

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Murugasar Marimuttu v. Charles Henry De
Soysa, from the Supreme Court of the Island of
Ceylon ; delivered November 12th, 1890.*

Present :

LORD HOBHOUSE.

LORD MACNAGHTEN.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

MR. SHAND (LORD SHAND).

[*Delivered by Lord Hobhouse.*]

IN this case the Plaintiff Marimuttu claims possession of the Dicklandé estate under a conveyance from one Nannytamby dated the 26th of September 1878. That deed of conveyance shows that a person named Tambyah was mortgagee in possession of the estate, and that the amount of his mortgage was unascertained; that it was the subject of a suit pending in the Supreme Court, and was to be decided by principles laid down by the Supreme Court; and the Plaintiff covenants with his vendor that he will pay and discharge all sums of money due to Tambyah as mortgagee in possession of the premises. Whether those accounts have been completed and the sum has been ascertained is a matter of dispute between the parties. There is an order of the District Court of Kalutara on the subject, but it is contended by the Plaintiff that the accounts which are affirmed by that order have not been taken in accordance with the principles laid down by the Supreme Court. In the view their Lordships take of this case it does not signify whether the accounts have been finally ascertained

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or not. The nature of Tambyah's mortgage was this. In point of form he was the purchaser out and out of the estate from Nannytamby. But the conveyance to him was disputed by a creditor of Nannytamby, who instituted a suit for the purpose of setting it aside as fraudulent. In that suit the Court held that the true contract between the parties was not a contract of sale out and out, but that money had been advanced, and by its decree of July the 2nd, 1875, it ordered that Tambyah should stand as mortgagee in possession for the amount of money advanced, and it went on to decree that when the accounts had been taken, and the amount due upon the mortgage ascertained and repaid by Nannytamby to Tambyah, Tambyah should be bound to re-transfer the estate to Nannytamby. Therefore Tambyah was owner of the estate to the extent that he could properly remain in possession of it until he was paid the amount which was due on the transactions between him and Nannytamby. Subsequently to the sale to the Plaintiff in 1878, Tambyah took certain proceedings under which sales of the estate were made. The details are a little complicated, and it is not now material to go into them. But ultimately the Defendant became the purchaser of the estate at a fiscal sale, and he now claims to be absolute owner of the estate under that sale. The Plaintiff contends that he was no party to the proceedings by Tambyah, and that he is not bound to recognise the sale to the Defendant. Whether that is so or not has been the subject of much argument, and was the subject of difference among the Judges in the Court below. But for the purpose of the present decision, and for that purpose only, their Lordships will assume that the Plaintiff is right in his contention. Supposing he is right, what is the effect? The effect must be to replace Tambyah, or anybody who stands

in the shoes of Tambyah, in the position which Tambyah held under the decree of the Court as mortgagee in possession. He would be in lawful possession of the estate until he is paid the money due to him on the transactions between Tambyah and Nannytamby.

The Plaintiff now asks to be declared the owner of the Dicklandé estate, and that the Defendant be declared not entitled thereto, and be ejected therefrom, and the Plaintiff placed in possession thereof; and he further asks for damages, and for a sum of 15,000 rupees a year during the time for which the Defendant has been in possession. Not a single word about payment of the mortgage which is due either to Tambyah or to the Defendant. What the Plaintiff desires by his plaint is to get into possession without any payment at all. That seems to their Lordships to be in the teeth of the decree of 1875; to be in the teeth of the contract which the Plaintiff entered into when he made his purchase from Nannytamby, and to be a glaring injustice towards the Defendant, who has honestly paid for his estate and is entitled at least to all that Tambyah himself could claim.

Their Lordships were told that there were some authorities in the Courts of Ceylon which would show that such an injustice as that was lawful. They hardly expected that such authorities would be produced; at all events they have not been produced; and their Lordships must hold that there is no ground in justice and in law for the relief that the Plaintiff asks.

This is a case in which the Plaintiff should be held strictly to the relief that he prays for. It is suggested at the bar that he may be entitled to redeem. He may be so entitled, and for the purpose of this decision it is assumed in his favour that he is so entitled; but he does not ask it, and their Lordships do not know at this

moment that he wishes it. On the contrary, so far as the materials on this record go, their Lordships have reason to think that he does not wish it, because in 1882 he did institute a suit to redeem Tambyah, and he apparently never proceeded beyond the filing of the plaint. Now he prays for a totally different relief, and it must be taken that he does not desire any relief except that which he prays for. That relief cannot be given him for the reasons indicated above, and his plaint must therefore be dismissed.

The result is that this appeal must be dismissed, and with costs, and the judgment of the Court below affirmed.

Their Lordships will humbly advise Her Majesty in accordance with that opinion.