Privy Council Appeal No. 51 *of* 1934

R. Shanmuga Rajeswara Sethupathi *alias* Naganatha Sethupathi Avargal, Raja of Ramnad - - - - *Appellant*

v.

Chidambaram Chettiar (deceased) and others - - - *Respondent*

Same - - - - - - - - - - - - *Appellant*

v.

M.R.M.A. Ramanathan Chettiar and others- - - - *Respondent*

M.R.M.A Ramanathan Chettiar and others - - - - *Appellant*

v.

R. Shanmuga Rajeswara Sethupathi *alias* Naganatha Sethupathi Avargal, Raja of Ramnad - - - *Respondent*

(*Consolidated Appeals*)

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JANUARY, 1938.

Present at the Hearing:
LORD MACMILLAN.
LORD ROCHE.
SIR GEORGE RANKIN.

[*Delivered by* SIR GEORGE RANKIN.]

In this case three appeals have been consolidated: two of these relate to minor questions as to interest, but the main appeal [C.M.P. No. 4220 of 1928] raises questions of more importance. These arise out of a mortgage suit brought on the 15th April, 1905, in the Court of the Subordinate Judge of Madura. The appellant in the main appeal (herein called "the appellant") is the grandson of the original mortgagor, whose eldest son, the appellant's father, was defendant No. 1 to the suit. This defendant died pending suit and the appellant now represents the mortgagor: on one point, to be mentioned later, he has independent interests of himself and of his father to defend. Respondents 8 to 11 are the contesting respondents to the main appeal. They are the representatives of the original plaintiff in the suit Subramaniam Chettiar who had succeeded his father Ramanathan Chettiar the original mortgagee. The decree dated 12th September, 1917, of the Trial Judge was modified in certain respects by the High Court of Madras whose decree dated 26th April, 1928, disposed of eleven appeals brought by divers parties. Their Lordships are concerned with two only of the appeals brought to the High Court—appeal No. 26 of 1918 by the present appellant and appeal No. 106 of 1918 by the plaintiff.

The suit was brought to enforce three securities described as hypothecation bonds or deeds, the first being dated 21st November, 1895; the second 7th November, 1896, and the third 25th November, 1896. They were given to Ramanathan Chettiar by the appellant's grandfather, the then Raja of Ramnad for the sums of Rs.24,000, Rs.71,000 and Rs.35,000, respectively, amounting to Rs.1,30,000. Interest on each bond was at the rate of 12 per cent. per annum, but in the case of the first two bonds only this was to be calculated as compound interest with annual rests from the date of default. The mortgaged subjects under the first and second bonds were certain jewels already in pledge to a moneylender named Anamalai and the Raja's allowance of Rs.5,500 per annum under a trust deed of 12th July, 1895, executed by himself as hereinafter mentioned. Under the third bond, the jewels together with certain furniture as to which no question now arises, were the security.

Objection has been taken by the appellant to the plaintiff's right as mortgagee under these bonds to the principal sum of Rs.1,30,000 claimed. It is said that Rs.15,000 thereof comprised in the sum of Rs.71,000 mentioned in the second bond, is without consideration, being the amount of a statute-barred debt of the Raja's father for which on 25th November, 1895, the Raja had given a promissory note. The objection on behalf of the appellant is that by the Raja's evidence, given on commission in January, 1903, it is proved that the promissory note was given, but it is not proved that there was any stipulation for a fresh advance, and that accordingly this portion of the principal amount of the second bond is not recoverable unless, indeed, it be brought within clause 3 of section 25 of the Indian Contract Act. It is contended that it is not within this clause as it was not a debt of the mortgagor, but of his father. Their Lordships are of opinion that the Courts in India have rightly rejected this objection. A promissory note having been given, consideration is to be presumed. The question is not, therefore, whether the plaintiff has formally and sufficiently proved that there was a stipulation for a fresh advance, but whether it is sufficiently shown by the appellant that there was no consideration for the promissory note. This burden the appellant has certainly not discharged and there is every probability against him on the point. It is not necessary, therefore, for their Lordships to decide whether under clause 3 of section 25 above mentioned a debt of which the creditor might have enforced payment from the mortgagor would be excluded by the circumstance that it was not a debt of his own. Their Lordships must not be taken to cast doubt upon the view taken by the High Court if this question, which does not arise, is not now discussed. Their Lordships are satisfied that the principal amount due on the bonds in suit is Rs.1,30,000 as decreed by the Indian Courts.

