Privy Council Appeal No. 51 *of* 1948

Valliappa Chettiar - - - - - - - - - *Appellant*

v.

J. Vander Poorten and others - - - - - - - *Respondents*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH JUNE, 1950

Present at the Hearing:

LORD PORTER
LORD OAKSEY
LORD RADCLIFFE
SIR JOHN BEAUMONT
SIR LIONEL LEACH

[*Delivered by* LORD PORTER]

This is an appeal from a decree of the Supreme Court of Ceylon, dated the 22nd August, 1946, which varied a judgment and order of the District Court of Colombo, dated the 10th March, 1944. This decree purported to give effect to the directions contained in an Order in Council, dated the 15th December, 1932, and drawn up in accordance with the judgment of the Judicial Committee of the Privy Council dated the 23rd November, 1932, in previous proceedings between the predecessors-in-title of the parties to the present appeal.

The relevant facts giving rise to the original dispute between the parties, which led to these directions, are set out in the judgment of the Board, delivered by Lord Tomlin:—

> "In the year 1923" he says "an action as to title to an estate in Ceylon, consisting of about 14,000 acres of forest land, was in progress between the Crown and certain persons who and whose successors in title will be hereafter referred to collectively as a Syndicate. The appellant is the representative of a person, now deceased, who was a member of the Syndicate in two capacities, one original, and the other derivative.
>
> "The Syndicate had expended sums to the amount of Rs. 200,000 in acquiring the estate from those whom they believed to be the owners of it. After they had done so the Crown asserted title to it, and the action in question resulted.
>
> "On the 28th March, 1923, a decree was made in the action between the Crown and the Syndicate whereby it was declared that the estate was the property of the Crown, but whereby also the Crown submitted to sell the estate to the Syndicate provided that a sum of Rs. 275,000 was deposited with the Settlement Officer within twelve months from the date of the decree.

"The Syndicate towards the end of the period allowed under the decree of the 28th March, 1923, for making the deposit, had succeeded in raising no more than Rs. 64,000 towards such deposit and the respondent, who was approached to assist the Syndicate provided at the last moment the balance, viz.: Rs. 211,000. By means of the Rs. 64,000 already raised and the money provided by the respondent the deposit was in fact made just before the time for making it expired.

"A sum of Rs. 5,160 was immediately repaid to the respondent, so that the sum actually provided by him was Rs. 205,840.

"No definite agreement appears to have been made between the Syndicate and the respondent at the time when the money was provided but the respondent then instructed his Proctor to see that he was properly protected.

"On the 29th March, 1924, after the deposit had been made, the Syndicate executed a deed which purported to be an assignment by the Syndicate to the respondent for Rs. 30,000 of the benefit of the decree of the 28th March, 1923. No sum of Rs. 30,000 was in fact paid or intended to be paid by the respondent to the Syndicate and the only purpose of this document was to give the respondent a temporary security for the money he had advanced.

"At a later date two deeds were executed, respectively dated the 2nd March, 1925, and numbered in the record 471 and 472.

"Deed No. 471 was framed as an out and out conveyance by the Syndicate to the respondent of the whole estate with the exception of a defined portion of 1,000 acres on the south-eastern side thereof, which had apparently been otherwise disposed of, to hold unto the respondent his heirs, executors, administrators and assigns absolutely and for ever.

"Deed No. 472 was of even date with Deed No. 471. Upon its construction and effect the result of this appeal mainly depends. It was made between the respondent of the first part and the persons then constituting the Syndicate of the second and third parts, the group of persons who were of the third part being persons claiming derivative interest under original members of the Syndicate."

The operative part of the deed was in the following terms:—

"The party of the first part shall hold and stand possessed of the said lands as absolute owner and with full power and authority to manage and control the same to fell and remove and dispose of the timber therein and to put the said lands to such use as he shall think fit in his absolute discretion and to sell the said lands for the best available price with or without the timber therein such price to be in his absolute discretion provided that if the price is less than Rupees one hundred (Rs. 100) per acre he shall obtain the approval of the parties of the second part for such sale and to apply all monies realised by him in respect of the sale of such timber and of the said lands or any portion thereof in payment of such sums as shall be due and payable to him for monies advanced to the Crown for the said purchase from the Crown and moneys expended on the management control and working of the said lands as aforesaid and of such compensation or profits for himself as he shall think reasonable and equitable in his own discretion and shall pay over the balance *pro rata* according to their respective interests among the said parties of the second and third parts or their successors in title and such other person or persons as shall have a legal claim to or interest in the said lands, provided however that it shall not be obligatory on any purchaser from the party of the first part to see to the application of the purchase money by the said party of the first part in manner herein provided and receipt by him shall be a full and complete discharge to such purchaser for the payment of such purchase money."

