

IN THE PRIVY COUNCIL

No.40 of 1970

ON APPEAL FROM

THE SUPREME COURT OF CEYLON

B E T W E E N :-

THE JUPITER CIGARETTE AND TOBACCO COMPANY LIMITED
OF LADY CATHERINE GROUP, RATMALANA
(Defendant-Respondent) APPELLANT

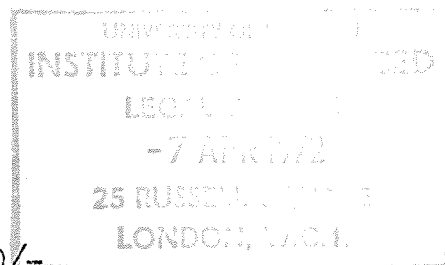
- vs. -

- 1. DR.HENNEDIGE CHARLES HENRY SOYSA of No.7
Greenlands Avenue, Havelock Town, Colombo
- 2. H. R. FERNANDO & CO., LTD., of No.131, City
Mission Building, Dam Street, Colombo 12.
- 3. CEYLON FINANCE & SECURITIES LTD., of 282
Grandpass Road, Colombo
(Plaintiffs-appellants) RESPONDENTS

C A S E FOR THE RESPONDENTS

Record

1. This is an appeal from the judgment and decree of the Supreme Court of Ceylon, dated the 20th December, 1968, allowing an appeal from the judgment and decree of the District Court of Colombo, dated 12th August, 1966, whereby in a hypothecary action instituted by the Respondents (hereinafter also referred to as "the Plaintiffs") against the Appellant (hereinafter also referred as "the Defendant Company) seeking to recover a sum of Rs.125,000/- on Mortgage Bond No.432 of the 13th August 1960, marked P1, it was held that the Plaintiffs' action should be dismissed with costs.



In allowing the appeal the Supreme Court entered judgment for the Plaintiffs as prayed for in the plaint together with costs in appeal.

2. The First Plaintiff and the Second and Third Plaintiffs-Companies instituted this hypothecary action in the District Court of Colombo against the Defendant-Company claiming a sum of

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Rs.125,000/- lent to the latter by the Plaintiffs on Mortgage Bond No.432 of the 13th August, 1960, marked P1.

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3. The Defendant-Company was formed in 1957, its principal object being to carry on the business of growers, manufacturers producers, dealers and distributors of tobacco, cigars, cigarettes and things commonly dealt with by tobacconists. The first Plaintiff was a Director of the Defendant-Company until August 1960. The Memorandum and Articles of Association of the Defendant-Company are marked D48. 10

4. Together with the first Plaintiff and certain others, Mr.E.A.P. Edirisinghe was a Director of the Defendant-Company and until August, 1960 was holding Rs.100,000/- worth of shares in the Defendant-Company.

5. As the Defendant-Company was running at a loss between 1957 and 1960, the first Plaintiff and all the other shareholders were desirous of selling shares in the Defendant-Company and Mr.E.A.P.Edirisinghe expressed a desire to make the Defendant-Company a going concern by taking over the management and to purchase the shares of the other shareholders. (Vide evidence of H.R.Fernando at page, lines 5-16 and the evidence of E.A.P.Edirisinghe at page 103 lines 17-19 page 104 lines 15-17 and line 29 to page 106 line 25.) 20

The Defendant-Company, however, required a certain amount of money so that all existing debts and liabilities would be liquidated in order to become a going concern in a solvent financial condition. 30

6. The first Plaintiff and other Directors resigned from the Board of Directors of the Defendant-Company and Mr.E.A.P.Edirisinghe purchased their shares and became the principal shareholder of the Defendant-Company on 12th August, 1960.

7. As the Defendant-Company required a certain amount of money to liquidate its debts and liabilities, the Plaintiffs agreed to loan a sum of Rs.125,000/- to the Defendant-Company. 40

8. Clause 69 and 69(a) of the Articles of Association of the Defendant-Company, marked D48, the meaning and construction of which is of the utmost importance for the purposes of this case, read thus :

10 "69. The Directors may from time to time at their discretion raise or borrow any sums of money for the purpose of the Company in such manner and upon such terms and conditions in all respects as they think fit. Provided that the Directors shall not without the sanction of a General Meeting of the Company so borrow any sum which will make the amount borrowed by the Company and then outstanding exceed the amount of the subscribed capital for the time being of the Company. Nevertheless no lender or other person dealing with the Company shall be concerned to see whether this limit is observed".

