Privy Council Appeal No. 63 *of* 1943

Marudanayagam Pillai – – – – – – – – *Appellant*

v.

Manickavasakam Chettiar – – – – – – – *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH DECEMBER, 1944

Present at the Hearing:

LORD RUSSELL OF KILLOWEN
LORD MACMILLAN
LORD SIMONDS
SIR MADHAVAN NAIR
SIR JOHN BEAUMONT

[*Delivered by* SIR JOHN BEAUMONT]

This is an appeal from the judgment and order of the High Court of Judicature at Madras dated 24th September, 1941, which, on appeal, modified the judgment and order of the Subordinate Judge of Mayavaram dated 15th February, 1939.

The question in the appeal is whether a sale of immoveable property, including land in the village of Tiruvali, made in execution of a mortgage decree obtained by the respondent against the appellant's predecessor is bad as regards the said land and should be so far set aside under Order XXI Rule 90 of the Code of Civil Procedure, on the ground of material irregularity and fraud in publishing and conducting the sale.

The said mortgage was executed on the 26th January, 1925, by one Srirangathammal in respect of land in three villages, including that of Tiruvali, to secure the repayment within one year of Rs.36,000, with interest at the rate of 15 per cent. per annum. The mortgagor was the widow of the last male proprietor of the estate, holding therein the limited interest of a Hindu widow, and the appellant was the next presumptive reversioner. So far as regards the land in the village of Tiruvali and certain other lands, the mortgage was expressed to be made subject to a prior mortgage (hereinafter referred to as the " prior mortgage ") dated the 16th November, 1924, by the same mortgagor in favour of third parties, to secure repayment of Rs.44,500 and interest. The prior mortgage included lands not covered by the respondent's mortgage. In 1929, the mortgagees instituted a suit on the prior mortgage before the Subordinate Judge of Mayavaram joining the respondent as puisne mortgagee, and on the 12th August, 1929, obtained a decree for Rs.79,238.2.6 with a direction for sale if the monies were not paid by the 12th February, 1930. The realisations under this decree will be mentioned later.

In 1930, the respondent instituted a suit before the same Subordinate Judge on his mortgage, and on the 7th October, 1930, obtained a preliminary decree for Rs.66,778.11.9, and on the 27th July, 1931, a final decree. In 1931, in a suit instituted by the appellant as next reversioner against the said Srirangathammal for an injunction to restrain her from committing waste, a receiver was appointed for the estate, and on the 7th April,

1931, he was added as a defendant in the suit on the prior mortgage, and on the 27th July he was added as a defendant in the suit on the respondent's mortgage. On 15th December, 1931, the respondent applied, under Rule 66 (2) of Order XXI for execution of his decree and he annexed to his application a draft proclamation which directed that the sale should be subject to the mortgage decree obtained on the prior mortgage, and contained this statement:—" A low valuation is made as there is a prior charge of about Rs.80,000, according to the said decree in respect of the aforesaid properties ". The value put upon the properties by the respondent amounted to Rs.7,317. In May, 1932, Srirangathammal died, and the appellant was added as a defendant in the respondent's suit, the receiver having been previously discharged. On the 13th September, 1932, the appellant, by his pleader, adopted the answer which had been put in by the receiver in the respondent's suit and which had challenged the respondent's draft proclamation, and the appellant agreed to put in a draft sale proclamation in the way in which he would have it, and the matter was then adjourned until 6th October, 1932. On the 6th October the appellant's pleader asked for an adjournment, and on its refusal stated that he had no instructions to proceed with the matter. No draft proclamation was put in by the appellant, and the Court thereupon approved the draft proclamation put in by the respondent, and adopted the respondent's valuation as the upset price. On the 2nd November, the Court directed that the sale should take place on the 19th December. On the 25th October, the appellant had made an application alleging that the widow mortgagor had no power to bind the reversion and that accordingly the decree for sale on the respondent's mortgage could not affect the interest of the appellant, and on the 16th December the appellant applied for an adjournment of the sale until this point had been determined. The Subordinate Judge thereupon adjourned the sale to the 23rd January, 1933, the defendant waiving a fresh proclamation. In the absence of such waiver the appellant would have been entitled to insist upon a fresh proclamation under Rule 69 of Order XXI. Further adjournments were obtained at the instance of the appellant, who on each occasion waived a fresh proclamation, and the sale ultimately took place on the 28th March, 1933. At the sale the respondent, the decree holder, who had obtained leave to bid under Rule 72 Order XXI, was the only bidder, and he purchased at Rs.16 above the upset price. From the judgment of the learned Subordinate Judge, it appears that after the sale the prior mortgagee sold certain land subject to the respondent's mortgage for some Rs.10,000 and that the respondent paid to him a further sum of Rs.1,000 balance due on the prior mortgage. In the result the respondent acquired free from incumbrances and at a price rather less than Rs.20,000 property which he had valued at Rs.7,317 subject to a mortgage for Rs.80,000.