" Possession was taken by the respondent of the property conveyed by Deed No. 471 after the execution thereof and he has since remained in possession. The respondent after going into possession admittedly cut and sold a considerable quantity of timber and alleges that he expended large sums in cultivating and improving the estate. No account of receipts or expenditure has ever been rendered by the respondent.

" On the 30th March, 1925, the Crown executed a conveyance of the estate to the Syndicate or the survivors of the original members thereof."

The judgment then referred to the fruitless efforts to sell the estate that had apparently been made and to communications between certain members of the Syndicate and the respondent as to the amount to be paid by the latter for redemption; to the fact that the amount demanded (Rs. 500,000) by the respondent being considered excessive by those seeking to redeem, the latter instituted an action in the nature of an action for breach of trust and redemption against the respondent and the other members of the Syndicate who did not join as plaintiffs, and to the fact that " before the trial of the action the respondent settled with all the members of the Syndicate except the two plaintiffs whom the appellant represents."

The judgment of the Board next referred to the pleadings of the parties in which the then plaintiff had declared himself as willing to redeem upon the footing that the amount due to the respondent was the aggregate total of the sum advanced, money expended, interest at 9 per centum per annum to date of the plaint and a sum of Rs. 25,000 for reasonable compensation and profit for the respondent's services, such aggregate total amounting, apart from expenditure, to Rs. 274,090; to the judgment of the District Judge, dated the 19th July, 1929, in which it was held that the respondent was liable to re-convey the estate if called upon to do so and upon being paid the money due to him, and to re-transfer the shares of the two plaintiffs whom the then appellant represented; and to the fact that an appeal from the said decision of the District Judge was allowed by the Supreme Court which, by its Judgment and decree, dated the 10th March, 1930, dismissed the action.

The judgment proceeded to give reasons for their Lordships' conclusions that the transaction effected by the two deeds was " the creation of a security for money advanced which in certain events imposed upon the respondent, who was the creditor, duties and obligations in the nature of trusts," that " nothing in Deed No. 472 can preclude the debtors from at any time redeeming the mortgaged property," but " the fact that the respondent settled with all the debtors except one cannot put that one in a worse position," and that " the appellant, as representing the persons with whom no settlement was made is entitled to redeem his shares on payment of his rateable proportion of the total amount due to the respondent." The judgment of the Board then continued as follows:—

" In ascertaining the amount due their Lordships think that no regard should be had to the provision of Deed No. 472 as to 'compensation or profits.' That provision is expressed to operate only in the event which has not happened of the respondent exercising his power of sale.

" It is, however, right that reasonable interest should be allowed on moneys advanced or expended.

" Bearing these considerations in mind, their Lordships think that the appeal should be allowed and that the decree below be discharged " subject to an exception immaterial to the present appeal.

" Their Lordships do not, however, think that the decree of the District Judge should be restored, but that a decree should be framed providing for the following matters. . . . "

These matters so far as relevant to this appeal were set out in the Order in Council drawn up to give effect to their Lordships' decision. It runs as follows:—

"(4) That the appeal ought to be remitted to the Supreme Court of the Island of Ceylon in order that a Decree should be framed providing for the following matters:—

"(*a*) a declaration that upon the true construction of Deeds Nos. 471 and 472 and in the events which have happened the appellant is entitled to redeem upon the terms hereinafter appearing the shares of the deceased person whom he represents in the property conveyed by Deed No. 471;

"(*b*) a direction for the taking of the following enquiry and accounts—

"(i) an enquiry as to the amount of the shares in the property in question of the person whom the appellant represents;

"(ii) an account of what is due to the respondent for principal monies advanced to provide the deposit under the decree of the 28th day of March, 1923, and for monies properly expended by him in the management and control of the property together with interest at such rate as the Court shall deem reasonable upon the monies advanced or expended from the respective dates of such advance or expenditure to the date of decree;

"(iii) an account of rent and profits (including proceeds of sale of timber and other produce) of the property received by the respondent or by any other person or persons by the order or for the use of the respondent or which without the wilful default of the respondent might have been so received, with interest at such rate as aforesaid upon such rents and profits from the respective dates of receipt to the date of decree; and

"(iv) an account of the costs payable to the appellant by the respondent under their Lordships' report as to payment of costs hereinafter contained and remaining unpaid;

"(*c*) a direction that the amounts certified under account (iii) ought to be deducted from the amount certified under account (ii) and that upon payment by the appellant to the respondent of the proportionate part of the balance so found corresponding with the shares which shall be certified under enquiry (i) to be the shares in the property of the person whom the appellant represents less any costs payable to the appellant under account (iv) remaining unpaid, the respondent shall re-convey to the appellant the shares in the property of such persons; and

"(*d*) such other directions as the Court may deem necessary or appropriate for working out the decree;"

Following the remittal of the appeal to the Supreme Court for the above-mentioned purpose that Court by an Order directed the District Court of Colombo to hold the enquiry and to take accounts in accordance with the directions of the Board.

