

9/11/62

IN THE PRIVY COUNCIL

No. 52 of 1960

ON APPEAL FROM
THE SUPREME COURT OF THE ISLAND OF CEYLON

B E T W E E N:

THE BANK OF CEYLON, Jaffna
(Plaintiff) Appellant

- and -

KANDAR ARUMUGAM CHELLIAHPILLAI
(Defendant) Respondent

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

68177

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CASE FOR THE RESPONDENT

Record

- 1. This is an appeal, by leave of that Court, from a Judgment of the Supreme Court of Ceylon, delivered on the 29th day of May 1959, and the Order of the same date made pursuant thereto, dismissing an appeal from the Judgment and Order of the District Court of Jaffna itself dismissing the Appellant's action claiming payment of a certain sum of money and interest thereon and the carrying into effect by means of a Judicial Sale of a certain Mortgage Bond bearing Number 3427 and dated the 20th day of February, 1952. p.49.
pp.35-41.
- 2. There has at no stage been any serious dispute as to the facts, and no question thereon arises in this appeal. p.42.
pp.26-30.
pp.12-13.
- 3. By a Bond No. 208, dated the 27th day of February, 1951, the Respondent mortgaged and hypothecated to the Appellant the property described in the Schedule thereto to secure repayment of the sum of Rs. 20,000 and interest as therein mentioned. The mortgaged property as described in the Schedule consisted chiefly of stock in trade situated at No. 108 Hospital Road in Jaffna aforesaid. A further part of the property so mortgaged was a Chevrolet Lorry bearing registration number CL.5172. pp.52-58.
p.59, 11.31-32.

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pp.59-62.

4. The Deed No. 3427 upon which the Appellant sued in this action was entered into by the Respondent on the 20th day of February, 1952. After reciting the said Bond or obligation No. 208, and that the mortgaged property included the stock in trade lying at No. 108 Hospital Road, Jaffna and the said Chevrolet Lorry, and that there was still owing and payable by the Respondent the sum of Rs. 14,792.61 with interest thereon from the date thereof until payment in full, the operative part of the Deed provided that the Respondent by way of further and additional security for the due payment of the said sum of Rs. 14,792.61 and interest specially mortgaged and hypothecated to the Appellant the lands more fully described in the Schedule thereto, and all the estate right title interest property claim and demand whatsoever of the Respondent of in to upon and out of the same. The Schedule contained descriptions of two parcels of land (hereinafter called "the said lands").

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p.68.
p.27, 11.4-7
p.29, 11.17-18.

5. On the 29th day of July 1953, the said Chevrolet Lorry was seized in execution under a Writ issued in D.C. Colombo Case No. 22280/M, and the Respondent's equity of redemption therein was sold. The Appellant to the prejudice of the Respondent wrongfully consented to the delivery of this lorry to the purchaser of such equity of redemption without taking any steps to secure payment of the monies owing upon the security thereof.

pp.11-13.

6. The present action was commenced in the District Court of Jaffna on the 8th day of October 1953. By the Plaint of the Appellant therein its constitution and the residence of the Respondent as founding jurisdiction were first set out. The Plaint then continued:-

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"3. By a bond or writing obligatory bearing No. 3427 dated 20th day of February, 1952 and attested by Navaratnarajah, Jaffna, Notary Public, executed at Jaffna aforesaid and duly registered the original whereof is filed herewith marked letter "A" and pleaded as part and parcel of this plaint, the defendant abovenamed bound himself, his heirs, executors and administrators to pay to the plaintiff Bank at Jaffna aforesaid the sum of Rs. 14,729/61 together with interest thereon at the rate of six per cent per annum to be computed from the date of

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the said bond.

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10 4. And for securing to the plaintiff Bank the repayment of all sums of money payable under and by virtue or in respect of the said bond the defendant specially mortgaged and hypothecated to and with the plaintiff Bank as a Primary mortgage free from encumbrances whatsoever the land and premises in the schedule to the said bond and in the schedule hereto fully described and all the estate, right, title, interest, property, claim and demand whatsoever of the defendant in to out of or upon the same.

20 5. Giving the defendant credit in a sum of Rs. 1,868/05 there is now due and owing to plaintiff Bank from the defendant the balance sum of Rs. 12,861/56 being principal and Rs. 600/21 being interest calculated at the rate of six per centum per annum from 1.1.53 till date hereof which sum of any part thereof the defendant has failed and neglected to pay though thereto often demanded."

7. The Plaint then concluded for the following relief:-

pp.12-13.

