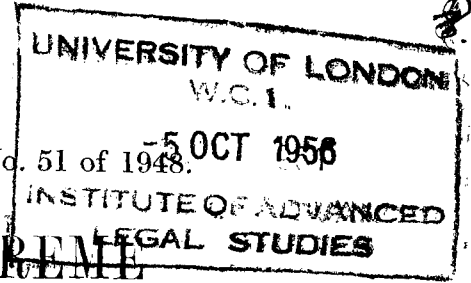


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12, 1950

In the Privy Council.



ON APPEAL FROM THE SUPREME
COURT OF CEYLON

44342

BETWEEN

VALLIAPPA CHETTIAR son of SOCKALINGAM CHETTIAR
of Sea Street, Colombo, substituted in place of 3rd and
• 5th Plaintiffs, deceased APPELLANT

AND

J. VANDER POORTEN, B. VANDER POORTEN,
G. BEMELMANS Executors of the last Will and Testament
of the late A. J. VANDER POORTEN of Galagedera, Kandy,
substituted in place of the 1st Defendant, deceased ... RESPONDENTS.

CASE FOR THE APPELLANT

1.—This is an Appeal from a Judgment and Decree of the Supreme Court of Ceylon, dated the 22nd August, 1946, which varied a Judgment and Decree of the District Court of Colombo dated the 10th March, 1944.

RECORD

pp. 200,183

2.—This is an Appeal in execution proceedings and the questions for determination relate to the construction and effect of an Order-in-Council dated the 15th December, 1932.

3.—The facts of the case are as follows :—

The parties to this litigation other than the 1st Defendant were members of a Syndicate, which had acquired at a cost of Rs. 200,000, certain forest estate in Ceylon known as Tankatiya from persons who were believed to be the owners of it.

The Crown however, disputed their title and an action between the Crown and the Syndicate ensued.

The suit ended in a compromise and following it a compromise decree was made on the 28th March, 1923. The title of the Crown to the estate was admitted and the Crown undertook to convey the estate to the Syndicate on the latter, paying the Crown Rs. 275,000, within twelve months. The payment was duly made. The Syndicate raised Rs. 64,000

RECORD and the 1st Defendant whose help was sought by the Syndicate provided the balance of Rs. 211,000 required. A sum of Rs. 5,160 was repaid to the 1st Defendant, thus reducing the sum advanced by the 1st Defendant to Rs. 205,840.

4.—On the 29th March, 1924, the Syndicate executed a document in favour of the 1st Defendant, which has been held by the Privy Council to have been intended only to provide a temporary security for the money advanced.

5.—On the 2nd March, 1925, two deeds Exhibits P. 3 and P. 4 (Nos. 471 and 472) were executed. By Deed No. 471 the Syndicate purported to transfer to the 1st Defendant the property acquired from the Crown excepting an area 1,000 acres on the South Eastern portion, which had been otherwise disposed of. 10

By Deed No. 472 which was entered into between the 1st Defendant and the members of the Syndicate, the 1st Defendant was given the right to sell the lands at his discretion, but if the price was below Rs. 100 per acre the consent of the members of the Syndicate was to be obtained.

On a sale of the properties the 1st Defendant was to apply the proceeds from it “ in payment of such sums as shall be due and payable to him for “ monies advanced to the Crown, and monies expended on the management, “ control and working of the said lands as aforesaid and of such compensation “ or profits for himself, as he shall think reasonable and equitable in his “ own discretion and shall pay over the balance ” to the members of the Syndicate *pro rata* according to their respective interests. 20

6.—The 1st Defendant took possession of the property and has since remained in possession. After going into possession the 1st Defendant cut and sold a large quantity of timber, but he has not rendered an account of it to the Syndicate.

On the 30th March, 1925, the Crown executed a conveyance of the property to the Syndicate. Several attempts were made to sell the property both by the 1st Defendant and by the members of the Syndicate, but without result. 30

On the 14th March, 1926, certain members of the Syndicate wrote to the 1st Defendant, with a view to redeem the property. The 1st Defendant demanded a very large sum in fact Rs. 500,000 as consideration for the re-conveyance of the property. This claim was regarded as exorbitant by the members of the Syndicate who were interested in redeeming the property.

THE ORIGINAL SUIT.

