Privy Council Appeal No. 55 of 1922.

Veerappa Chetty and another - - - - - - *Appellants*

v.

L.A.R. Arunachellam Chetty - - - - - - *Respondent*

FROM

THE CHIEF COURT OF LOWER BURMA.

JUDGMENT OF THE LORDS OF JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 1ST MAY, 1924.

Present at the Hearing:
LORD SHAW.
LORD PHILLIMORE.
LORD BLANESBURGH.
SIR JOHN EDGE.
LORD SALVESEN.

[*Delivered by* LORD BLANESBURGH.]

This is a suit to enforce by an order for sale a mortgage of certain property in Upper Burma, made by the respondent in favour of the assignor of the original plaintiff.

The case comes before their Lordships on an appeal from an order of the Chief Court of Lower Burma dismissing the suit, and discharging a decree for sale of the mortgaged property—which had been made by the Trial Judge in the District Court of Myaungmya. The question is whether there was adduced by the plaintiff at the trial evidence sufficient to justify an order for sale of the mortgaged property.

Such suits as the present, are governed by Sections 86–90 of the Transfer of Property Act, 1882. In effect these sections, now embodied in Order 34 of the Schedule to the Code of Civil Procedure, protect a defendant mortgagor against a decree for sale, unless the amount due upon his mortgage, if not admitted, has either at the hearing been proved by the plaintiff or has been ascertained after the hearing by an account then directed, on, of course, a case for the taking of such an account having by evidence first been made.

The solution of the problem so presented to their Lordships has proved to be one of some difficulty. Veerappa, a protagonist

in the transactions in question, to whom reference will constantly be made in the sequel, had died before the suit was commenced. His side of the case was testified to by witnesses whose information was to a large extent secondary. The evidence too, so far as it is really material was taken on commission by means of interrogatories not very happily framed, while, for reasons, the adequacy of which their Lordships do not presume to question, cross-examination of the plaintiff's witnesses was disallowed.

The facts up to a point, however, are not in doubt, and, as it happens, documentary evidence is available at critical stages in the story to supplement or correct the verbal testimony and clear up what would otherwise have been obscure. It is possible, therefore, with sufficient accuracy to ascertain the relevant facts.

The mortgage in suit originates in the arrangements made upon the dissolution in March, 1910, of a money-lending business carried on at Myaungmya and two other places in Upper Burma under the style of P.V.D.V. The partners in that firm were the appellants' grandfather, Veerappa, the respondent, and three other persons. The respondent was the manager of the business at Myaungmya and resided there. Veerappa lived at Rangoon.

By the end of 1909 this business had proved to be unsuccessful: serious losses had been sustained: indebtedness had increased: Veerappa was proposing to make India his permanent place of residence and dissolution of the firm was in prospect.

In January, 1910, P.V.D.V. had amongst their creditors a Rangoon firm of money-lenders, O.A.M.K. On January 11th, 1910, the P.V.D.V. debt to O.A.M.K. was Rs. 42,000. On that day Veerappa, at Rangoon granted in favour of O.A.M.K. a mortgage on separate property of his own to secure Rs. 60,000, with interest. The Rs. 60,000 were made up of the Rs. 42,000 debt of P.V.D.V. and a further sum of Rs. 18,000, then proposed to be advanced to Veerappa by O.A.M.K., but never in fact advanced.

Much was made of this mortgage in the course of the discussion before the Board. It is convenient to dispose at once of one important argument with reference to it put forward by the appellants' learned counsel.

The effect of the mortage was, he said, to discharge the Rs. 42,000 debt of P.V.D.V. and relegate O.A.M.K. for their sole remedy in respect of that debt to Veerappa and to the security upon his property created by the mortgage.

Their Lordships can see no ground for this suggestion. It is quite clear from the accounts of P.V.D.V., from later receipts given by O.A.M.K., from payments to O.A.M.K. subsequently made by the respondent on behalf of P.V.D.V., to mention only these salient facts, that this mortgage operated neither a novation, nor an extinction of the firm's debt to O.A.M.K.

On the 2nd March, 1910, the dissolution of the partnership of P.V.D.V. took place. Its terms are recorded in an agreement executed by all the partners. Veerappa thereunder made himself personally responsible for the liabilities of the firm to six named creditors: the respondent took over the business and made

himself personally responsible for the remaining debts and liabilities of the partners in relation to it.

