Privy Council Appeals Nos. 108, 118, *and* 128 *of* 1913.

M. R. M. A. Subramanian Chettiar - - - *Appellant,*

v.

Rajah Rajeswara Dorai - - - *Respondent.*

M. R. M. A. Subramanian Chettiar - - - *Appellant,*

v.

Rajah Rajeswara Dorai and others - - *Respondents.*

M. R. M. A. Subramanian Chettiar - - - *Appellant,*

v.

Rajah Rajeswara Dorai and others - - *Respondents.*

(Consolidated Appeals)

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH NOVEMBER 1915.

Present at the Hearing:

VISCOUNT HALDANE. LORD WRENBURY.
LORD PARMOOR. SIR JOHN EDGE.
MR. AMEER ALI.

[Delivered by LORD PARMOOR.*]*

These are consolidated appeals from three judgments of the High Court of Judicature at Madras. The appeal which has been argued before their Lordships is one in which M. R. M. A. Subramanian Chettiar is appellant, and Rajah Rajeswara Dorai is respondent. It is unnecessary to refer further to the other two appeals since it is admitted that the decision in those

cases depends on the decision given in the case which has been argued.

The question involved in the appeal is the validity of an agreement of compromise executed on the 16th day of January 1899, and of two mortgages dated respectively the 6th July 1899 and 13th July 1899. The validity of these documents is largely dependent on the consideration whether the trustee under a voluntary settlement of 12th July 1895, had power to give a mortgage bond for 4 lakhs of rupees on the security of a suitable portion of the Ramnad estate to the then Rajah of Ramnad.

The father of the appellant lent considerable sums to the respondent's father, who at all material times was the Rajah of Ramnad. On the 12th July 1895 the Rajah owed his creditors sums of money amounting to 20 lakhs of rupees, including a sum of Rs. 1,30,000, which he owed to the appellant's father. At that date the Rajah executed a deed of voluntary settlement settling all his Ramnad Zemindary and certain other property, subject to the payment of the debts which he then owed and to certain allowances to members of the family including the Rajah himself therein directed to be made and to the several trusts, provisoes, and declarations therein contained, on the present respondent, who was a minor. The Rajah appointed as trustee Venkata Rangier, and as coadjutor P. Chentsal Rao, and it was provided that the trustee should not without the permission in writing of the coadjutor enter into any agreement with the creditors or mortgage or sell any part of the trust premises. Subsequent to the execution of the voluntary deed, the Rajah borrowed further sums from the appellant's father giving as security certain jewels and furniture and his allowance under the deed of settlement.

The sums due to the creditors had been borrowed at a high rate of interest, and the

income in the hands of the trustee was not sufficient to meet the charges on the trust estate. To save the estate, it became necessary to borrow a large sum of money at a moderate rate of interest, and negotiations were entered into between the trustee, the coadjutor, and certain financiers in England. On the 18th June 1897 a preliminary agreement was made between the trustee, Charles Augustus Verner, and Ogilvie, Gillanders, & Co., to raise for payment of the debts existing at the date of the settlement of the 12th July 1895 the sum of 160,000*l*., and the equivalent in sterling of the Government revenue for a quarter of one year, to be secured by a trust deed vesting the Ramnad Zemindary freed from all incumbrances in trustees for debenture holders. This arrangement was not completed until the 13th of June 1899, on which date the trustee, with the privity and consent of the coadjutor and the Rajah, executed a mortgage of the whole trust estate for the sum of 175,000*l*., repayable by instalments with interest at the rate of 5 per cent. The validity of this deed is not in question. Before its execution there were prolonged negotiations between the trustee and the intending lenders. Their Lordships recognise the difficulties which confronted the trustee and it was clearly of the first importance to obtain a large loan at a moderate rate of interest in order to pay off debts carrying compound interest at the rate of 12 per cent.

In the course of the negotiations for the English loan the intending lenders required that the Rajah should become a party to the deed, and that the allowances specified in the voluntary deed should be expressly postponed to their security. It is contended on behalf of the appellant that in order to obtain the assent of the Rajah, and the consent of the persons entitled to the payment of allowances, it became necessary, and was reasonable and prudent on