7.—On the 29th July, 1926, certain members of the Syndicate, brought the action which resulted in the present proceedings in the District Court of Colombo, claiming redemption of the property. 40

The Plaintiff after referring to the transactions mentioned above stated that the Plaintiffs and the 2nd to the 7th Defendants were the owners of the Tankatiya forest land ; that the 1st Defendant to whom the property was mortgaged was not prepared to allow the redemption of the same except on onerous terms ; that the Plaintiffs were willing to redeem the property by paying the 1st Defendant the amount due to him which they estimated as Rs. 274,090. They prayed for a decree declaring that the amount due to the 1st Defendant was Rs. 274,090 or such other sum as the Court might adjudge, for an account of the management by the
10 1st Defendant of the property ; and for a re-conveyance of the property by the 1st Defendant to the Syndicate on payment of the amount found to be due to him.

8.—The 1st Defendant raised various pleas in defence denying the right of the Plaintiffs to redeem the property. Before the trial of the suit the 1st Defendant settled with all other members of the Syndicate excepting the 3rd and 5th Plaintiffs, who are now represented by the Appellant herein.

9.—On the 19th July, 1929, the District Judge delivered Judgment. He held that the intention of the parties was that the property should be sold, but as the 1st Defendant had failed to sell it he was bound to re-convey
20 the property to the owners on payment of the money due to him, and that the 3rd and 5th Plaintiffs, who have not settled with the 1st Defendant, were entitled to a re-conveyance of their shares on payment of a proportion of the money due.

He made a decree directing the 1st Defendant to re-convey to the 3rd and 5th Plaintiffs, their shares of the property on their paying the amount due to him. p. 19, l. 39

10.—The 1st Defendant appealed against the said Judgment and Decree to the Supreme Court of Ceylon. On the 10th March, 1930, that
p. 20 Court delivered Judgment.

30 The learned Judges were of the opinion that there was no trust as contended by the Plaintiffs and that it was not correct to regard the land as being a security for the debt. In this view they set aside the Decree of the District Judge and dismissed the suit with costs. p. 24, l. 6

11.—The representative of the 3rd and 5th Plaintiffs appealed against the said decision of the Supreme Court to His Majesty-in-Council. On the 23rd November, 1932, the Judicial Committee of the Privy Council delivered Judgment. Their Lordships held that the transactions effected by Deeds Nos. 471 and 472, was the creation of a security for money
p. 34 advanced which in certain events imposed upon the 1st Defendant, who
p. 41, ll.1-5 was the creditor duties and obligations in the nature of trusts ; that there
40 was nothing to preclude the debtors from at any time redeeming the mortgaged property and the Appellant was entitled to redeem his shares l. 35

RECORD on payment of his rateable proportion of the total amount due to the
 — 1st Defendant ; that in ascertaining the amount due no regard should be
 had to the provision of Deed No, 472 as to compensation or profits, but
 that reasonable interest should be allowed on moneys advanced or
 expended.

p. 42, l. 7 In the result, their Lordships set aside the Decrees of the Courts
 below and remitted the appeal to the Supreme Court for framing a Decree
 providing for the following matters, which have been set out in an Order-
 in-Council dated the 15th December, 1932 :—

p. 31, at
 p. 32, l. 32

“(a) A declaration that upon the true construction of 10
 “ Deeds Nos. 471 and 472 and in the events which have happened
 “ the appellant is entitled to redeem upon the terms hereinafter
 “ appearing the shares of the deceased person whom he represents
 “ in the property conveyed by Deed No. 471 ; (b) a direction for
 “ the taking of the following enquiry and accounts (i) an enquiry
 “ as to the amount of the shares in the property in question
 “ of the person whom the appellant represents ; (ii) an account
 “ of what is due to the respondent for principal monies advanced
 “ to provide the deposit under the Decree of the 28th day of 20
 “ March, 1923, and for monies properly expended by him in the
 “ management and control of the property together with interest
 “ at such rate as the Court shall deem reasonable upon the monies
 “ advanced or expended from the respective dates of such advance
 “ or expenditure to the date of Decree ; (iii) an account of rents
 “ and profits (including proceeds of sale of timber and other
 “ produce) of the property received by the respondent or by any
 “ other person or persons by the order or for the use of the
 “ respondent or which without the wilful default of the respondent
 “ might have been so received with interest at such rate as
 “ aforesaid upon such and profits from the respective dates of 30
 “ receipt to the date of Decree, and (iv) an account of the costs
 “ payable to the appellant by the respondent under their
 “ Lordships’ report as to payment of costs hereinafter contained
 “ and remaining unpaid ; (c) a direction that the amounts certified
 “ under account (iii) ought to be deducted from the amount
 “ certified under account (ii) and that upon payment by the
 “ appellant to the respondent of the proportionate part of the
 “ balance so found corresponding with the shares which shall be
 “ certified under enquiry (i) to be the shares in the property of
 “ the person whom the appellant represents less any costs payable 40
 “ to the appellant under account (iv) remaining unpaid the
 “ respondent shall re-convey to the appellant the shares in the
 “ property of such person ; and (d) such other directions as the
 “ Court may deem necessary or appropriate for working out the
 “ Decree ; (5) that the respondent ought to pay the costs of the
 “ person whom the appellant represents and of the appellant of