30 "(a) for judgment against the Defendant in the sum of Rs. 13,461/77, together with interest on the sum of Rs. 12,861/56 at the rate of six per centum per annum from the date hereof till date of decree and thereafter on the aggregate amount of the decree at five per centum per annum till payment in full and costs of suit payable forthwith

(b) that the said lands be declared specially bound and executable for the repayment of the said sum and interest and costs of suit of the footing of the said mortgage bond No. 3427

40 (c) that in the event of default being made in the payment of the said sum Rs.13,461/77 interest and costs as aforesaid the said lands be sold by public auction by the Fiscal, Northern Province, Jaffna or by any other person authorised in writing by the said Fiscal"

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and for certain consequential directions to be given to the said Fiscal.

pp.14-15.

8. The Respondent in his defence contended:-

- (a) That the Deed No. 3427 was by way of further or additional security for the payment of the money secured by Bond No. 208;
- (b) That no claim for the payment of any sum of money could be made on the said Deed No. 3427 as he had not by the said Deed No. 3427 bound himself to pay any sum of money;
- (c) That by reason of the Appellant's actions in relation to the said Lorry it abandoned or re-released the hypothecary charge created by the said Bond No. 208 and was therefore not entitled in law to enforce the additional hypothecary charge created by Deed No. 3427;
- (d) That the Appellant was not entitled to proceed to sell the said lands without proceeding to sell the said lorry and stock in trade.

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pp.16-17.

9. The issues as framed before and accepted by the District Court were as follows:-

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- (1) What amount is due to the plaintiff Bank on the bond obligatory referred to in paragraph 3 of the plaint?
- (2) Is any money due to the plaintiff on bond No. 3427 of 20.2.52 sued upon in this case?
- (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?
- (4) If so, can any claim for the recovery of money be made on the said bond No. 3427?
- (5) If not, is the plaintiff's action maintainable?
- (6) Did the defendant, by bond No. 208 of 27.2.51, agree to pay Rs.20,000/- and interest thereon and, as security for the payment thereof, hypothecate the stock-in-trade lying at 108 Hospital Road, Jaffna, and lorry No. CL.5172?

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- (7) If so, can the plaintiff maintain this action without seeking to enforce the hypothecation contained in the said bond No. 208?
- (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?
- (9) Has the plaintiff Bank failed to receive the money due from the purchaser at the said sale?
- 10 (10) Was the said lorry delivered to the purchaser at the said sale with the consent and approval of the plaintiff Bank?
- (11) If any of the issues (8) (9) and (10) is answered in the affirmative, have the said bond No. 208 and the hypothecary charges created by the said bond No. 208 and by bond No. 3427 been discharged in law?
- (12) If so, is the plaintiff's action maintainable?

20 10. By its Judgment, the District Court of Jaffna (A.E.R. Corea, A.D.J.) decided that the action was not maintainable in the form in which it was presented. The Assistant District Judge said:-

pp.26-29.

p.27, 11.19-23.

30 "A hypothecary bond is normally in two parts, viz. the promise and the security. No.3427 contains only the security. It cannot, therefore, be enforceable in law without the promise, which is contained in No. 208. It seems to me therefore that the Plaintiff's proper remedy was to sue the Defendant on No. 208 and combine No. 3427 with it in order to avail itself of the additional security I hold that the money is due not on No. 3427, but on No. 208, and that the Plaintiff's action on No. 3427 is, therefore, not maintainable."

11. The Assistant District Judge decided against the other contentions of the Respondent as set out in (c) and (d) or paragraph 8 hereof. He answered the issues which had been framed as follows:-

p.29, 11.9-20.

"(1) Nil.

(2) No.

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(3) Yes.

(4) No.

(5) No.

(6) Yes.

(7) Yes.

(8) Yes.

(9) Yes.

(10) Yes.

(11) No.

(12) Does not arise." 10

p.30.

12. From this Judgment, and the Order dismissing the action with costs framed in accordance therewith, the Appellant appealed to the Supreme Court of the Island of Ceylon. The grounds of appeal as set out in their Petition of Appeal were as follows:-

p.33, 1.17 to
p.34, 1.28.

"(a) The said judgment is contrary to law and against the weight of the evidence adduced at the trial.

(b) The learned District Judge has erred in holding that P1 (Bond No. 3427) is not enforceable in law without the promise which is contained in D7 (Bond No. 208) being embodied in the Bond P1 sued upon in this case. 20

(c) The learned District Judge has misdirected himself in regard to the nature of a mortgage and hypothecation in Roman Dutch Law and in regard to the right of a mortgagee upon a hypothecation to sue for a hypothecary decree only, as distinct from a money decree based upon a promise to pay. 30

(d) The learned District Judge has failed to give effect to or consider the provisions of the Mortgage Act of 1949 and more particularly Section 46 of that Act in relation to the facts of this case.

