

Dawson's Bank Limited - - - - - *Appellant*

v.

Maung Mya Thwin and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 9TH JUNE, 1939

Present at the Hearing :

LORD RUSSELL OF KILLOWEN
LORD ROMER
SIR LANCELOT SANDERSON
SIR GEORGE RANKIN
MR. M. R. JAYAKAR

[*Delivered by* LORD RUSSELL OF KILLOWEN]

This appeal is against a decree of the High Court of Judicature at Rangoon (dated the 12th January, 1938), which affirmed a decree of the District Court of Pyapon. It is necessary to state the relevant facts which led up to the litigation out of which this appeal arises.

In the year 1926 a mortgage deed in favour of the present appellants, Dawson's Bank Ltd. (hereinafter referred to as the Bank) was executed and registered. The persons described in the deed as mortgagors were ten in number, viz., a mother, her daughter, and the eight children of the latter. Of these eight children, four (including the three present respondents), were minors. They did not execute the deed, but it is stated therein that they were represented by their guardian. He was their eldest brother and he executed the deed.

He had no authority to bind the infants, and it is clear, and is admitted by the Bank that the mortgage deed in no way binds the respondents or affects their shares in the mortgaged properties, which consisted of nine items numbered one to nine and described in a list set out in the deed. The principal sum secured was a sum of Rs.40,000, with interest at the rate of Rs.1-4-0 *per mensem*. Neither the grandmother, nor the mother of the eight children, had any title to or interest in the mortgaged properties.

The youngest of the three respondents attained his majority some time in the year 1930.

In the autumn of the year 1935 the amount due to the Bank under the mortgage deed for principal and interest amounted to a sum exceeding Rs.54,000. The Bank was minded to enforce its security. At the same time the family who had been carrying on an electric plant and installation and lighting business (item No. 9 in the list of mortgaged properties) under a Government sanction due to expire on the 31st October, 1935, were faced with a Government requirement for improved plant involving an expenditure of some Rs.10,000 to Rs.12,000.

As the result of negotiations with the Bank three documents were prepared to which the Bank and the eight children were expressed to be parties, each dated the 8th October, 1935.

The first document, and the one more immediately relevant on this appeal, is a deed of sale, by which the eight children transferred outright to the Bank the nine mortgaged properties in satisfaction of the mortgage debt which is stated to be only Rs.50,000.

By the second document the Bank agreed (provided the Government would grant a sanction to the Bank to supply electrical energy) to purchase all additional plant required by the Government up to a limit of Rs.12,000. The Bank also agreed, subject to Government's approval, to lease the electrical business to the family for a period of five years at a rent to be fixed as therein mentioned; and further agreed that the family should (subject to Government sanction) have the right during the lease to purchase the business and the plant new and old for the sum of Rs.5,000 plus the cost of the additional plant limited to Rs.12,000.

By the third document the family was given the right, to be exercised within three years, to repurchase the other items of the mortgaged property for the sum of Rs.45,000.

The grandmother had died in 1934. The mother was made a party to these documents. These facts, however, have no bearing on this appeal.

Apparently it became impossible to carry out the provisions of the second document. The Government refused the Bank's application for a sanction, but extended the sanction to the family for a few weeks, when it lapsed. In the meanwhile the Bank was compelled to obtain compulsory registration of the deed of sale. This was obtained on the 3rd February, 1936. The Bank then proceeded, by the suit in which this appeal arises, to endeavour to get possession of the properties comprised in the sale deed.

The defendants to the suit were the mother and the eight children. A tenth defendant was added as the legal representative of the grandmother. By the plaint, dated the 9th February, 1936, the Bank claimed possession of the properties enumerated in the deed of sale. Alternatively the Bank claimed as against one defendant, who had not executed the deed of sale, specific performance, and that the shares of the others be partitioned and possession thereof delivered to the Bank. The three present respondents (defendants 6, 8

and 9), delivered a separate written statement, the relevant paragraphs of which as amended run thus:—

8. With reference to paragraph 5 of the plaint these defendants submit that they were induced by the plaintiff to execute, and executed, the alleged sale-deed without any consideration whatever on the misrepresentation of the plaintiff to the effect that they (these defendants) were legally liable to execute the same. The sale-deed is therefore null and void and of no effect as against them. They deny that they had ever agreed voluntarily to convey their interest or shares in the suit property.

