroborating the appellant's story or as being inconsistent with the plaintiff's case.

In this condition of affairs it is not surprising to find different conclusions being reached by the different persons who have had to consider the evidence.

The District Judge, after a careful and minute examination of the evidence, found in favour of the appellant upon the footing of an agreement by Karuppiah to cancel the bond made, not on the 5th June, 1923, but on the 31st May, 1923. He found on the first two issues as follows :—

“ (1) That the plaintiff did on or about the 31st May, 1923, agree with the second defendant to cancel the bond No. 229 on receipt of Rs. 2,602·50 from the second defendant.

“ (2) That it was agreed that Rs. 102·50 on account of interest should be paid, and that it was paid and accepted on 7th June, 1923, and that it was agreed that Rs. 2,500 be paid and it was paid and accepted on 23rd August, 1923.”

The Supreme Court, after an equally careful and minute examination of the evidence came to the conclusion that the alleged agreement had not been proved.

To indulge in a third exhaustive and detailed examination of the evidence would, their Lordships conceive, serve no useful purpose. Of one thing there can be no doubt. The appellant's bond is later in date than bond No. 229, which being duly registered confers, unless displaced, a valid security in priority to all of later date. The onus lies on the appellant to displace that priority. This in the opinion of the Supreme Court he has failed to do.

The sole question for their Lordships' consideration is whether the view entertained by the Supreme Court is erroneous or not. Their Lordships have been assisted by a thorough and critical scrutiny of the evidence by counsel on both sides. Having themselves considered the evidence in the light of this scrutiny, and having weighed the arguments advanced, they are unable

to affirm that the Supreme Court took a mistaken view in holding that the appellant had failed to prove the agreement, which it was essential for him to prove for the purpose of establishing the priority which he claimed.

In these circumstances, it is unnecessary to consider, or in any way deal with, certain points of law which were argued before the Board.

Their Lordships are of opinion that this appeal fails and should be dismissed with costs. They will humbly advise His Majesty accordingly.

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In the Privy Council.

P. S. S. M. K. T. CATHIRESAN CHETTIAR

o.

N. S. NATCHIAPPA CHETTIAR.

DELIVERED BY LORD RUSSELL OF KILLOWEN.

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