- 10 (e) The learned District Judge has erred in holding that the plaintiff-appellant is bound by the act of its agent in consenting to the lorry being delivered to the purchaser notwithstanding that the said agent was not authorised to do so. In any event the said matter is irrelevant and has no bearing on the rights of the plaintiff-appellant in this case, there being no duty cast upon the plaintiff-appellant in law to prevent the delivery of the said lorry to the purchaser.
- 20 (f) It is submitted that in respect of the amounts which the defendant-respondent had borrowed from the plaintiff-appellant the defendant-respondent had given two kinds of security, namely that on Bond No. 208 (D7) and Bond No. 3427 (P1) and that the plaintiff-appellant was entitled to select any of the securities given by the defendant-respondent for the purpose of recovering what was admittedly due to the plaintiff-appellant.
- 30 (g) It is submitted in law the only effective legal remedy available to the plaintiff-appellant in view of Bond No. 3427 (P1) being a mortgage of immovable property was a hypothecary action upon the said bond, and that in the circumstances this action was properly constituted and the plaintiff-appellant was entitled to judgment.
- 40 (h) In any event it is submitted that in Bond No. 3427 (P1) sued upon there was an admission by the defendant-respondent that the sum of Rs.14,792/61 was due and owing to the plaintiff-appellant and this was sufficient grounds for the plaintiff-appellant to claim repayment of the said sum in view of the fact that the defendant-respondent accepted the position that the amount was still due.
- (i) It is submitted that the Bond No. 3427 (P1) is evidence of an earlier oral promise by the defendant-respondent to pay and in the circumstances the plaintiff-appellant was entitled to maintain this action relying on such oral promise."

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p.42.

13. The Supreme Court (Basnayake, C.J. and Sansoni, J.), by its Order dated the 29th day of May, 1959, dismissed the said appeal. In his Judgment (in which Sansoni J. concurred) the learned Chief Justice said:-

pp.35-41.

p.38, 11.17-23.

"Though his answer to issue 7 is not reconciliable with his answers to the other issues, I am of opinion that the learned District Judge is right in holding that deed No. 3427 creates no obligation to pay money but only creates a hypothec and that it is deed No. 208 that creates that obligation and that the plaintiff's present action which is an action to recover money which he alleges is due on deed No. 3427 is not maintainable."

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and again:-

p.41, 11.24-33.

"The right to sue under deed No. 208 arises in default of payment upon a demand made in terms of that Deed. Deed No. 3427 does not purport to create an additional obligation to pay money. It is designed to secure the money due on deed No. 208 by obtaining additional security and preserves the rights and remedies under deed No. 208. But in the instant case the action is not on the latter deed. The plaintiff cannot by suing on deed No. 3427 obtain a decree in respect of the obligation created by deed No. 208. To obtain a decree in respect of that obligation he must sue on that deed."

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14. The Supreme Court did not in its judgment deal with the other contentions of the Respondent.

p.49.

15. The Supreme Court accordingly dismissed the Appellant's appeal. From this dismissal the present appeal is now preferred, final leave so to do having been granted by the Supreme Court on the 4th day of September 1959.

16. The Respondent humbly submits that the Judgments of the District Court of Jaffna and the Supreme Court of the Island of Ceylon were correct and that the present appeal ought to be dismissed for the following among other

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R E A S O N S

(1) BECAUSE no obligation on the part of the

Respondent to pay any money to the Appellant arises under the terms of Deed No. 3427.

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- 10 (2) BECAUSE any action to enforce payment of any sum of money by the Respondent to the Appellant could only be founded upon Bond No. 208.
- (3) BECAUSE the sole effect of Deed No. 3427 is to provide additional security for the money due under Bond No. 208.
- 10 (4) BECAUSE the allegations in the Appellant's Plaintiff insofar as the same was proved at the trial disclose no cause of action.
- (5) BECAUSE by reason of the Appellant's actions in relation to the said Lorry, the mortgage created by the said Bond No. 208 had been abandoned or released, and in consequence the Appellant is not entitled to enforce the mortgage created by the Deed No. 3427.
- 20 (6) BECAUSE the Appellant was in any event not entitled to proceed to sell the said lands without proceeding to sell the said lorry and stock in trade.
- (7) BECAUSE, for the reasons therein given, the Judgment of the Supreme Court of the Island of Ceylon was correct.
- (8) BECAUSE, for the reasons therein given, the Judgment of the District Court of Jaffna was correct.

RAYMOND WALTON.

SINHA BASNAYAKE.