“ the action up to the Decree of the District Court of Colombo
 “ dated the 19th day of July, 1929, and of the appeal incurred in
 “ the said Supreme Court and the sum £495 4s. 3d. for his costs
 “ thereof incurred in England ; and (6) that any subsequent costs
 “ in this action in working out the Decree or otherwise ought to
 “ remain to be dealt with in due course by the Court in Ceylon
 “ having seisin of the matter.”

RECORD

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In 1933 the Supreme Court of Ceylon remitted the Order-in-Council
 to the District Court of Colombo for being carried out.

p. 43, l. 11

p. 45, l. 28

10 There were changes in the parties and substitutions had to be made
 which caused considerable delay. The Appellant was substituted in place
 of the former representative of the 3rd and 5th Plaintiffs and the
 Respondents in place of the 1st Defendant who was dead.

13.—Towards the end of 1941 the enquiry directed by the Order-in-
 Council was commenced.

The Respondents filed an account under the following heads :
 (1) Tankatiya Purchase Account ; (2) Tankatiya Working Account ;
 (3) Tankatiya Timber Sales Account ; Interest was calculated at 9 per cent.

20 The Appellant disputed the correctness of the accounts and objected
 to the inclusion of certain items. He also contended that the interest of
 9 per cent. was excessive.

14.—On the 10th March, 1944, the District Judge delivered Judgment.
 First point considered by him was as to the interests of the Plaintiffs in
 Tankatiya, which is the subject matter of redemption. On this he held
 that their share was 3,586 acres out of a total of 12,492 acres. In arriving
 at this figure the acreage of 1,000 which had been allotted to one Simon
 de Alwis a member of the Syndicate, should be excluded as the said member
 refused to enter into any negotiations with the 1st Defendant and was no
 party to the Deeds Nos. 471 and 472.

p. 184, l. 10

30 15.—The second point was as to the monies advanced by the
 1st Defendant “ to provide the deposit under the Decree of March, 1928,”
 the contention for the Appellant was that the costs incurred in connection
 with the execution of the Documents Nos. 471 and 472 and the assignment
 of the benefit of the compromise Decree with the Crown were not covered
 by the direction contained in the Order-in-Council. The District Judge
 held, however, that these items should be taken into account.

p. 185, l. 5

p. 188, l. 42

40 16.—The third point considered related to the working expenses,
 which fall under the direction of the Board, for taking an account
 of “ moneys properly expended by him (1st Defendant) in the management
 “ and control of the property.”

p. 189

Under this head the contention of the Plaintiffs was that the rights
 and liabilities, should be decided on the basis that the 1st Defendant

p. 189, l. 20 was in the position of a mortgagee under the English law and as such, he could not charge for improvements that have not been of value to the property and in that view the expenditure for the experimental plantations undertaken by the 1st Defendant should not be allowed.

The District Judge held that the parties were bound by the terms of Deed No. 472, which empowered the 1st Defendant to make experimental plantations.

It is, however, submitted that the learned Judge had not properly appreciated the effect of the decision of the Privy Council which disregarding Deed No. 472 treated the transaction between the parties to amount to nothing more than a mortgage. 10

p. 192, l. 42 17.—The next point considered was interest. It was submitted that 6 per cent. would be a reasonable rate of interest in the circumstances of this case and not 9 per cent. as claimed by the 1st Defendant. The Court, however, allowed 9 per cent. interest.

p. 193, l. 20 18.—The fifth point was the rents and profits. On this, the sale of logs of timber by the 1st Defendant was in issue. The Plaintiffs claimed that the 1st Defendant should be debited with the cost of all the logs for which permits have been issued by him, which numbered 698. The District Judge, however, found for only 315 logs and allowed a credit for Rs. 13,350 for logs not accounted for. 20

A claim was made by the 1st Defendant's representatives for allowance of a certain sum on account of bad debts, but the District Judge rejected this claim.

19.—The costs awarded to the Plaintiffs by the Privy Council were assessed at Rs. 10,879. As to the costs of the enquiry the learned Judge directed that this should be divided. In the result, the District Judge directed the 1st Defendant's representatives to submit account in the terms of the above directions.