the part of the trustee, to agree to give a mortgage for 4 lakhs of rupees to the Rajah on the security of a suitable portion of the Ramnad estate, such security being subsequent to the mortgage given for securing the repayment of the English loan. This proposal is contained in a letter from the trustee to the Rajah on 25th April 1898, and on the same day the Rajah wrote to the agents of the intending lenders informing them that in the event of their advancing to the trustee a loan on the agreed conditions he would agree that the lenders, or their nominees, should have a first charge upon the Ramnad Zemindary, and that no part of the marginally-noted allowance payable to him under the voluntary settlement should be paid in any year until all charges, that might be payable to the lenders under the present mortgage, had been paid in full, and that he undertook to execute in favour of the lenders or their nominees such documents as in their opinion might be necessary for carrying out the arrangements. The High Court of Madras have held that assuming—without deciding—it to be within the power of the trustee to create such a charge on the trust estate, the power was not exercised properly and reasonably and in the interest of the estate. Their Lordships concur in the conclusions of the High Court. There is no satisfactory evidence that the Rajah would not have executed the English mortgage deed and consented to postpone his allowance without some payment or consideration. The Counsel for the appellant was pressed in his argument before their Lordships to refer them to the evidence in support of his proposition that the Rajah would not have assented to sign the deed and postpone his allowance without receiving payment or consideration. Their Lordships were not referred to any such evidence and the Counsel for the appellant relied on a general statement that the Rajah was a difficult

person for the trustee to influence. Apart from any payment or consideration it was in the interest of the Rajah that the intending loan should be satisfactorily arranged and, in the absence of evidence, there is no room for a presumption that he would not sign the deed, or would refuse to postpone his allowance, without some payment or consideration. On the other hand, the documents to which their Lordships have been referred do not support the contention put forward on behalf of the appellant.

The preliminary agreement for the loan was signed on 18th June 1897. On the 22nd September 1897, the coadjutor, P. Chentsal Rao, without whose assent the trustee had not the power to arrange the English loan, sent a telegram to Messrs. Lovelock and Lewes, Chartered Accountants, acting on behalf of the lenders, that:—"the Rajah consented to sign mortgage "deed and Rs. 66,000 or possibly Rs. 76,000 of "the allowances can be postponed, letter follows." A further telegram was sent on the 28th September 1897 explaining that the Rajah was willing to give a charge upon the Zemindary free of the payment of allowances of Rs. 66,000 and possibly Rs. 76,000, and that this is what the coadjutor meant by postponement. These telegrams were followed by a letter of 29th September 1897 in which the later telegram was confirmed, and the coadjutor again states, that the Rajah is quite willing to do what Messrs. Lovelock and Lewes propose, namely, to give a charge on the Zemindary free from the payment of Rs. 66,000 or possibly Rs. 76,000, out of the allowances of Rs. 1,30,000, referred to in the trust deed. The position taken up by the intending lenders on the question of the allowances is explained in a letter of 25th November 1897 which was brought to the notice of the trustee, and to which the trustee refers in a letter of 24th December 1897. It is stated that

the intending lenders are prepared to proceed with the negotiations for the loan provided that all the allowances in favour of the Rajah and the members of his family are postponed to the security to be given to the debenture holders, both as regards the current payment required for the service of the loan and also in the event of the security having to be enforced. The consent of six members of the Rajah's family was not obtained to the postponement of the allowances, but the consent of the other allowance holders was accepted as sufficient after the intending lenders had obtained an opinion from Mr. Mayne that such consent was not required having regard to the terms of the trust deed.

The material factor is that the letter written by the Rajah on 25th April 1898, after receiving the promise of a payment or consideration of Rs. 4,00 000 secured by mortgage bond on a suitable portion of the Ramnad estate, does not give any undertaking beyond that contained in the telegrams and letter of September 1897. Under these circumstances their Lordships are of opinion that the appellant has failed to prove the first step which is necessary to justify the placing of a charge of Rs. 400,000 on the trust estate.

In the second place the appellant has failed to establish that the consent of the allowance holders was required to enable the trustee to postpone their rights to the security of the debenture holders, or that the intending lenders would have pressed their objection if the legal position had been explained to them. This point was not argued at any length before their Lordships, though it was evidently a main point in the argument in the High Court. The relevant paragraphs of the voluntary settlement are 7, 23, and 24. In paragraph 23 the settlement sets out in the sixth place a trust to make payment of the allowances specified in the second schedule,

but these allowances are placed for the purpose of payment after (in the fifth place) the specified debts and the interest on and principal of such other debts and sums of money as shall be incurred or become payable by the trustee for the purpose of paying off all or any of the said debts and sums of money, although under paragraph 24 the trustee is not bound to make the payments in the order mentioned in the deed. Paragraph 7 provides that notwithstanding anything contained in the voluntary settlement, an assign for value in execution of those trusts should hold the estate or interest purporting to be conveyed or assigned to him, in the premises thereby assigned free and discharged of the trusts, provisoes, directions, and declarations therein contained, except as otherwise expressly provided in such assignment. The joint effect of Sections 7 and 23 is that the trustee had power to place the loan security for the payment of the specified debts in priority to the allowance payments and that the assign for value would hold the estate or interest conveyed or assigned to him assured free and discharged of the trusts contained in the voluntary settlement except as otherwise expressly provided.