The enquiry was accordingly held and accounts taken in the District Court, the present appellant being substituted for the previous representative of the 3rd and 5th plaintiffs, and the present respondents for the defendant No. 1, since deceased.

After holding the enquiry the District Judge published his award from which an appeal by the present appellant to the Supreme Court was dismissed subject to a variation in a matter not now material.

From that dismissal the present appeal has been taken to His Majesty in Council, but only two matters are now in dispute although those are of some considerable importance.

As set out above the Decree embodying the judgment of their Lordships' Board contained directions for amongst other matters an account of what was due to the 1st respondent for principal monies advanced to provide the deposit under the Decree of the 28th March, 1923, and for monies properly expended by him in the management and control of the property together with interest at such rate as the Court shall deem reasonable upon the monies advanced or expended from the respective dates of such advance or expenditure to the date of decree, and the two matters now in dispute are (1) what monies are included amongst those properly expended and (2) what rate of interest should be allowed.

As to the first question the appellant contended that their Lordships' Board having decided that the property was held by the 1st respondent as mortgagee, the principles of an English mortgage apply, that in accordance with those principles the mortgagee could not burden the property with experimental expenditure thereby imposing an increased burden on a mortgagor who wished to redeem and complained that the District Judge had allowed such expenditure in taking the accounts.

Undoubtedly the learned judge did allow such expenditure and it appears from his judgment that so far from the property profiting by them, considerable expenditure was incurred with little or no result.

If the English rule of law was a rigid one and was applicable to Ceylon the argument would be a formidable one. But in their Lordships' opinion neither premise can be accepted. In the first place a mortgagee, like any other holder of property under a deed, is subject to the terms of the deed and his rights may be enlarged or diminished by its terms. In the second place a mortgagee in Ceylon is not subject to all the underlying conceptions of English law, but is without doubt bound strictly to fulfil the terms of the deed under which he holds.

In the present case the 1st respondent's rights or powers are drawn in the widest terms. Those terms have already been quoted but special attention may be called to such expressions as " absolute owner " " full power and authority to manage and control ", " . . . and to put the said lands to such use as he shall think fit in his absolute discretion." There is power to cut timber but no obligation to replant and no sign throughout the deed that the use is to be confined to cutting or replacing timber. Rather it seems intended that in places where the timber has been cut or in places where no timber exists the use and cultivation should be wholly within this respondent's direction.

Moreover the primary object appears to be the realisation of the money expended by selling the property and that result might well have been achieved and perhaps only could be achieved by putting the land to some immediate use rather than by the long term process of replanting.

" I am inclined to think " says the learned District Judge " that the parties are bound by their covenants and the plaintiffs will have to accept on the debit side all expenses properly incurred by the original first defendant in an attempt to improve the land although ultimately the land itself derived no benefit from such expenditure. It is not suggested that the original first defendant acted unwisely or extravagantly in making experimental plantations."

This, their Lordships think, not only accurately presents the Roman Dutch law of Ceylon, but is consonant with the law of England. In *Shepherd* v. *Jones* 21 Ch. D. 469, such reasonable expenditure as the nature of the estate warranted was alone permitted. But, it is added, any reasonable expenditure assented to in terms or by implication apart from the deeds must be allowed to the respondents.

It appears from the evidence that some at any rate of the respondents were aware of what was going on, i.e., that the respondent was trying a number of experimental crops in order to make the best use of the property, though there is no direct evidence of assent on the part of the appellant, but in truth the Syndicate as a whole were content to leave the management in the hands of the respondent. No doubt the result

might be that a larger sum would have to be paid on redemption than might have been chargeable if these experiments had not been made, but on the other hand, if they had been successful they would have enhanced the value of the property and might have been the only method of effecting a sale, and the parties to the deed took the risk.

In their Lordships' view the expenditure was properly allowed and the decision of the learned judge rightly approved in the Supreme Court.

The question of interest can be more shortly disposed of. The period in respect of which interest was to be allowed was during the years 1926 to 1933. During that period the interest on decrees was 9 per cent. and remained at that figure until 1944 when it was reduced to 5 per cent. The Syndicate themselves when framing their plea suggested 9 per cent. as the appropriate amount and indeed added a sum of Rs. 25,000 as compensation for the 1st respondent's services. The Money-lenders Act then in force would have allowed 15 per cent. and as the learned District Judge says no evidence was called to show that 9 per cent. was excessive. The Supreme Court thought it on the high side but recognised that the matter was for the judge's discretion and could see no reason for interfering or concluding that he had exercised it on any wrong principle. Their Lordships agree with the Supreme Court in this view.

In their opinion the learned judge and the Supreme Court came to a right conclusion on both points and they will humbly advise His Majesty to dismiss the appeal. The costs must be paid by the appellant.

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In the Privy Council

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[DELIVERED BY LORD PORTER]

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