Privy Council Appeal No. 28 of 1939

P. T. Krishnaswami Ayyangar – – – – – *Appellant*

v.

Chevula Kamalamma and others – – – – *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD JUNE, 1941

Present at the Hearing:

LORD ATKIN
LORD RUSSELL OF KILLOWEN
LORD ROMER
SIR GEORGE RANKIN
LORD JUSTICE CLAUSON

[*Delivered by* LORD ROMER]

Chevula Venkatasubbaya Chetti now deceased was the owner of two houses in Madras. For the sake of brevity they may be referred to as Nos. 60 and 68 respectively, and their owner as the testator.

On the 2nd June, 1919, the testator executed a promissory note for Rs.12,000 bearing interest at 9 per cent. per annum in favour of one Rangayya Chetti and deposited with him the title deeds of No. 60 as security. At the same time the testator executed a document headed "Collateral Security Bond" which recorded the fact of the deposit of the title deeds as collateral security in respect of the promissory note and then proceeded as follows: "I shall therefore pay you the principal and interest accruing due on the said promissory note from this date in full, and redeem the said title deeds. To this effect is the collateral security bond executed by me with consent." This document was never registered.

The testator died in the year 1920 having by his will appointed four executors of whom the respondents 1 and 2 and one Chevula Subrahmanyam Chetti appear to be alone surviving. It should be mentioned that the will contained an express provision that the two houses should not be sold.

Rangayya Chetti died in the year 1921, and on the 13th October, 1930, his junior widow Gouriamma who was his sole legal personal representative instituted the present proceedings for the purpose of enforcing the equitable mortgage purporting to have been created in favour of Rangayya by the deposit of the title deeds of No. 60.

The first three defendants to the suit were the surviving executors of the testator. The fourth defendant was the present appellant. The reason for adding him as a party was this. On the 26th June, 1924, the first three defendants and on the 24th November of the same year the first two defendants as executors of the testator had executed mortgages in favour of the appellant of both the houses to secure various sums of money that they had borrowed from him or that he had paid at their request. He was therefore, assuming these mortgages to have been valid, a necessary party to the proceedings. The relief that Gouriamma asked for by her plaint was the usual relief sought in a suit by a mortgagee to enforce his security.

The first two defendants (being the present respondents 1 and 2) by their written statement impeached the validity of the equitable mortgage in suit on the ground that it was created by the collateral security bond and that the document had never been registered. The third defendant Subramahmanyam neither filed a written statement nor took part in any of the subsequent proceedings in the suit. The appellant by his written statement put the plaintiff to proof of the equitable mortgage but did not in terms impeach its validity.

In due course issues were directed to be tried of which the only ones now material were to the following effect:—

2. Is the mortgage sued upon invalid?

5. Are the mortgages in favour of the fourth defendant binding on the estate of the testator?

6. What is the amount due upon those mortgages?

On the 6th September, 1932, the case came on for trial before Beasley C.J. After a consideration of the relevant authorities he came to the conclusion that the collateral security bond did not require registration and that a valid equitable mortgage upon No. 60 had been created by the deposit of the title deeds. He accordingly pronounced the usual mortgage decree in favour of the plaintiff. The appellant did not at the trial adduce any evidence to prove his mortgages. The learned Chief Justice in those circumstances made no findings upon the fifth or sixth issue. The decree merely provided that the appellant should be at liberty to enforce his claim as a second mortgagee of the suit property by a separate suit. With this decision upholding the validity of the plaintiff's mortgage defendants 1 and 2 appeared to be content. The appellant, however, took the matter to the appellate side of the High Court where it came on for hearing on the 11th May, 1933, before Ramesam and Cornish JJ. Those learned judges took the view that unless the appellant's mortgages were valid and there was something remaining due upon them the appellant had no right to be heard on the appeal. They accordingly remanded the case to the judge sitting on the original side to submit his findings upon the fifth and sixth issues. They ordered however that the costs entailed by the additional hearing, that is to say, the hearing fee and the fee payable to counsel should be paid by the appellant in any event.

The trial of these two issues took place before Anantakrishna Ayyar J. in August, 1933, and on the 25th of that month he gave judgment recording his findings upon them. It is unnecessary to deal with them in any detail. It is sufficient to say that on the sixth issue he found that, assuming the appellant's mortgages to be valid, there was a substantial sum due to him thereunder which would be properly payable out of the testator's estate. He made no finding upon the fifth issue which raised a question of law rather than one of fact. It was the question whether in view of the provisions of S. 307 of the Indian Succession Act the executors had power to mortgage the houses of their testator. He thought that this question could not properly be answered until the question of the validity of the plaintiff's own mortgage had been settled.

The hearing of the appeal before Ramesam and Cornish JJ. was resumed on the 26th July, 1935. They evidently thought that the findings of Anantakrishna Ayyar J. were sufficient to establish the right of the appellant to be heard upon the appeal, for they proceeded to consider the question of whether the collateral security bond of the 2nd June, 1919, required registration. Differing from the Chief Justice upon the point they decided that it did, and that the plaintiff's suit so far as it sought to enforce a charge upon No. 60 was not maintainable. The plaintiff, however, was by virtue of the promissory note an unsecured creditor of the testator's estate for so much of the Rs.12,000 as still remained owing together with arrears of interest and was entitled to a simple money decree against the executors for that amount. But the appellant was not a proper party to a suit for such a decree. The suit against him should therefore have been dismissed with costs. When once it had been decided that the plaintiff was merely an unsecured creditor of the testator, the question of the validity or other-

wise of the appellant's mortgages could not by any possibility be an issue in the suit. It would only arise for determination if and when the plaintiff should seek to enforce her decree in execution against No. 60. (It should be mentioned here that No. 68 had long since been sold in proceedings instituted by a person who held a mortgage on that house granted by the testator.)