The next question is whether the bonds in suit confer a valid charge upon the jewels and the allowance already

mentioned. On this point it is necessary to refer to the settlement of 12th July, 1895 (herein called "the settlement"). The then Raja had become heavily involved in debt: a list of his creditors is given in the third schedule to this deed showing that he was indebted in a total sum of 20 lacs. His impartible zamindari of Ramnad was of great extent, covering no less an area than 2,351 square miles. This and much other property, aggregating in value 50 lacs of rupees, he conveyed to a trustee for the benefit of his heir apparent and eldest son, then a minor, and for the purpose of making provision for the maintenance of the settlor and several members of his family as mentioned in the second schedule. The trustee was directed to pay Government revenue, certain expenses of management, of litigation and of repairs: in the fifth place he was directed to apply monies in his hands to the payment of the interest on and principal of the debts mentioned in the third schedule, and thereafter of the allowances mentioned in the second schedule. It was provided that on the settlor's eldest son attaining the age of twenty-one, the trustee should convey the trust premises then existing to him for the same estate as if he had inherited them, but subject to the several payments directed by the deed and to the several trusts which should then be subsisting in respect thereof. The first of the allowances mentioned in the second schedule is the allowance of Rs.5,500 per month to the settlor himself. In the third schedule among the creditors is mentioned the plaintiff's father Ramanathan (Muthia) Chettiar as a creditor for Rs.1,30,000: this debt is entirely independent of the sum of Rs.1,30,000 due upon the bonds now in suit. The creditor Anamalai is also mentioned as a creditor for Rs.75,000, but in this deed there is no mention of the circumstance that Anamalai was a pledgee of any jewels.

The appellant contends that although the jewels are not specifically mentioned in the deed of 12th July, 1895, the wide language of the fifth clause thereof is sufficient to comprise these jewels in view of the fact that the right of the Raja was a mere right to redeem. The fifth clause is very lengthy: upon examining it their Lordships are of opinion that the jewels are not within its language. They are not "claims now due, owing or payable" and the general language as to "all rights to prosecute any suit or other proceeding" and as to securities for money, furniture, fixtures and other articles in the offices of the zamindari are, in their Lordships' opinion, inapplicable to them. The settlor was the owner of these jewels although he had made a bailment of them by way of pledge. Having regard to their value, their importance to the settlor, and the nature of his property in them their Lordships have no difficulty in agreeing with the Courts in India that the jewels were not comprised in the settlement. They see no reason, therefore, why the settlor should not include them in the hypothecation bonds in suit.

A second question upon the settlement deed is whether or not the Raja's monetary allowance of Rs.5,500 described

by clause 3 as being for the purpose of making provision for the maintenance of himself, comes within clause (*d*) of section 6 of the Transfer of Property Act as it stood in 1899. The clause (*dd*) was inserted by the legislature in 1929 and does not apply in the present case. Clause (*d*) runs as follows:—

> "An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him."

In the present case the Raja was an owner in full right of certain property; this he granted to a trustee upon trust *inter alia* to pay him this allowance of Rs.5,500 per month, explaining no doubt in the deed that it was for the purpose of making provision for his maintenance. In their Lordships' opinion, this is not a "restricted" interest in the sense of clause (*d*): whatever difficulty might arise upon the newer clause which uses the phrase "a right to future maintenance in whatsoever manner arising, secured or determined" their Lordships are satisfied that they would be giving much too wide an application to clause (*d*) if the present case were held to come within it. They think, accordingly, that the hypothecation bonds create a valid charge on the allowance.