20 "69(a) The Directors may for the purpose of raising or securing the repayment of any sum or sums borrowed as aforesaid and interest thereon create and issue any bonds, perpetual or redeemable debentures or debenture stock of the Company charged upon all or any part of the property of the Company both present and future including its uncalled capital for the time being".

30 9. The subscribed capital of the Defendant-Company at this juncture was Rs.324,000/- (Vide the Annual Returns of the Defendant - Company marked P7, P6 and P8) and according to D1, which is a statement of the affairs of the Defendant-Company as at 31st May, 1960, the Defendant-Company was in debt to the extent of about Rs.122,000/-

Page 303,
291, 314
and 203

10. By Mortgage Bond No.432, marked P1, the Plaintiffs lent to the Defendant Company the total sum of Rs.125,000/-

Page 218.

The Defendant-Company in its answer, inter alia, pleaded that :-

40 (a) it denies having borrowed and received from the Plaintiffs the sums set out in the Bond P1 or any sum whatever,

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- (b) in any event (i) the alleged borrowing and/or the alleged execution of the Bond was not only for the purposes of the Defendant-Company and (ii) there was no resolution or decision in terms of the Articles of the Defendant-Company to borrow the alleged sums or for the alleged execution of the said Bond or resolution authorising the alleged borrowing or the alleged execution of the Bond, 10
- (c) for the reasons set out in (i) or (ii) above the alleged borrowing of the said sums or the alleged execution of the said Bond is ultra vires of the Defendant-Company and/or the said Bond is not binding on the Defendant-Company,
- (d) to the knowledge of each of the Plaintiffs the Defendant-Company did not borrow any sum whatsoever from the Plaintiffs or any of them and/or that the alleged borrowing or the said execution of the Bond was not for the purposes of the Defendant-Company. 20
- (e) there is a misjoinder of parties and causes of action.
11. The main points for determination in this case were and are :-
- (a) whether or not, in the circumstances of this case the borrowing on the said Bond marked P1 was in contravention of clause 69 of the Articles marked D48, namely, whether the borrowing of the sum of Rs.125,000/- was such as would make the amount borrowed by the Defendant-Company and then outstanding exceed the amount of the subscribed capital of the Defendant-Company; 30
- (b) whether or not, the sum of Rs.125,000/- was borrowed for the purposes of the Defendant-Company and so utilised;
- (c) whether or not, the Defendant-Company acquiesced in the borrowing of the sum of Rs.125,000/- on the said Bond marked P1; 40

- (d) whether or not, interest on the said Bond marked P1 was paid to the Plaintiffs by the Defendant-Company;
- (e) whether sanction of the General Meeting of the Defendant-Company was necessary for the said borrowing and/or execution of the said Bond marked P1;
- (f) whether there was a misjoinder of parties or causes of action.

10 12. The Plaint is at page 14 and the answer is at page 18 of the record.

Pages 23 and 158.

Issues framed in the action were thus answered by the learned District Judge:-

1. Did the Defendant by Bond No.432 dated 13.8.60 bind itself to pay to the Plaintiffs the respective sums therein mentioned, aggregating to Rs.125,000/- with interest at 10 per cent per annum?

Yes.

- 20 2. Did the Defendant, for further securing the payment of the said sum referred to in issue 1, mortgage to the Plaintiffs, by way of primary mortgages, the properties referred to in the said Bond and described in schedules 1 and 2 to the plaint?

Yes.

- 30 3. Did the defendant fail to pay the said sum referred to in issue 1 with interest from 13.6.62?

Yes.

4. If issues 1, 2 and 3 are answered in the affirmative are the plaintiffs entitled to :

- (a) judgment in a sum of Rs.125,000/- with interest at 10 per cent per annum from 13.6.1962?

No.

Record

(b) enforce the mortgage upon the said Bond No.432 in terms of the prayer to the plaint?

No.

5. Did the defendant by the said Bond, mortgage to the first second and third plaintiffs the property described in the Schedule to the plaint, for the repayment of the respective sums due to the first, second and third plaintiffs?

10

Does not arise.

6. Is there a misjoinder of parties and causes of action in the plaint?

Does not arise.

7. If issue 6 is answered in the affirmative, can the plaintiffs have and maintain this action?

Does not arise.

8. (a) was the alleged borrowing and/or the alleged execution of the Bond for the purpose of the defendant-company?

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Does Not arise.

(b) Was there a resolution or decision of the defendant company -

(1) to borrow the alleged sum, or

(2) for the alleged execution of the said Bond, or

(3) authorising the alleged borrowing and/or the alleged execution of the Bond?

30

No.

9. If issue 8a) and or b) be answered in the negative, was the alleged borrowing or execution of the bond ultra vires of the defendant-Company?