The position under the prior mortgage appears from exhibit M.M. which is the suit register in the Subordinate Court of Mayavaram of the prior mortgage suit. It appears that in January, 1931, the receiver paid into Court Rs.3,000, and in September a further Rs.20,000 and these sums had been paid out to the decree holder prior to December, 1931. In June, 1932, sales were effected in the prior mortgage suit and sums amounting to Rs.30,444 were paid into Court and these sums were paid out to the decree holder in July and August, 1932. In November and December, 1932, there were further sales for sums amounting approximately to Rs.16,000, and this sum was paid out to the decree holder by the 4th March, 1933. The position therefore is that at the time when the draft proclamation was submitted by the respondent the sum of approximately Rs.80,000 mentioned therein as due on the prior mortgage (which was correct as the sum originally due) had been reduced by a sum of Rs.23,000. At the date when the proclamation was approved, namely, 6th October, 1932, the sum had been reduced by a further Rs.30,444; and at the date of the sale the sum had been reduced by a further Rs.16,000, making a total reduction of Rs.69,000.

On the 19th June, 1933, the appellant applied under Rule 90 of Order XXI to set aside the sale on the ground of material irregularity or fraud in

publishing or conducting it. The learned Subordinate Judge came to the conclusion that the sum of Rs.80,000 mentioned in the proclamation as the amount due on the prior mortgage was wrong at the respective dates of presenting and settling the proclamation, and of the sale for the reasons hereinbefore stated, and that had the Court known the true facts the upset prices would have been fixed at a much higher figure, and that the appellant had been seriously prejudiced by the mistake in the proclamation. He stated that he was not prepared to hold that the respondent had been guilty of fraud in mis-stating the amount due on the prior mortgage, though he considered the case to be one of grave suspicion. He held further that there was nothing to show that the appellant was aware of the payments into Court in the prior mortgage suit.

On appeal the High Court held that there was no material irregularity in the proclamation which had prejudiced the appellant. They took the view that the only mistake in the proclamation at the time when it was presented and approved by the Court was that the figure of Rs.80,000 should have been Rs.67,000. They considered that the further payments into Court beyond the Rs.23,000 must have been made in respect of sales which were challenged and the payments out must have been on some form of undertaking that the amount would be refunded if the sales were eventually set aside. Their Lordships can find nothing on the record to justify these conjectures, and the further evidence read before their Lordships on behalf of the appellant, without objection from the respondent, consisting of affidavits made in the prior mortgage suit in relation to the payments out, makes it abundantly clear that these payments were only made after the sales had been confirmed. The whole basis of the High Court's judgment therefore fails, and the reasoning has not been relied upon by Counsel for the respondent. The learned Judges did not think it necessary to consider the evidence as to the state of knowledge of the parties.

The respondent based his case on waiver by the appellant, contending that the appellant must have known about the sales of his own property in the prior mortgage suit, and about the disposal of the purchase monies; that accordingly when he waived his right to a fresh proclamation he must be taken to have accepted the statements in the existing proclamation and to have waived his right to object to them, and reliance was placed upon the decisions of this Board in *Girdhari Singh* v. *Hurdeo Narain Singh* 3 I.A. 230 and in *Arunachellam Chetti* v. *Arunachellam Chetti* 15 I.A. 171.