10. With reference to paragraphs 7, 8 and 9 of the plaint, these defendants submit that the sale-deed, though compulsorily registered, is void *ab-initio* as against them inasmuch as they were neither mortgagors nor debtors of the plaintiff inasmuch as the alleged consideration of Rs.50,000 is the old debt due on the mortgage.

The Bank in reply denied that there was either want of consideration or misrepresentation.

The relevant issues as fixed were these:—

3. Is the plaintiff entitled to delivery of possession against defendants Nos. 1 to 9 and specific performance against defendant No. 7 as claimed in para. 11 in the plaint?

4. Is the plaintiff entitled to the alternative relief of partition and possession as claimed in para. 12 of the plaint and to permission being granted for a separate suit against defendant No. 7?

5. Is the plaintiff entitled to mesne profits as claimed in para. 13 of the plaint?

6. Is the plaintiff entitled to the alternative relief of a mortgage decree against the defendants as claimed in para. 14 of the plaint?

7. Is the mortgage and sale of the electric plant and undertaking *ab-initio* void?

8. Are not the defendants estopped from taking the defence that the transfers of the electric plant and undertaking are void?

Issues (1) and (2) are no longer material; but attention must be called to the fact that no issue was framed or directed to the allegation of misrepresentation by the Bank. It would seem to have been abandoned at the trial. The District Judge does not mention it in his judgment. No evidence was given of any misrepresentation, no suggestion of misrepresentation was made in the cross-examination of Mr. Dawson (the Bank's Managing Director) or of any other witness from the Bank. No one of the three respondents (to whom it was alleged that the misrepresentations were made) was called as a witness.

The District Judge was of opinion that the Bank was entitled to possession of the entirety of the electric plant, which he thought stood on a different footing from the other properties in suit, and the mortgage of which he thought was binding on the minors. This result was reached on the theory of a partnership, the manager of which could bind the partnership assets, and in which the minors had after majority elected to be or to continue to be partners. There was no appeal from this decision, so it is unnecessary to consider further the question of the electric plant. He was, however, of opinion that the mortgage of the other properties did not bind the minors, and that it followed "as a necessary corollary" that the deed of sale, founded as it was on the mortgage, was of no effect so far as concerned the shares

in the other mortgaged properties of the defendants who were minors at the date of the mortgage. By decree dated the 7th December, 1936, it was ordered and decreed:—

(1) that the plaintiff is entitled to deliver [i.e. to delivery of] possession with regard to the electrical plant in its entirety. He is, however, not entitled to specific performance;

(2) that the plaintiff is entitled to partition and separate possession of a half share only in the properties described in schedule A and B in the plaint;

(3) that the plaintiff is entitled to mesne profits of the properties decreed according to their shares.

On appeal to the High Court that decree was, on the 12th January, 1938, affirmed by Moseley and Dunkley JJ. From that decision the Bank now appeals to His Majesty in Council.

Their Lordships deem it right to point out that the decree of the District Court though affirmed, was affirmed by one Judge, in part, upon grounds which if true would reflect most seriously upon the honour of the Bank and of those responsible for the conduct of the Bank's affairs. Moseley J. in his judgment (after showing why in his opinion there was no consideration for the deed of sale moving to the respondents) in terms held that Mr. Dawson fraudulently represented to the three respondents that they were legally liable to execute the deed of sale and that their execution was procured by such fraudulent misrepresentation. This passage in the judgment of the learned Judge should, their Lordships think, to avoid misconception, be quoted in full. It is thus expressed:—