The learned judges nevertheless proceeded to discuss the question at some length, and eventually arrived at the conclusion that the mortgages were beyond the competence of the executors and were accordingly invalid as between the appellant on the one hand and the plaintiff and the rest of the unsecured creditors of the testator on the other; but that the mortgages were valid as between the appellant and the executors, by which the learned judges meant, as will presently appear, that it was valid as between the appellant and the persons interested in the testator's estate other than the creditors. They also held that the appellant was entitled to stand in the shoes of the unsecured creditors whose debts had been paid off out of the moneys advanced by him on the security of his two mortgages. Having arrived at these conclusions and having ascertained that the amount remaining due to the appellant on the footing just mentioned was Rs.Y, and that of the total amount advanced by him under his mortgages there still remained due for principal and interest the sum of Rs.X, and that the sum due to the plaintiff on the promissory note for principal and interest was Rs.18,985.6.4, the learned judges gave effect to their several findings in a decree dated the 26th July, 1935. Stated shortly it was to this effect: The appeal was allowed, the decree of the 6th September, 1932, was set aside and declarations were made substantially as follows:—(1) that the equitable mortgage of the 2nd June, 1919, was not valid as a mortgage as between the plaintiff and the appellant as it was not registered; (2) that the mortgage by the executors of No. 60 in favour of the appellant was not valid as a mortgage as between the plaintiff and the appellant and (3) that the plaintiff and the appellant were respectively entitled to money decrees for the debts due to them viz., Rs.18,985.6.4 to the plaintiff and Rs.X to the appellant. The decree then went on to order a sale of No. 60 and directed in effect that out of the net sale proceeds Rs.18,985.6.4 should be paid to the plaintiff and Rs.Y to the appellant, but that if any balance should be left after making such payments it should be applied in payment to the appellant of Rs.X-Y. In case of deficiency the plaintiff and the appellant were to be at liberty to apply to the court for payment of the same by the defendant executors. Finally, it was ordered that each party should pay his or their own costs of the appeal and in the court below. From this decree the appellant now appeals to His Majesty in Council.

It will be observed that the decree treats the plaintiff and the appellant as being the only creditors of the testator, the only creditors at any rate who were entitled to be paid out of the proceeds of sale of the property in suit. As to this Ramesam J. made the following observations:—

> It is necessary to mention one matter. After the whole argument was closed it was represented to us that there are other creditors who up to now have not taken any action. They are not parties to this suit. We do not think that we can adjourn this suit to enable them to be made parties at this stage. It is possible that the claims of some of them are barred. So far as the plaintiff and the fourth defendant are concerned, the form of the relief we have given practically takes the form of relief in an administration action as between them only and as if there are no other creditors. But when there are other creditors, our adjudication does not bind them. They can take separate action impleading these parties and get appropriate relief.

If it had been necessary to consider the position of the other creditors at all, and it was not, their Lordships cannot think that this was a satisfactory way of dealing with them. Nor can their Lordships think that it was proper to qualify the declaration as to the invalidity of the plaintiff's mortgage by the insertion of the words " as between the plaintiff and the fourth defendant." If the mortgage security be invalid by reason of the

failure to have it registered, it is invalid for all purposes. That it required registration must be taken to have been finally determined, there being no cross appeal by respondents 3 to 6 who now represent the estate of Rangayya Chetti in lieu of the plaintiff who has died since the decree was pronounced. It necessarily follows that the only decree that could properly have been made after a declaration of the invalidity of the mortgage was a simple money decree against the executors in favour of the plaintiff for Rs.18,985.6.4. With all respect to the learned judges it was wrong to direct a sale of the property in suit, or to make any pronouncement as to the validity or otherwise of the appellant's mortgages, or to give the appellant any relief whether as against the property or as against the executors. Whether or not the appellant will eventually obtain anything better than was given him by the decree is a question upon which it is not for their Lordships to express any opinion. He is entitled to appeal from it if he thinks fit, and to have the decree put into the proper form.

In their Lordships' opinion the appeal should be allowed, and the decree of the 26th July, 1935, should be varied as follows: there should be omitted from the first declaration the words " as between the plaintiff and the fourth defendant "; the whole of the decree subsequent to such declaration should be omitted with the exception of the order as to costs, and there should be substituted a simple money decree for payment to the plaintiff out of the property of the testator of Rs.18,985.6.4 with interest at 6 per cent. per annum from the 26th July, 1935; the order for costs should be varied by inserting after the words " each party " the words " other than the fourth defendant " and by ordering the plaintiff to pay the costs of the fourth defendant of the appeal and of the suit on the original side of the High Court, other than the costs directed by the order of the 11th May, 1933, to be paid by the fourth defendant in any event, which order is to remain unaffected.

Their Lordships will humbly advise His Majesty accordingly.

The respondents Nos. 3 to 6 will pay to the appellant such costs of this appeal as he is entitled to having regard to the fact that he is appealing *in formâ pauperis*.

(12791) Wt. 8194—7 150 7/41 D.L. G. 338

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DELIVERED BY LORD ROMER

Printed by His MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1941