Section 24, which provides that the trustee shall make the several payments under the voluntary settlement as and when the same shall be required, cannot be construed to curtail the discretion given to the trustee in paragraph 23. It is material to observe that the trustee in a telegram to the coadjutor on 18th March 1898, said that he and the coadjutor must point out to the London people that under the trust deed they are empowered to attend to the service of interest prior to payment of allowances. A similar opinion was expressed by Sir V. Bhasbyam Iyengar on 30th June 1898, and by Mr. Mayne on 20th September 1898. The Counsel for the appellant

justified the action of the trustee in giving consideration for the consent of the Rajah to postponement, although such consent was not legally required, on two grounds. In the first place he said that, apart from questions of strict right, the intending lenders insisted on the postponement of the specified allowances. The answer is that there is no evidence that the intending lenders would not have altered their attitude if the true legal position had been insisted on throughout the negotiations. They did alter it so far as regards six of the allowance holders, after obtaining the opinion of Mr. Mayne. In the second place it was said that, although the trustee might have had the power to postpone the payment of allowances, he was justified in his action out of regard to the position of the Rajah and his family, and his unwillingness to incur the ill-will of the Rajah and of the other allowance holders, which he might have incurred if he had used his power without their consent. Their Lordships cannot accept this explanation as justifying the trustee in placing a burden of Rs. 4,00,000 on the trust estate, or come to any other conclusion than that the trustee was not acting properly and reasonably and in the interest of the trust estate when he undertook to give the mortgage bond to that amount in favour of the Rajah.

The next question is whether the agreement of compromise of 16th January 1899, and the two mortgages of the 8th and 16th July 1899, can be supported if the promise to give the mortgage bond of Rs. 4,00,000, on the security of the trust estate is invalid as not being within the powers of the trustee. The recitals of the compromise deed recite the agreement with the Rajah to give a mortgage bond for Rs. 4,00,000, on the trust estate, thus giving the appellant full notice. Moreover the compromise deed is based, not on inposing a new charge on the trust estate,

but on utilising the charge, already promised to the Rajah. The deed carries out this proposal by providing for the payment of certain sums to the appellant so soon as the English loan is obtained, and by giving as security a third mortgage on the trust estate, a first mortgage being executed to secure the English loan, and a second to secure the loan of Rs. 1,00,000 due to another creditor. In other words the compromise deed assumes the validity of the agreement with the Rajah and there is no evidence that the trustee or the coadjutor had any intention, apart from the agreement with the Rajah, to place an additional charge in favour of the appellant on the trust estate.

The mortgage of the 6th July 1899, was executed in pursuance of the provision contained in the deed of compromise. The amount thereby secured was Rs. 4,73,143, with further interest thereon less the sum of Rs. 50,000 which the trustee agreed to pay in one week. Towards this sum the trustee paid to the appellant Rs. 20,000, and secured the balance by a mortgage on crops on the 13th July 1899. This is the second mortgage to which this appeal relates. On the second mortgage the appellant has received certain payments from the trustee and has been ordered to repay the sums to the credit of the trust estate. It is impossible that these mortgages can be regarded as valid and binding upon the properties therein comprised if the deed of compromise is not valid, and their Lordships concur in the conclusion of the High Court both as to the validity of the deed of compromise and of the two mortgages and as to the amount of the repayment ordered to be made by the appellant to the credit of the trust estate.

If on other grounds the deed of compromise could be supported, it is invalid in not complying with the condition imposed by Section 462

of the Code of Civil Procedure applicable when the compromise was made. One of the parties to the suit, the Rajah's son the first Respondent, was a minor, and the trustee of the voluntary settlement was appointed his guardian *ad litem*. Section 462 of the Code of Civil Procedure enacts "that no next friend or guardian for the suit "shall, without the Order of the Court, enter into "any agreement or compromise on behalf of a "minor, with reference to the suit in which he "acts as next friend or guardian." In the present case the leave of the Court was not obtained, and in the absence of such leave the compromise cannot be supported. Their Lordships regard the provision making it necessary to obtain the leave of the Court as of great importance to protect the interests of a minor. It clearly applies to the compromise in question in the present appeal. It may be well to quote the language used by Lord Macnaghten in *Manohar Lal* v. *Jadi Nath Singh* (33 I. A. 128):—

"It is not sufficient that the terms of a compromise are "before the Court. There ought to be evidence that the "attention of the Court was directly called to the fact that "a minor was a party to the compromise, and it ought to be "shown by an order on petition, or in some way not open "to doubt, that the leave of the Court was obtained."

Reference may also be made to the more recent case of *Ganesha Row* v. *Tuljaram Row* (40 I. A. 132).

In the opinion of their Lordships these appeals fail and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

M. R. M. A. SUBRAMANIAN CHETTIAR

v.

RAJAH RAJESWARA DORAI.

M. R. M. A. SUBRAMANIAN CHETTIAR

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RAJAH REJESWARA DORAI AND OTHERS.

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DELIVERED BY LORD PARMOOR.

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