Amongst these was the debt of the firm to O.A.M.K. That debt is separately entered in a credit balance sheet prepared for dissolution purposes, as amounting on 1st March, 1910, to Rs. 41,055-3-6.

The dissolution so agreed to was duly effectuated, and the P.V.D.V. businesses were taken over by the respondent and carried on by him, under the style of L.A.R., all as provided by the dissolution agreement. Payments to O.A.M.K. were made—not by Veerappa, be it noted—as a result of which the dissolved firm's indebtedness to O.A.M.K. had, by the succeeding 12th May—the date of the mortgage in suit—become reduced to Rs. 36,000.

It is convenient now to consider what, as at that date, was the position, in which, in relation to this debt as one of the old firm's liablities assumed by him, the respondent stood to Veerappa. That position may be easily stated.

O.A.M.K. were no parties to the dissolution agreement. The direct joint liability of each of the partners to them remained entirely unaffected by its execution.

But by that agreement the respondent, as between himself and each of his former partners, became solely responsible for the firm's debt to O.A.M.K., and Veerappa as one of these partners became entitled to an indemnity from the respondent against all liability as a former partner of his in respect of it. And he was entitled to have that right of indemnity declared and enforced (by an order on the respondent, for example, to pay off the debt) if the right were disputed or the obligation neglected.

But he was entitled to no more. Veerappa could not recover the debt from the respondent unless and until he had himself paid it. Give Veerappa that right and the result might have been—for it would equally be the right of the three other partners—that the respondent would be exposed to the risk of having to pay the debt twice over at the least. To put this in other words, Veerappa at this date had paid to O.A.M.K. nothing in respect of this firm debt. There was accordingly at that time no existing relation of debtor and creditor in respect of it between the respondent and himself.

It is in these circumstances that the mortgage in suit was executed by the respondent on the 12th May, 1910. It is expressed to be made in favour of one Sethuraman, who was a money-lender of Rangoon. It purports to be made in consideration of Rs. 20,000 borrowed by the respondent from him. The receipt for Rs. 20,000 is acknowledged in the body of the deed. Interest on the whole sum runs from the date of the deed. It is first payable on the 13th May, 1911. Rs. 8,000 of the principal with accrued interest are payable on the 12th May, 1912 : the remaining Rs. 12,000, with interest on the 13th May, 1913.

On its face, whether in respect of the amount secured or the person to whom that amount is due or otherwise, this mortgage bears no relation at all to the dissolution agreement, to

the then amount of O.A.M.K.'s debt, or to Veerappa. It purports to record an independent transaction of loan of Rs. 20,000 by Sethuraman to the respondnet. And in the plaint in this suit it is so put forward by the original plaintiff, who sought to enforce it solely in the character of an assignee from Sethuraman. But in the course of the proceedings it became common ground that the mortgage, in its terms, records no transaction that ever happened.

The appellants admit that no money at all was lent by Sethuraman to the respondent, nor is it denied by them that the documentary record of the transaction that took place on the 12th May, 1910, is to be found not in the mortgage alone ; but in that mortgage, in a promissory note for Rs. 16,000 made by the respondent also in favour of Sethuraman, and in a letter, Exhibit H, then written and addressed by him to Sethuraman. These documents were all handed by the respondent to Veerappa at Myaungmya on the 12th May, 1910 on his demand. They show, and in particular Exhibit H shows, that the whole transaction was directly connected with the liability of the respondent as between himself and Veerappa to discharge the P.V.D.V. debt to O.A.M.K., by that time reduced as above stated to Rs. 36,000, which is the combined amount of the mortgage and the promissory note.

The following is the material part of Exhibit H :—

> " Corresponding with the 30th (Sitrai) I have mortgaged you my three launches and one-sixth portion of the pucca building, containing six rooms, of this place " [the property comprised in the mortgage in suit] " for Rs. 20,000 by means of registered deed. Further, I have executed a promissory note for Rs. 16,000 in your favour. Pay the above amount of Rs. 36,000 to O.A.M.K. for 30th sitrai, and tell them that it should be credited towards P.V.D.V. in their account. I will send you the money on the promised date."

In view of the fact that Veerappa is now dead and can himself give no account of it, and that there is a conflict between the witnesses for the plaintiff and the respondent as to the genesis of this transacton of the 12th May, 1910, the importance of this exhibit can hardly, in their Lordships' judgment be overestimated.