“The defence in the Written Statement of defendants 6, 8 and 9 was that their consent to the agreement was obtained by the misrepresentation of Mr. Dawson that they were legally liable to execute the deed though they received no consideration for it (paragraph 8 of the amended Written Statement). It is true that these defendants did not go into the witness-box to repeat on oath what they had stated in their Written Statements, but their word would have added little to the facts on record, and the circumstances sufficiently speak for themselves. The ages of these defendants, Nos. 6, 8 and 9, are not given in the case; but in 1926, when the mortgage deed was executed, the youngest minor must have been 14 or less, and in 1934, when the sale deed was executed, he would have been 22 years or less, and the others a year or two elder. Here was Mr. Dawson, an experienced man of affairs with whom the family had had dealings for some years, and whose word they must have trusted, advising them that they were all liable, and this misrepresentation of the law which is set out in the sale deed must presumably have been made throughout the previous negotiations in September between Mr. Dawson and some of the defendants. Certainly, at the very least they must have been encouraged to believe that they were all liable, and were therefore encouraged not to seek independent advice on the matter.

It must be held that the misrepresentation was, in law, a fraudulent one and that the minors' consent to the agreement was caused by it.

It should have been remarked that the questions of lack of consideration and misrepresentation were both intended to be covered by the issue—No. 7—as to whether the mortgage and sale were *ab initio* void.”

Their Lordships find it difficult to speak of this finding with becoming restraint, but they feel bound to state that in their opinion a grave and lamentable injustice has been done to Mr. Dawson in making against him and the Bank an imputation of fraud, as to which no issue was fixed, to which no one has ventured to testify, and which seems to rest solely upon an allegation in the written statement which contains no mention of fraud and which was not supported by any evidence.

Dunkley J. was of opinion that a conveyance by B of property to C in satisfaction of A's debt and accepted by C in satisfaction of it, is founded on good consideration; but he thought that in so acting in the present case, the three respondents acted under the mistake of law that they were bound to pay the mortgage debt and that Mr. Dawson knew that they were not so bound, and "therefore"—said the learned Judge—"the conclusion arises that the mistake of law under which the respondents executed the sale deed, namely their mistaken belief that they personally and their properties were bound by the mortgage deed, was perceived by him [Mr. Dawson] and taken advantage of by him. Under these circumstances the respondents are entitled to be relieved from the consequences of their mistake." This is a finding somewhat less offensive to Mr. Dawson than that of his colleague, but it also seems to rest upon no evidence in the case. The conclusion which is stated to arise, viz., that Mr. Dawson perceived (i.e., knew) that the respondents executed the deed of sale under a mistake of law, is matter of proof not surmise, and no evidence either of the fact or of Mr. Dawson's knowledge of it was given.

The sole question for determination is whether a deed of sale executed by persons who have attained majority, and are otherwise competent to act and dispose of their property is binding upon them, there being no evidence that they were wrongfully induced so to act. Their Lordships observe that in the judgments of the District Court and the High Court expressions occur, which indicate or suggest that the matter is being dealt with as though it rested in contract; at any rate the fact is in no way emphasised that the deed of sale is a transfer of property carried to completion by registration.

In these circumstances their Lordships will consider the matter under appeal upon the assumption that such a deed would not be binding upon a party to it in the absence of consideration moving to that party. Upon that assumption their Lordships feel no doubt that there was ample consideration for the conveyance by the respondents of their property to the Bank. The instance given by Dunkley J. covers the case, for the Bank accepted the conveyance of the respondents' property in satisfaction of the debt due to the Bank from their four elder brothers, who were thus freed from all personal liability to the Bank. Further, the conveyance of the respondents' property to the Bank obtained for those brothers an opportunity (under the third document) of recovering their property at a price lower than

the amount which was actually due under the mortgage. Other considerations might be suggested, but those stated are sufficient to establish that the three respondents are bound by the deed of sale.

Their Lordships are of opinion that the appeal should be allowed and the decree of the High Court reversed so far as it relates to the respondents. The Bank's suit against the respondents so far as not already allowed by the District Court should be decreed and the decree of the 7th December, 1936, varied by substituting the word "seven-eighths" for "half" in the paragraph numbered 2 therein. Their Lordships will humbly advise His Majesty accordingly. The respondents must pay the costs of the Bank of this appeal, and also the Bank's costs in the District Court and the High Court.

In the Privy Council

DAWSON'S BANK LIMITED

v.

MAUNG MYA THWIN AND OTHERS

DELIVERED BY LORD RUSSELL OF KILLOWEN

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