A still further attack is made by the appellant upon the bonds in suit. This arises out of the fact that on 6th July, 1899 (Ramanathan Chettiar having died in 1898) the trustee under the settlement of 1895 executed in favour of Subramaniam Chettiar a mortgage deed for a sum of Rs.4,73,000 intended to comprise the sums due by the Raja prior to the date of the settlement deed, and the further sums which had been subsequently borrowed. On 13th July, 1899, another mortgage, called the "paddy" mortgage, was given to secure the payment of Rs.30,000 out of an amount of Rs.50,000 which by the mortgage of 6th July, 1899, was to have been paid within a week thereof. These mortgages were given in compromise of a suit brought in 1897 by Ramanathan Chettiar attacking the validity of the settlement of 12th July, 1895. By 7th October, 1899, the trustee had paid to Ramanathan Chettiar, or to his son who had succeeded him, the full amount with interest due upon the debt which the Raja had owed to Ramanathan Chettiar at the time of the settlement deed. He had not, however, discharged any portion of the debt which had been incurred after the date of the deed, save that Ramanathan had been paid Rs.20,000 in cash and had received a certain amount under the paddy mortgage, which sums were in discharge of the Raja's post settlement indebtedness. In this state of affairs Subramaniam Chettiar filed two suits on the 30th January, 1900, to enforce his securities under the mortgage of 6th July, 1899, and the paddy mortgage of 13th July, 1899, in order that he might recover the balance of the debt incurred by the Raja after the settlement. The Raja's son, however, counter-attacked by bringing a suit (No. 6 of 1902) against Ramanathan's representatives and the trustee to obtain a declaration that the mortgages of the 6th and 13th July, 1899, were invalid as against the settled estate. This suit succeeded in the Courts in India

and also on appeal to His Majesty in Council (16th November, 1915) [cf. I.L.R. 39 Madras 115]. Subramaniam was directed to repay the sum of Rs.39,087, namely, the sum of Rs.20,000 cash and what he had received under the paddy mortgage. The sum of Rs.87,421 which he had received in respect of his pre-settlement debt on 7th October, 1899, he was not ordered to refund. It was within the terms of the settlement that this indebtedness should be discharged; the mere circumstance that it might not have been paid so soon had he not been willing to enter into the mortgages of July, 1899, was not counted a sufficient reason for ordering that he should refund this money. The contention of the appellant is that in these circumstances the plaintiff, Subramaniam Chettiar, lost his right to have recourse to the hypothecation bonds in suit by reason that he elected in 1900 to bring a suit upon the mortgages of July, 1899. Clause 12 of the mortgage of 6th July is as follows:—

> "12. Except as hereunder provided your rights already existing for recovery of the whole or any portion or portions of the amount secured by this deed shall not be affected by this deed. That from this date your lien or charge on the allowance due to the Raja M. Bhaskara Sethupathi Avargal, under the said settlement deed for any portion or portions of the amount due under this deed shall cease. On the payment of the sums of Rs.1,81,727-0-2 and Rs.1,25,000 with interest on the said two sums as mentioned in paragraphs 5 and 6 of this deed, all other securities other than the securities created by this instrument shall cease."

The first question upon this clause is whether the plaintiff's charge on the Raja's allowance was intended to be released whether or not the mortgage was valid, that is whether he gave up his old security on the footing that he was getting a new one, or taking a chance that he might not get a new one. In their Lordships' opinion, the intention of the plaintiff was entirely frustrated by the fact that the mortgage of 6th July, 1899, turned out to be invalid and was set aside. While it is possible to put a case in which a mortgagee releases one security unconditionally with an intention to take the risk of a new security turning out to be invalid, there are no facts in this case pointing to so unusual a bargain. The result is that this contention as to the allowance fails. The case of *Har Chandi Lal* v. *Sheoraj Singh,* (1916) L.R. 44, I.A. 60, furnishes a complete answer to the suggestion that a beneficiary under the trust can claim the benefit of the mortgage of 6th July, 1899, as a release of the hypothecation bonds so far as the allowance is concerned. The appellant's contention that because the plaintiff had received the amount that was due to him upon debts contracted prior to the deed of settlement and was not directed to refund it when the Raja's son elected to avoid the mortgage he can now claim that the mortgage has not been altogether set aside, is a contention which their Lordships reject. The appellant cannot single out a particular clause of the mortgage deed and claim to hold the plaintiff by its terms and in this way maintain that the release of

the charge upon the allowance is a valid and subsisting release.