Its preservation—it was produced in the suit by the plaintiff—relieves them for example from the necessity of determining as between the parties the gravely disputed question with reference to the position which Sethuraman was represented to the respondent as occupying. The respondent's story was that he never would, under the dissolution agreement, have assumed the O.A.M.K. debt had not Veerappa promised him that when necessary he would find a lender ready, upon security, to advance to the respondent the sum necessary to pay off O.A.M.K. Sethuraman, the respondent goes on to say, was put forward to him by Veerappa as the lender he had found in pursuance of his promise. The case of the plaintiff, on the other hand, was that Sethuraman was all through known to be, as in fact he was, merely benami for Veerappa.

Exhibit H enables their Lordships to proceed without expressing any conclusion of their own upon this issue. It enables them, indeed, to act upon the appellants' version of the transaction

which was that the respondent was required by Veerappa to give to him, in the name of Sethuraman, his benami (for he was himself about to depart to India), the mortgage in suit and the promissory note, for the reason that O.A.M.K. were pressing Veerappa to pay their debt and the respondent was neglecting to settle it. All this may be accepted. It still leaves the question unresolved why the respondent, who, as their Lordships have just shown, was not at the time liable to pay Veerappa anything in respect of the O.A.M.K. debt, should by the mortgage in suit have been taken bound to make payment to his nominee of Rs. 20,000, with interest from the date of the deed, all irrespective of any payment of that sum or any part of it by Veerappa, either to O.A.M.K. or to himself.

That question is answered by Exhibit H which, in their Lordships' view when properly understood explains with quite sufficient clearness the whole transaction even accepting the plaintiff's witnesses' account of it so far as that account goes. Apart from, and notwithstanding Mr. de Gruyther's contention, to which their Lordships will recur in a moment, it is impossible to read Exhibit H without seeing that it was dealing with a real advance of Rs. 36,000 to be made to the respondent. The mortgage deed and promissory note to which it refers bear that that sum had actually been received by the respondent and was to be repaid by him with interest as therein respectively provided. Exhibit H is the direction to Sethuraman or, if you will, to Veerappa as lender, by the respondent as borrower, instead of paying them to himself to pay over to O.A.M.K. the Rs. 36,000 advanced and secured in discharge of the P.V.D.V. debt for which, as we know, as between the respondent and Veerappa the respondent was solely liable. The payment so directed was to be made as on the very day of the mortgage and at Rangoon. On the footing that it would be so made it instructed accurately enough the statement in the mortgage executed at Myaungmya that Rs. 20,000, the portion of the advance thereby secured, had that day been paid to the respondent, and it justified the obligation to pay interest on the full amount as from the same date.

The respondent does not dispute that if such payment had been made to O.A.M.K., as directed by him, there would have been then no further question as to his liability to repay it in terms of his mortgage. But there never was any such payment made. This was apparently admitted in the Chief Court. It was not suggested by Mr. de Gruyther, before their Lordships, that there had. It is indeed quite clear that there had not. What then is the position ?

The answer of the learned Trial Judge was based upon a misapprehension. He found that the payment had been made, and accordingly he ordered a sale. But his finding arose from a misreading, on his part, of an entry in Sethuraman's books. In these there is entered as on the date of the mortgage, a credit of Rs. 20,000 in favour of Veerappa and a corresponding debit against the respondent. But Sethuraman being only a nominee of Veerappa, these entries import no more than a recognition on the

part of Sethuraman that the sum expressed by the mortgage to be owing by the respondent belonged to Veerappa and not to himself. The entries in no way import that any sum was on that day paid by anyone to anyone else—least of all that any sum was on that day found or applied by either Veerappa or Sethuraman for any purpose of the respondent. The learned Trial Judge however, mistakenly treated the entry in Sethuraman's books as a credit to O.A.M.K., and as evidence of a payment made on that day by Sethuraman to them. It was a clear misapprehension on the part of the learned Judge and Mr. de Gruyther not suggesting before their Lordships that any such payment had been made, did not seek to support the learned Judge's order directing a sale on the ground that it had. His main contention before the Board, indeed his only contention on the appeal, was that that learned Judge's order should be restored on an entirely different ground.

