

(1898) 08 MAD CK 0002
In the Madras High Court

Asan Koothoo Sahib Mercoyar and Others	APPELLANT
Vs	
Ramanatha Chetty	RESPONDENT

Date of Decision : 03-08-1898

Acts Referred:

Citation : (1898) 8 MLJ 159

Hon'ble Judges : Subrahmania Aiyar, J; Davies, J

Bench : Full Bench

Judgement

Subrahmania Aiyar, J.—It was contended for the appellants that the Subordinate Judge erred in finding that the respondent advanced under

Exhibit A, Rs, 9,647-3-6 and under the arrangement come to subsequent to that document Rs. 7,551-9-5. But the Subordinate Judge has not

allowed any item of advance claimed by the respondent not supported by duly-proved vouchers. The evidence thus accepted by the Subordinate

Judge is practically uncontradicted and in my opinion quite trustworthy. I have no hesitation, therefore, in holding that the plaintiff has proved that

advances to the extent stated above were made by him.

2. The next question for determination is, whether the respondent is disentitled to recover the whole or any portion of his claim, inasmuch as the

barque Lord Earns, referred to in Exhibit A, became a wreck subsequent to 21st March 1891, the date fixed in the document, with reference to

the payment of the money due thereunder. This depends, in one aspect of the matter, upon whether the transaction is, as contended for the

appellants, supportable as a bottomry bond. Now, though not only a master but an owner also may give a bottomry bond (Duke of Bedford, 2

Hagg. Ad. 294), yet to the validity of such a bond given by an owner, it is

necessary to show, as was laid down in several cases, that he had no adequate personal credit or security, other than the bond, available at the port where it was given. In the early case of the *Nelson*, Lord Stowell observed: "It is certainly the vital principle of this species of bonds" (bottomry) "that they shall have been taken where the owner was known to have no credit, no resources for obtaining necessary supplies" (1 Hagg. Ad. at page 175). This language was quoted and relied on in the case of the *Hersey* where Sir John Nicholl added, "if they" (the necessary supplies) "can be procured upon the credit either of the master or of the owners or by advances on the freight or by passage money or upon any other credit than the hypothecation of the ship, the bond of hypothecation (viewed as a bottomry bond) "is absolutely void" (3 Hagg. Ad. at page 408). Did the condition thus required by the authorities exist in the present case ? Clearly not. For Exhibit A itself shews that in the first instance the owners undertook a personal liability which was to subsist for a period of about five months from the date of the bond, i.e., up to the 21st March 1891. This circumstance alone is fatal to the contention that the transaction should be viewed as a valid bottomry bond, and it is unnecessary to consider whether another objection urged on behalf of the respondent against the appellants' said contention is well founded, the objection being that the instrument could not operate as a bottomry bond, inasmuch as it was executed by the owner in a place which was not a foreign port to him. I consequently hold that Exhibit A could not be supported as a bottomry bond.

3. Next, taking, as was argued for the respondent, that the transaction is a hypothecation not amounting to a bottomry bond, the question is as to the validity of the portion of the instrument which provides for the contingency of the amount lent not being paid back within the 21st March 1891.

In this connection it is first necessary to consider the meaning and effect of the word "yogyam" used in the instrument to qualify the vernacular term for hypothecation. The meaning of the word does not appear to have been considered in any decided case. And no attempt was made in the present instance to prove what is denoted by the word according to mercantile custom, if such a custom exists with reference to it. According to Rottler's dictionary "yogyam" sometimes in Tamil usage means "chance,"

"hazard," "danger" and the phrase "'yoggyathukku kodukkirathu'" is explained in the same work (1) "to advance money, &c., to an honest man trusting to his honesty; (2) "to risk one"s own money, &c, on a ship or otherwise." That, in Exhibit A, the word was inserted to indicate that the lender, in consideration of his receiving higher interest subsequent to the 21st March 1891, consented to his right to recover the money after that date being made to depend on the safety of the barque is not denied, though the parties are not agreed as to the circumstances in which the loss of the vessel should take place to disentitle the lender from claiming his money. The respondent in his evidence stated that ho was not to be affected unless the vessel was lost during a voyage. On the other hand, one of the appellants and a relation of his say that it is immaterial whether the loss occurs during voyage or when the vessel is in port, as was the case in the present instance. Neither view could, in my opinion, be accepted, sought to be established as it is by such meagre and interested evidence. In this state of things, could the provisions of the document, as to what was to be the result to the lender if the money remained unpaid within the 21st March 1891 and the barque was lost subsequently, be held to amount to a valid agreement? I think not, since though the parties might have thought that after the 21st March the money was risked by the respondent upon the safety of the vessel, yet they have failed to express themselves with the definiteness indispensable to an enforceable agreement, the term yoggyam used with reference to the risk believed to be undertaken being very vague in itself and the contract being entirely silent on several points on which in a case like this the parties thereto were bound to make up their minds and indicate with reasonable clearness what their intentions as to those points were if effect is to be given to their agreement by a Court of Justice. To explain myself, whether it was the intention that the respondent was to be deprived of his money even if the vessel was destroyed while in port, or whether it was intended that he was to be affected only if the loss of the vessel happened during voyage and if the latter loss during what particular voyage or voyages, it being distinctly understood that the barque was to make more than one, was contemplated--those are matters which should have been settled and provided for in the contract. It was equally necessary that the document should have stated loss

resulting from what cause or causes, e.g., such and such perils of the sea was to disentitle the lender from claiming repayment. As to these

absolutely-essential points, the document is completely defective. Therefore, the portion of the instrument dealt with above must be held to be void

for uncertainty. And it follows that on the one hand the respondent's right to recover his advances is unaffected by the fact that the barque became

a wreck subsequent to the 21st March 1891, and on the other hand, that he is not entitled to the higher interest or vattam at 20 per cent, agreed to

be paid in consideration of a risk which was never legally undertaken by him. I would, therefore, modify the decree of the Subordinate Judge by

awarding to the respondent on account of the first item claimed in the plaint Es. 9,647-3-6 with interest at 12 per cent, per annum and on account

of the second item Rs. 8,427-10-2 with interest at the same rate on Rs. 7,551-10-2 thereof, minus the sums found by the Subordinate Judge to

have been received by the respondent with interest thereon at the above rate. The appellants will pay and receive proportionate costs in this

appeal.

4. As to the memorandum of objections, I think that the Subordinate Judge was justified in declining to act upon the respondent's accounts in the

absence of vouchers or other more satisfactory evidence, especially with reference to so large an amount as Rs. 6,781-12-8 included in the

second item in the plaint. I would, therefore, dismiss the"" memorandum of objections with costs.

Davies, J.

5. I concur.