It will be noticed that by clause 12 it is expressly provided that the plaintiff's existing securities, apart from the allowance, should not be affected by the deed. By express agreement, therefore, the hypothecation bonds and the invalid mortgage of the 6th July, 1899, were to be cumulative and independent securities. No question of election could arise as between these securities, even on the hypothesis that the latter mortgage was valid; still less can it arise now that the mortgage has been set aside. As observed by the Vice-Chancellor in *Miln* v. *Walton* (1843) 2 Y. & C.C.C. 354, at 361, "the earlier mortgage remains in force and maintains its rank notwithstanding the other and may be dealt with by the creditor separately." The following passage from the Board's judgment (delivered by Lord Robertson) in *Shankar Sarup* v. *Mejo Mal* (1901) L.R. 28, I.A. 203, 209-10, discloses perhaps a fuller answer to the appellant's argument in the present case:—

> "If the bond of November, 1883, be considered on its own terms, there is no room for the suggestion that it superseded the bond of May so as to impair the effect of that bond as a subsisting hypothecation. The argument of the respondents was rather that the appellants by their suing on the bond of November and not on the bond of May, had relinquished their rights under the bond of May. No such inference can legitimately be drawn. The appellants did not need to sue on the bond of May in order to obtain a sale for the whole of their debt, that being comprised in the bond of November. But in suing on the bond of November they did nothing to imply or to lead others to believe that they abandoned what apart from abandonment was a subsisting hypothecation. . . ."

For these reasons their Lordships conclude that the plaintiff had a valid charge for the principal amount of his debt with interest upon the subjects comprised in the bonds in suit. The objections of the appellant on these points have been rightly overruled by the admirable judgment of the learned Subordinate Judge which the High Court upheld.

In one matter, however, the appellant, in their Lordships' view, has made good a serious objection to the view taken by the Indian Courts. The present suit was brought in 1905 and the issues in it were settled on 24th November, 1906: additional issues on 3rd September, 1910. The case was heard in 1917 and judgment was reserved on 25th August, 1917. On that day a petition was presented by the plaintiff asking leave to amend his plaint by adding a prayer that the first defendant, that is the Raja's son, be ordered to pay to the fourth defendant, namely, the representative of Anamalai, the amount due on account of the debt of Rs.60,000 and interest in respect of which Anamalai had obtained the jewels in pledge; or, in the alternative, that on the plaintiff paying off Anamalai, the plaintiff be declared entitled to sell the settled property to realise the said amount. The learned Subordinate Judge took the view that the

amendment asked for was formal and that if the plaintiff was entitled to the relief claimed on the facts already on record he should not be told that he had not asked for it and therefore could not be given it. The decree of the learned Subordinate Judge by its second clause directed the Raja's son to pay off Anamalai, whose debt of Rs.60,000 with interest was held to have amounted to over 2 lacs; and ordered that in default the plaintiff should be entitled to have the settled property sold for satisfying the amount. He also directed that if the first defendant did not pay off Anamalai, the plaintiff, on bringing the money into Court, should get the jewels and certain securities in the hands of Anamalai. The learned Judge proceeded on the basis of the doctrine of subrogation. The High Court on appeal discovered that Anamalai had by that time sold the jewels to liquidate his debt; they made no order accordingly in respect thereof and deleted from the decree of the Subordinate Judge his directions in that regard. Against defendants 1 and 2 as representatives of their father the original debtor, the High Court by clause 1 of their decree gave judgment for the mortgage debt payable out of the assets, if any, of their father coming to their hands; and the decree by its second clause directed as follows:—

> " (2) In default of the 1st defendant paying as aforesaid within six months from 2.3.1928 (26.4.1928) (the date of the High Court judgment), i.e. within 2.9.1928 (26.10.1928), the plaintiff be entitled to apply to the Court to have the estate in the 1st defendant's hands or a sufficient portion thereof sold for satisfying the aforesaid sum mentioned in clause (1) above."

The result of this clause is to make the settled property liable for the whole of the plaintiff's claim upon his hypothecation bonds. As the property which came to the settlor's sons under the settlement deed of 12th July, 1895, was not assets of the settlor at the date of his death, it is necessary to justify a direction which throws the Raja's post-settlement debts upon the trust estate. The learned Judges of the High Court appear to have considered that the relation between Anamalai and the plaintiff was analogous to that of principal and surety, an analogy which, in their Lordships' opinion, is entirely inapplicable to the present case. Their Lordships are unable to see any method by which it is possible to justify a decree making the trust estate liable for the whole of the plaintiff's debt; but it is contended on the part of the plaintiff's representatives that the Raja as settlor had a right against the trustee to require him to pay off the debt of Anamalai; that he had by the bonds in suit represented that the plaintiff would have a charge upon the whole value of the jewels as the trust estate would pay off Anamalai; that accordingly the plaintiff had the right as equitable assignee of the settlor to call upon the trustee to discharge Anamalai's debt and in this way to make available to the plaintiff the security which the Raja had agreed to give. Now it may or may not be that had such a cause of action been pleaded and had evidence been adduced to show what had been done by