To the foundation of this contention of his, their Lordships have already alluded. Veerappa's mortgage to O.A.M.K. of the 11th January, 1910, extinguished, he said, all liability on the part of everyone but himself for the P.V.D.V. debt to O.A.M.K. That being so the reference to that debt in the dissolution balance sheet operated to entitle him, in place of O.A.M.K., to receive payment of it from the respondent. On that footing the recital in the mortgage in suit that Rs. 20,000 had been advanced by Veerappa's nominee, Sethuraman, to the respondent was quite correct, Veerappa, as between himself and the respondent being entitled to recover from the latter every part of the O.A.M.K. debt. Whatever arrangement he might or might not himself make with O.A.M.K. for its ultimate liquidation, that full debt the respondent was bound to pay Veerappa under the dissolution agreement on demand. The mortgage in suit and the promissory note were the terms on which Veerappa was willing to give him time for payment.

Their Lordships hope that they have correctly stated the contention. In their judgment the argument breaks down at every point of fact. First of all, as they have already shown, the mortgage of the 11th January, 1910, did not work either a novation of the O.A.M.K. debt or a release of the respondent or any partner of P.V.D.V. from full liability in respect of it. This of itself destroys the whole contention. But, further, if by the date of the dissolution agreement, the O.A.M.K. debt had ceased to be a partnership liability, then under that agreement the respondent did not contract to assume it. It was only firm liabilities that the respondent assumed. But still further the view of the respondent's and the P.V.D.V. position involved in this contention is completely negatived by the terms of Exhibit H. It follows in their Lordships' judgement that the order of the Trial Judge directing a sale can no more be justified on the ground suggested by Mr. de Gruyther than it can on the ground taken by the learned Judge himself.

That the Trial Judge's order was erroneous was made clear on appeal to the Chief Court. The learned Judges of that Court

fully appreciated the error of fact into which the Trial Judge had fallen, and they, it being admitted before them that no payment as directed by Exhibit H had been made to O.A.M.K., held that the suit should be dismissed on the ground that the mortgage in suit had no consideration to support it and created no security for any sum whatever upon the property comprised in it. Their Lordships do not agree. If the suit is to be dismissed it must be on some ground other than that chosen by the Chief Court. When the position in which the respondent stood towards Veerappa in relation to this O.A.M.K. debt is remembered, there was in their Lordship's judgment ample consideration to support the mortgage. Veerappa, when it was given, was entitled to require, as their Lordships have shown, that the respondent should, under his indemnity, procure Veerappa's release from his joint liability in respect of it, and most effectively, by making immediate payment to O.A.M.K. of the P.V.D.V. debt. Veerappa stayed his hand on the terms that by the grant of the mortgage to his nominee the respondent's indemnity should become to the extent of Rs. 20,000 and interest, a secured instead of an unsecured indemnity. The consideration for the mortgage was therefore complete and the judgment of the Chief Court was, in their Lordships' opinion, to this extent erroneous.

But the result reached by the Chief Court may properly be arrived at in another way. It is clear that the real consideration for the mortgage is not therein correctly expressed. The true consideration their Lordships take to have been proved by the appellants themselves, and the resultant operation of the mortgage follows as a consequence from a consideration of the antecedent relations between the parties to it and the provisions of Exhibit H. To the extent of Rs. 20,000 it stands as a security for such sums as Veerappa shall pay towards discharge of the P.V.D.V. debt to O.A.M.K. with interest, at the mortgage rate, from the date of each payment respectively.

Had then Veerappa paid any such sums at the commencement of this suit? In the opinion of the Board no such payments were proved. Whatever may be the true explanation of the receipts endorsed by Sethuraman on the mortgage deed—a question which their Lordships do not consider it necessary to discuss—they represent no payments by or on behalf of Veerappa. Nor is any claim on that footing put forward in respect of them by the appellants. One or two witnesses for the plaintiff said Veerappa had not made any payments and there is no evidence or suggestion to the contrary. Strangely enough a representative of O.A.M.K. was amongst the plaintiff's witnesses. He gave no evidence of any such payment.

In these circumstances it appears to their Lordships that the plaintiff entirely failed at the hearing to establish, under the sections already referred to of the Transfer of Property Act any case whatever, either for a decree or for an account.

Their Lordships will accordingly humbly advise His Majesty that this appeal from the Order of the Chief Court should be dismissed with costs.

In the Privy Council.

VEERAPPA CHETTY AND ANOTHER

v.

L.A.R. ARUNACHELLAM CHETTY.

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