Yes.

6.

10. If issue 9 is answered in the affirmative can the Plaintiffs have and maintain this action? Record
No.
11. In any event are the plaintiffs entitled to the relief claimed in the plaint?
Does not arise.
- 10 13. By his judgment dated 12th August 1966 incorporating his answers to the issues framed in the action the learned District Judge of Colombo dismissed the plaintiffs' action with costs. Page 158
- 20 14. A Decree in accordance with the judgment of the learned District Judge was drawn up on the 14th of October 1966 and against the said judgment and decree the present Respondents appealed to the Supreme Court of Ceylon on grounds stated in their petition of Appeal dated 18th August 1966, which contained the usual reservation of other grounds being urged at the hearing of the Appeal. Page 161
Page 162
15. The Appeal came up for hearing before a Bench consisting of H.N.G.Fernando, C.J. and Sirimane J. who heard the arguments of both sides on the 1st, 2nd, 5th, 21st and 22nd November 1968.
- 30 16. By their judgment dated the 20th December 1968 the learned Judges of the Supreme Court allowed the Appeal with costs and set aside the judgment and decree of the District Court of Colombo and entered judgment for the Plaintiffs as prayed for in the plaint Page 166
17. Delivering the main judgment of the Supreme Court Sirimane J. (with whom H.N.G. Fernando C.J. agreed) -
- (a) referred to the indebtedness of the Defendant Company and stated:
- 40 "At the time of borrowing the Company was in debt to the extent of about RS.122,000/- according to D1, which is Page 166
Line 30

Record

a statement of affairs of the Company
as at 31.5.60"

(b) On the question of acquiescence of the
borrowing by the Defendant Company he
stated thus:-

"P9 shows that this bond had been sent to
the Registrar of Companies for registration
as an instrument creating a charge
over the Company's property as required by
section 78 of the Companies Ordinance
Chapter 145. The annual returns of the
Company for the years 1961, 1962, and 1963
sent to the Registrar of Companies (P.7,
P6, and P8) shows this sum of Rs.125,000/-
borrowed on this bond as a debt due from
this Company."

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Page 166
line 34 to
Page 167
line 3.

(c) On the question as to whether the Bond was
correctly executed by Directors properly
appointed he states thus:-

"at the time the Bond was signed E.A.P.
Edirisinghe was admittedly a Director
of the Company and his father E.A.S.
Appuhamy, before he signed as a Director
had, according to the evidence, the terms
of the Bond explained to him by his own
lawyer".

20

Page 167
lines 4
to 12

"E.A.P. Edirisinghe giving evidence on
behalf of the Defendant Company stated that
his father was a Director on 13.8.60, i.e.
the day on which the Bond was signed.
This fact was never in dispute. So that
on the face of the Bond and the defendant's
own evidence relating to its execution, P1
was a perfectly valid bond and would be
binding on the Company".

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(d) On the question as to whether the
borrowing was ultra vires of the Defendant-
Company and was in contravention of clause
69 of the Articles, Sirimane, J. says this:-

"The sum borrowed is admittedly much less
than the subscribed capital of the Company
at that time. So that there was no necessity
for a meeting or a resolution authorising
the Borrowing as long as it was done by two

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Page 167
Line 25 to
line 33.

10 Directors for the purposes of the Company. In these circumstances, I do not think it was necessary to decide, whether in fact, a meeting had been held to authorise the loan and the exact time and place of the meeting. It could not seriously be contended, that the money borrowed was not utilised for the purposes of the Company. On the contrary P1, P6, P7 and P8 referred to earlier indicate that it was so used".

(e) Sirimane further states :-

20 "As pointed out earlier under regulation 69, no resolution was necessary to empower the Directors to raise the loan, and once it was admitted that two persons, who were, in fact Directors of the Company at the time of its execution signed the Bond, I think that the Company cannot avoid liability to repay the loanEven assuming that there had been some irregularity in the appointment, the evidence (for example, P9, P6, P7 and P8) clearly shows that the Company ratified the borrowing of the loan on P1."

Page 168
line 11 to
line 24

He concluded the judgment thus :-

30 "The judgment of the learned District Judge is set aside and judgment entered for the Plaintiffs as prayed for in the plaint. The Plaintiffs are entitled to the costs of this appeal"

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18. A decree in accordance with the judgment of the Supreme Court was drawn up on 28th December, 1968, and, against the said judgment and decree, this appeal to Her Majesty in Council is now preferred, The Appellant-Company having obtained leave to appeal by two decrees of the Supreme Court dated 5th May, 1969, and 26th June 1969, respectively.