the trustee under the deed, what monies were available to him, what obligations he had to provide for out of the settled property, what discretion he had exercised and so forth—it may be that a case could have succeeded on the lines suggested. But such a case would require careful and timely pleading and a careful trial. It is in effect a charge of breach of trust having serious consequences both to the trustee and to other beneficiaries. It would be necessary to determine first whether the trustee was under any obligation to pay off Anamalai's debt save out of income of the property, and the course of administration of the trust in the events that happened would require minute examination. What has happened in this suit is that at the last moment an amendment was permitted under which, in spite of the obvious objections to any such course, relief of so wide and exceptional a nature has been decreed without examination. The amendment authorised by the Subordinate Judge by his order of 28th August, 1917, does not cover what the High Court have done. Their Lordships are of opinion that no such case should have been entertained by way of amendment at the end of the trial and that the plaintiff's endeavour to make the trust estate responsible for the debt due to him upon the bonds in suit must be rejected altogether.

It remains therefore that their Lordships should indicate the form of relief to which they think the plaintiff entitled. The first question on this point is as regards interim interest. For many years compound interest at 12 per cent. per annum must be decreed under the first and second of the bonds, and simple interest at the like rate under the third bond. This covers the period down to the institution of the suit. In view of the great accumulation of interest the learned Subordinate Judge was well entitled to exercise his discretion by making an unusual order as regards interim interest: he directed that interim interest should be at the rate of 6 per cent. on the principal amount only, both between the date of suit and date of decree, and between the date of the decree and the date of payment. The learned Judges of the High Court do not appear to have appreciated the exact effect of the trial Court's order which they varied by granting simple interest at 12 per cent. on the principal sum only, from the date of the decree. Their Lordships do not think that there was any reason to interfere with the discretion of the Trial Court and they prefer the order of the learned Subordinate Judge in all the circumstances of the case.

The result is that in their Lordships' view the appeal brought by Ramanathan Chettiar and others pursuant to special leave granted by Order in Council dated 10th June, 1932, should be dismissed and the other two appeals (brought by the representative of the first defendant) should be allowed. The decree of the High Court should be varied so as to include simple interest at 6 per cent. on the principal amount of Rs.1,30,000 from the date of the plaint to the date of payment. For the words "from the assets, if any,

of the late Raja M. Bhaskara Sethupathi in the hands of defendants one and two" should be substituted the words "from the assets, if any, belonging to the late Raja M. Bhaskara Sethupathi at the date of his death coming to the hands of defendants one and two". This will make it clear that the judgment is intended to be in the form prescribed by section 52 of the Civil Procedure Code. Any question as to the liability of the sons for the Raja's debt by virtue of the doctrine mentioned in section 53 of the Code remains unprejudiced by the decree in this case and must be dealt with if it arises in execution. Clause 2 of the High Court's decree should be altogether deleted. As all parties interested in the redemption of the jewels were impleaded in the suit there should be liberty to the representatives of Subramaniam Chettiar to apply to the High Court within two months of the receipt by that Court of His Majesty's order upon this appeal to have an account taken of the sum due to Anamalai upon the security of the jewels and of the amount with which he should be debited as the proceeds thereof. It will be for the High Court to give directions for the taking of the necessary accounts and inquiries: the appellant as a party interested should have the right to take part in the proceedings, if any, but the liberty to apply should be given only to the representatives of Subramaniam. In other respects the decree appealed from should stand. Their Lordships will humbly advise His Majesty accordingly.

The order of the Subordinate Judge as to the costs of the Trial Court will stand as also the High Court's order as to costs in appeal No. 106. There will be no order for costs in the High Court in appeal No. 26 and any costs paid in respect of that appeal under the High Court's decree should be returned. The parties will bear their own costs of all three appeals to His Majesty, but this will not interfere with the direction contained in the Order in Council of 10th June, 1932, as to the costs of the petition for special leave.

(57313—5A) Wt. 8151—17 190 3/53 P. St. G 338

In the Privy Council

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DELIVERED BY SIR GEORGE RANKIN.

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