20.—The representatives of the 3rd and 5th Plaintiffs appealed against the said decision of the District Judge to the Supreme Court of Ceylon, praying for the following reliefs:— 30

p. 199
p. 200, l. 13 “ (a) That the order of the learned District Judge dated “ 10th March, 1944, be varied as below.

“ (b) An order be made deleting from the accounts filed the “ following items:—

“ (i) All items on the purchase account excepting the item “ of Rs. 275,000, on the debit side and Rs. 65,000 and “ Rs. 5,163 on the credit side.

“ (ii) All items on the working account except those incurred “ in felling and transporting those trees which were sold “ and converted into money. 40

“ (c) The respondents be directed to account to the appellants
 “ for the balance logs unaccounted for at the maximum price
 “ prevailing on the date on which the logs could have been brought
 “ to Colombo. RECORD
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“ (d) An order that interest be charged at 6 per cent.

“ (e) Grant the appellant his costs in both Courts.”

21.—On the 22nd August, 1946, the said Supreme Court, Soertsz
 A.C.J., and Cannon J. delivered Judgment. The learned Acting Chief
 Justice who delivered the Judgment said that the matters that appeared
 10 to require consideration were the question of rents and profits, particularly
 the profits derived from the sale of timber, the question of what the working
 expenses ought to be held to be and the question of interest.

Regarding the matter of the sale of timber he said that the evidence
 was confusing and that the Court was satisfied that a fairer rough estimate
 would be in all the circumstances to allow a credit of Rs. 20,000 for logs
 not accounted for instead of the sum of Rs. 13,350, allowed by Trial Judge.
 He further said that the absence of Joe Vander Poorten from the witness
 box was studied and deliberate and it deprived the Court of material,
 which it would otherwise have had for a better estimate of the position
 20 in regard to the sales of timber. As regards the working expenses the
 learned Acting Chief Justice, said that he was satisfied with the directions
 given by the Trial Judge. With regard to interest he had no doubt that
 having regard to the amount involved 9 per cent. per annum was a high
 rate, but that was a matter within the discretion of the Trial Judge and it
 would be wrong to interfere with his order, which could not be said to be
 a wrong exercise of his discretion. In regard to the argument that in
 accounting for the expenses for the management and control, the
 1st Defendant or his representative should account on the footing that
 he was a mortgagee, the learned Judges stated they were in agreement
 30 with the Trial Judge that that doctrine had no place in this case where
 there are special covenants relating to the matter. In the result, the
 Decree of the Trial Judge was varied as stated above. p. 201

22.—The Appellant has appealed to His Majesty-in-Council, against the
 said decision of said Supreme Court and it is respectfully submitted on
 his behalf that his appeal should be allowed with costs and the decrees
 of the Courts below varied for, among other, the following

REASONS

- (1) BECAUSE the Courts below have not correctly interpreted
 the Order-in-Council and have failed to carry out the directions
 contained therein fully.

- (2) BECAUSE the rights and liabilities of the parties ought to have been ascertained on the basis of English law and that the 1st Defendant was simply a mortgagee.
- (3) BECAUSE the Courts below have erred in going outside the scope of the directions of the Privy Council, and relying upon documents which no longer governed the relations between the parties.
- (4) BECAUSE the Respondents are not entitled to any credit for expenditure incurred for experimental plantations.
- (5) BECAUSE in the purchase account the only items admissible are the sums actually advanced by the 1st Defendant for the purchase of the property and the cost of the preparation and execution of the deed of assignment and the Deeds Nos. 471 and 472 should not be allowed. 10
- (6) BECAUSE the Respondents are accountable for the balance of the logs, not accounted for at the maximum price prevailing at the time.
- (7) BECAUSE the Appellate Court having held that the rate of 9 per cent. interest awarded by the Trial Judge was high, erred in not reducing it to 6 per cent. per annum. 20

P. V. SUBBA ROW.

In the Privy Council.

No. 51 of 1948.

ON APPEAL FROM THE SUPREME COURT OF
CEYLON.

BETWEEN

VALLIAPPA CHETTIAR son of
SOCKALINGAM CHETTIAR of Sea
Street, Colombo, substituted in place
of 3rd and 5th Plaintiffs, deceased
APPELLANT

AND

J. VANDER POORTEN, B. VANDER
POORTEN, G. BEMELMANS
Executors of the Last Will and
Testament of the late A. J. VANDER
POORTEN of Galagedera, Kandy,
substituted in place of the 1st
Defendant, deceased ... RESPONDENTS.

CASE FOR THE APPELLANT

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