Privy Council Appeal No. 9 of 1940

M.M.R.M. Chettiar Firm – – – – – – *Appellant*

v.

S.R.M.S.L. Chettiar Firm and others – – – *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD APRIL, 1941

Present at the Hearing:

LORD ATKIN
LORD THANKERTON
LORD ROMER
SIR GEORGE RANKIN
LORD JUSTICE CLAUSON

[*Delivered by* LORD THANKERTON]

This is an appeal from a decree of the High Court of Judicature at Rangoon, dated the 8th March, 1938, which varied a decree of the District Court at Thaton, dated the 27th September, 1937.

By a registered sale deed dated the 4th December, 1928, the appellant firm purchased from the first respondent firm certain lands, of which the 2nd and 3rd respondents are in possession, and in the present suit the appellant firm sues for possession. The only question in the appeal is whether the 2nd and 3rd respondents have a charge upon the lands which is valid as against the appellant firm.

On this point the only case made by the 2nd and 3rd respondents in their pleadings and the only case that was tried by the District Judge was as follows:—that they agreed in March and April, 1924, to buy the lands in suit from the first respondent, but that they found that the land in Kyagale Kwin was inferior to the lands in Ngotto Twin, and that, on their protest and after negotiation, it was agreed between them and the first respondent on the 30th May, 1924, that the sale contract should be cancelled, and that they should remain in possession of the lands until repayment of the sum of Rs.16,100 already paid by them towards the purchase price payable under the cancelled contracts, and that they should have a charge on the lands for that amount. The issues relative to this point were,

> (1) Was there a novation of contract as alleged in paragraph (6), clause (e), of the written statement of the 2nd and 3rd defendants?
>
> (2) Did the 2nd and 3rd defendants take possession of the suit lands as a result of such novation of contract?

There was thus no suggestion of anything but a contractual charge in the pleadings or at the trial, and, by his judgment dated the 27th September, 1937, the learned District Judge found that the 2nd and 3rd respondents had failed to prove the alleged agreement of the 30th May, 1924. On their appeal to the High Court, it does not appear that this finding was seriously challenged, and a completely new contention was introduced, based on section 55 (6) (*b*) of the Transfer of Property Act, which was held by the learned Judges to apply to this case, and they varied the decree for possession made by the District Court, by making the grant of possession

subject to payment to the 2nd and 3rd respondents of the balance due to them in respect of the purchase price partly paid by them, after taking into account the mesne profits of the lands.

Their Lordships find themselves unable to hold that the High Court were justified in giving effect to this new contention, and, in their Lordships' opinion, the learned Chief Justice did not do justice to the learned District Judge when he said " that neither the facts nor the principles of law were ever properly presented to the mind of the learned District Judge, who had to decide a very simple issue and allowed the matter to be complicated by elaborate references to what he described as a novation." The only case submitted to the District Judge was a simple one and it was not inaccurately described as a case of novation, vizt., the cancellation of the original contracts of sale and the substitution of the new agreement of 30th May, 1924, in their place. In the opinion of their Lordships, the learned Judges of the High Court were not justified on the failure of this simple issue, in entertaining the question of a statutory charge, as, owing to its absence from the pleadings and the issues, two important issues of fact, which were essential to its success, had not been considered.

These two questions are (*a*) whether the buyer has improperly declined to accept delivery of the property, and (*b*) whether the appellant firm, as a transferee from the seller prior to the amending Act of 1929, had " notice of the payment "; these words were taken out in 1929. It cannot be suggested that the evidence, which was directed to the somewhat inconsistent case of cancellation of the sale contracts and a new agreement, contains the material on which, with any justice, these two matters can be determined, and the view of Dunkley J. that the possession of the 2nd and 3rd respondents was sufficient notice, seems to forget that possession by a tenant is not notice of the lessor's title, unless the transferee had in fact learnt that the rents were paid to him, and the evidence, so far as it goes, suggests that the lands in suit were occupied by tenants without disclosing whether any rent was in fact paid to the 2nd and 3rd respondents, or whether, if so, the appellant was aware of it.

In these circumstances, their Lordships are of opinion that the decree of the High Court cannot stand, and that the decree of the District Judge should be restored, and they will humbly advise His Majesty accordingly. The 2nd and 3rd respondents must pay the appellant's costs of this appeal and his costs in the High Court.

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In the Privy Council

M.M.R.M. CHETTIAR FIRM

S.R.M.S.L. CHETTIAR FIRM AND OTHERS

DELIVERED BY LORD THANKERTON

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