Page 169
Pages 177
& 179

40 In the Respondents' respectful submission this Appeal should be dismissed with costs throughout, for the following among

other

R E A S O N S

1. The burden was at all times on the Defendant-Company to prove that the borrowing on the Bond on marked P1 was ultra vires the powers of the Directors as being in contravention of Clause 69 of the Articles of the Defendant Company marked D48;
- 10 2. The Defendant Company has failed to prove the borrowing of the sum of Rs.125,000/- would make the total sums borrowed exceed the subscribed Capital of the Defendant Company;
- 20 3. Because the document D1 shows that at the time of the borrowing, the Company was in debt to the extent of about Rs.122,000/- so that after the loan on P1 the total amount borrowed would definitely not exceed Rs.324,000/- which was the subscribed Capital of the Company;
4. Because, since the borrowing on P1 would not exceed the total subscribed share capital, no sanction of a General Meeting was required to authorise the borrowing and/or execution of P1;
- 30 5. Because, by virtue of clause 69(a) of the Articles marked D48, Directors had the power to execute the Bond P1;
6. Because, the Defendant Company, through its Directors and shareholders ratified and acquiesced in the said borrowing according to the documents P6, P7, P8 and P9;
- 40 7. Because the Defendant-Company paid interest according to the terms and under the said Bond P1 as shown in the documents marked P13, P14, P15 to P21;
8. Because, in any event, there was

- evidence that E.A.S.Appuhamy had been a Director of the Defendant-Company on 13th August 1960 and this fact was admitted by E.A.P. Edirisinghe, the principal witness of the Defendant-Company and its Managing Director (Vide evidence at page 115 lines 10 to 20 and page 116 lines 22 to 26) who also admitted that on the same day his father E.A.S.Appuhamy became a shareholder of the Defendant Company (Vide evidence at page 116 lines 7 to 9) even though under clause 72 (f) of the Articles marked D48 a Director could qualify within two months after his election or appointment (Vide page 195 line 38 to page 196 line 10);
- 10 9. Because, the sum of Rs.125,000/- was admittedly utilised for the purposes of the Defendant-Company, namely, to pay its debts and make it a going concern;
- 20 10. Because, E.A.P.Edirisinghe had no necessity to utilise the sum borrowed to purchase shares in the Defendant Company as the document D76 and his evidence shows that he had ample money to buy these shares;
- 30 11. Because, the Defendant Company never, by way of pleadings and/or by way of issues raised the question, that E.A.S.Appuhamy was not a properly appointed Director of the Defendant Company at the time P1 was executed and because this fact was never in dispute;
- 40 12. Because, there is no misjoinder of parties or causes of action as Section 65(1) of the Mortgage Act, Chapter 89, contemplates an action of this kind;
13. Because, this action was a hypothecary action brought under the provisions of the Ceylon Mortgage Act No.6 of 1949, Chapter 89, which in Section 2

thereof defines a hypothecary action :-

"an action to obtain an order declaring the mortgaged property to be bound and executable for the payment of the monies due upon the mortgage and to enforce such payment by a judicial sale of the mortgaged property."

10 and therefore the action was indivisible;

14. Because, under the Roman Dutch Law which prevails in Ceylon a mortgage is indivisible (Vide, Appuhamy vs. Gunasekera, 19 New Law Reports at page 266 and 53 New Law Reports page 183)

0 15. Because, for the reasons aforesaid a hypothecary action can be brought by all the mortgagees in a Bond irrespective of the multiplicity of debts that have been secured under the Bond;

16. Because, the judgment of the Supreme Court in favour of the Plaintiffs was right and ought to be affirmed.

H. W. JAYAWARDENE, Q.C.

IN THE PRIVY COUNCIL

ON APPEAL FROM

THE SUPREME COURT OF CEYLON

B E T W E E N :-

THE JUPITER CIGARETTE AND TOBACCO
COMPANY LIMITED of LADY
CATHERINE GROUP, Ratmalana.
(Defendant-Respondent)
APPELLANT

- vs. -

1. DR.HENNEDIGE CHARLES HENRY
SOYSA of No.7 Greenlands Avenue,
Havelock Town,Colombo.
2. H.R.FERNANDO & CO.LTD. of No.131,
City Mission Building, Dam
Street, Colombo 12.
3. CEYLON FINANCE & SECURITIES
LIMITED of 282 Grandpass Road,
Colombo (Plaintiffs-Appellants)
RESPONDENTS

CASE FOR THE RESPONDENTS

OSWALD HICKSON COLLIER & CO.,
Cromwell House,
6/9 Surrey Street,
W.C.2.