

9/1962

Appeal No. 52 of 1960

IN THE PRIVY COUNCIL

ON APPEAL  
FROM THE SUPREME COURT OF CEYLON

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
29 MAR 1963  
25 RUSSELL SQUARE  
LONDON, W.C.1.

BETWEEN :

68178

THE BANK OF CEYLON  
JAFFNA

Plaintiff-Appellant

- and -

10 K. ARUMUGAM CHELLIAHPILLAI  
of KARAINAGAR, presently of  
Hospital Road, Jaffna

Defendant-Respondent

CASE FOR THE APPELLANT

RECORD

1. This is an appeal by the Plaintiff-Appellant (hereinafter called the Appellant) from the judgment and decree of the Supreme Court of Ceylon dated the 29th May 1959 whereby the Supreme Court dismissed with costs the Appellant's appeal from the judgment and decree of the District Court of Jaffna dated the 25th August 1955. The said decree of the District Court had dismissed the Appellant's action with costs.

p.35-p.41.  
p.42

p.26-p.30.

2. The action from which this appeal arises is a mortgage action instituted by the Appellant against the Defendant-Respondent (hereinafter called the Respondent) in the District Court of Jaffna for the recovery of a sum of Rs. 13,461/77 and further interest and for an order for the judicial sale of two lands hypothecated by the Mortgage bond sued upon (Bond No. 3427 dated 20th February 1952) in the event of the Respondent's failure to pay the said sum forthwith.

p.11-p.13.

RECORD

3. The relevant facts may be briefly summarised :-

- p.52,1.1-  
p.58,1.15.
- (a) The Appellant is a commercial Bank and the Respondent borrowed from the Appellant at its Jaffna Branch the sum of Rs. 20,000 and executed a Mortgage Bond No. 208 dated the 27th February 1951 to secure the repayment of the said sum together with interest at 6%. The security given under the said bond was a motor lorry and the stock in trade in a shop belonging to the Respondent. 10
- p.59-p.62.
- (b) On the 20th February 1952, the Respondent executed the Mortgage Bond sued upon (Bond No. 3427) by way of further and additional security for the due payment together with interest at 6% of the sum of Rs. 14,792/61 acknowledged by the Respondent as still owing and payable to the Appellant at that date. The security given by this bond was the hypothecation of two lands belonging to the Respondent.
- p.66, 1.15  
p.67, 11.11-15.
- (c) In execution of a money decree obtained by an unsecured creditor of the Respondent, the lorry No. CL 5172 hypothecated by Bond No. 208 was seized by the Fiscal and sold subject to the said mortgage. 20
- p.14-p.15.
4. The Respondent contested the Appellant's action and in his answer dated the 6th May 1954 prayed for the dismissal of the Appellant's action upon the following grounds :
- p.14, 11.30-32. (a) that no claim for the payment of any sum of money could be made on the bond sued upon; 30
- p.15, 11.10-14. (b) that the Appellant could not maintain the present action without seeking to enforce the hypothecation contained in the earlier bond No. 208;
- p.15, 11.15-24. (c) that the hypothecary charge created by Bond No. 3427 was discharged by the operation of law because the said bond was executed as further and additional security and the Appellant had allowed a judgment creditor in an action against the Respondent to sell the Respondent's lorry No. CL 5172 in execution proceedings. 40
- p.26, 1.19-  
p.27, 1.12  
p.29, 11.8-21.
5. The learned District Judge having answered the issues tried in the case in the manner set out below, dismissed the Appellant's action with costs :-

- (1) What amount is due to the Plaintiff Bank on the bond obligatory referred to in paragraph 3 of the plant?

ANSWER: Nil

- (2) Is any money due to the Plaintiff on Bond No. 3427 of 20.2.1952 sued upon in this case?

ANSWER: No.

- 10 (3) Did the Defendant, by the said Bond No. 3427, give further and additional security for the repayment of the sum of Rs. 14,792/61 with interest at six per cent per annum, which is due to the Plaintiff on Bond No. 208 of 27.2.51?

ANSWER: Yes

- (4) If so, can any claim for the recovery of money be made on the said Bond No. 3427?

ANSWER: No

- (5) If not, is the Plaintiff's action maintainable?

ANSWER: No

- 20 (6) Did the Defendant by Bond No. 208 of 27.2.1951 agree to pay Rs. 20,000/- and interest thereon and as security for the payment thereof hypothecated the stock-in-trade lying at No. 108 Hospital Road, Jaffna, and lorry No. CL 5172?

ANSWER: Yes

- (7) If so, can the Plaintiff maintain this action without seeking to enforce the hypothecation contained in the said Bond No. 208?

ANSWER: Yes

- 30 (8) Was lorry No. CL 5172 seized and sold in case No. 22280/M D. C. Colombo subject to mortgage in favour of the Plaintiff Bank?

ANSWER: Yes

- (9) Has the Plaintiff Bank failed to receive the money due from the purchaser at the said sale?

ANSWER: Yes

RECORD

(10) Was the said lorry delivered to the purchaser at the said sale with the consent and approval of the Plaintiff Bank?

ANSWER:Yes

(11) If any of the issues (8) (9) (10) is answered in the affirmative, have the said Bond No. 208 and the hypothecary Bond No. 3427 been discharged in law?

ANSWER:No

(12) If so, is the Plaintiff's action maintainable? 10

ANSWER:Does not arise.

p.35-p.41. 6. The Appellant appealed, and by its judgment dated the 29th May 1959 the Supreme Court (Basnayake, C.J. and Sansoni, J.) dismissed the appeal with costs.

7. Basnayake, C.J. held :-

p.38,11.18-23. (a) that the Mortgage Bond sued upon (Bond 3427) created no obligation to pay money; and

p.38,11.27-33. (b) that the Appellant had not pleaded the Bond  
p.41,11.29-33. No. 208 and that the action was therefore failed.

8. It is respectfully submitted that the judgment of the Supreme Court is wrong because it is based upon a fundamental error in regard to the law of mortgage. It is not essential for the valid creation of a mortgage that the primary obligation which the mortgage secures should itself be created by the instrument of hypothecation. The legal effect of the Mortgage Bond sued upon was to hypothecate the two properties as security for the sum acknowledged by the Respondent as being still due. The Appellant had two separate mortgages to secure the repayment of the same debt and he had the option to choose which of them he would first seek to enforce. 20 30

9. The Appellant humbly submits that the appeal should be allowed with costs throughout and that judgment should be entered as prayed for in the Appellant's plaint for the following among other

R E A S O N S :

1. BECAUSE the judgments in the Courts below have wrongly decided that the Appellant by suing on

Mortgage Bond No. 3427 was not entitled to a hypothecary decree for the judicial sale of the lands hypothecated thereunder.

2. BECAUSE the Appellant had exercised the option to seek a judicial sale of the properties hypothecated by Bond No. 3427 and was, therefore, under no obligation to institute proceedings in the first instance for the enforcement of the security available to the Appellant under the earlier Bond No. 208.
3. BECAUSE the learned District Judge was right in answering issue 11 in favour of the Appellant.

WALTER JAYAWARDENA

E. F. N. GRATIAEN.