The efficacy of a plea of waiver by the appellant depends on the ability of the respondent to prove that the appellant knew the true facts from which an intention on his part to waive his right to object to a misstatement in the proclamation can be inferred. Their Lordships appreciate that there are reasons for suspecting that the appellant may have known more about the dealings with his property in the prior mortgage suit than he was prepared to admit, but they think that there are reasons at least equally cogent for suspecting that the respondent was in like case. The respondent was a party to the prior mortgage suit; he was presumably served with notice of the execution proceedings, and he was interested in seeing that the direction which the Court had given that property subject to the prior mortgage which was not subject to the respondent's mortgage should be sold before that subject to the respondent's mortgage was carried out. If the respondent knew the true facts; if he purchased at what he knew was too low a figure based on an upset price accepted by the Court owing to his own initial misrepresentation and subsequent suppression of material facts, his conduct would amount to fraud on the Court, as the learned Subordinate Judge points out. The Court could not have allowed the respondent purchasing at a Court sale to take advantage of his own fraud, whatever the conduct of the appellant might have been.

However, as already noted, the learned Subordinate Judge did not find fraud against the respondent, nor did he find knowledge on the part of the appellant requisite to found a plea of waiver, and the High Court did not disagree with these findings of fact. Their Lordships think that, whatever grounds for suspicions there may be, there is no material on the

record which would justify the Board in disregarding the findings of fact by the Subordinate Judge who had seen the witnesses, including the appellant himself, in the witness box. Their Lordships therefore will dispose of the appeal on the basis that neither the appellant nor the respondent at the material dates knew the position under the prior mortgage.

Order XXI Rule 66 imposes upon the Court the duty of causing a proclamation of the intended sale to be made and requires the proclamation to be drawn up after notice to the decree holder and the judgment debtor and such proclamation must specify, as fairly and accurately as possible, amongst other things, any encumbrance to which the property is liable. In most cases no doubt the Court has no means of checking the information supplied by the parties but the Court ought, as far as practicable, to bring its mind to bear upon the contents of the proclamation; and where material is readily available to check the information supplied by the parties the Court ought to avail itself of such material. In the present case all the facts relating to the prior mortgage could have been ascertained by an inspection of the suit register on the files of the Court. When the proclamation was settled, and again when the sale took place, it might well have occurred to the officer of the Court responsible that it was unlikely that nothing had occurred in the prior mortgage suit since its inception, even if he did not recall having himself sold properties in that suit, and that it was desirable to check the figure of Rs.80,000. The power conferred upon the Court by Rule 66 (4) for summoning a witness for the purpose of ascertaining the matters to be specified in the proclamation shows that the Court is not intended to act blindly on information supplied by the parties. Their Lordships think that the Subordinate Court cannot be acquitted of a measure of carelessness in not having checked this figure of Rs.80,000 both when the proclamation was approved and when the sale subsequently took place. Apart from the duty cast upon the Court, Rule 66 sub-rule 3 provides that every application for an order for sale shall be accompanied by a statement signed and verified in the manner mentioned, and containing so far as they are known to, or can be ascertained by, the person making the verification, the matters required by sub-rule 2 to be specified in the proclamation.

It is clear that the respondent if he did not know the position in the prior mortgage suit could easily have ascertained it, seeing that he was a party to the suit, which was in the same Court. The position therefore is that this sale took place at a serious under-value occasioned by failure on the part of the Court, and of the respondent decree holder, to carry out their obligations under Rule 66, and there can be no doubt that the appellant sustained substantial injury thereby. Their Lordships are of opinion that the case falls within the language of Rule 90 and that, however dilatory and unsatisfactory the conduct of the appellant may have been, he has not on the facts found debarred himself of the right to have the sale set aside.

Their Lordships will humbly advise His Majesty that this appeal be allowed, the order of the High Court be set aside and the order of the Subordinate Judge be restored. The respondent must pay to the appellant his costs of the appeal to the High Court and of the appeal to His Majesty in Council.

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In the Privy Council

MARUDANAYAGAM PILLAI

v.

MANICKAVASAKAM CHETTIAR

DELIVERED BY SIR JOHN BEAUMONT

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