
(1933) 05 PRI CK 0001

In the Privy Council

Case No : Privy Council Appeal No. 120 of 1931

P.S.S.M.K.T. Cathiresan Chettiar

APPELLANT

Vs

N.S. Natchiappa Chettiar

RESPONDENT

Date of Decision : 04-05-1933

Acts Referred:

Citation : (1933) AIR(PC) 191

Hon'ble Judges : Macmillan, Russell of Killowen, Lords Atkin, JJ.

Advocate : H.I.P. Hallett, L. De Gruyther, Harold Murphy, D.B. Somervell, for the Appearing Parties.

Judgement

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 money-lenders, 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 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 20th and 29th January 1925), representing moneys lent to him by the plaintiff and alleged to be secured by a bond (No. 229), dated 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 Sch. 1, and as a secondary mortgage certain lands described in Sch. 2.

The appellant was joined as a defendant to the action because by a bond (No. 372), dated 7th June 1923, and signed by Barnabas and one David Daniel, the lands comprised in Sch. 1 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 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 16th October 1925, a decree was entered against Barnabas directing him to pay to the plaintiff a sum of Rupees 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 warranted 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 23rd May 1928, an order was made on 10th September 1928, vacating so much of the decree of 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 1st October. 1928.

By his answer the appellant claimed to have priority over the plaintiff as mortgagee of the lands described in the said Sch. 1, 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 defendant 2 to cancel bond No. 229 on the receipt of Rs. 2,602.50 from defendant 2? 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 5th June 1923, but on 31st May 1923. He found on the first two issues as follows:

?(1) That the plaintiff did on or about 31st May 1923, agree with defendant 2 to cancel the bond No. 229 on receipt of Rs. 2,602.50 from defendant 2. (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.