

Privy Council Appeal No. 60 of 1938

Ramanathan Chettiar - - - - - *Appellant*

v.

M. Ar. Rm. Viswanathan Chettiar - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 2ND DECEMBER, 1940

Present at the Hearing:

LORD ATKIN

LORD THANKERTON

SIR GEORGE RANKIN

[*Delivered by* LORD THANKERTON]

The appellant, who is defendant No. 2 in a suit brought by the respondent to enforce a mortgage, appeals from a decree of the High Court of Judicature at Madras dated the 20th April, 1937, which modified a decree of the Subordinate Judge of Devakottai dated the 31st July, 1930.

The mortgage in suit was executed on the 22nd December, 1916, in favour of Ekappa Chettiar by Annamalai Chettiar, who is defendant No. 1 in the present suit, "for himself and as family manager and guardian of his undivided younger brother Ramanathan," the present appellant, for the sum of Rs.5,000, on the security of certain properties belonging to the joint undivided family. The consideration was stated to have been received "by your obtaining the same and paying the same towards the debts due by our common firm at Colombo."

Chokalingham Chettiar, who had three daughters by his first wife, but no son, adopted defendant No. 1 as his son. After the death of his first wife, he married a second wife, by whom he had a son, the appellant. Chokalingham, who died in the early part of 1910 or sooner, carried on a business in Colombo. The appellant and defendant No. 1 are members of an undivided Hindu family, governed by the Mitakshara law. In 1916 defendant No. 1 was karta of the family, the appellant being then a minor.

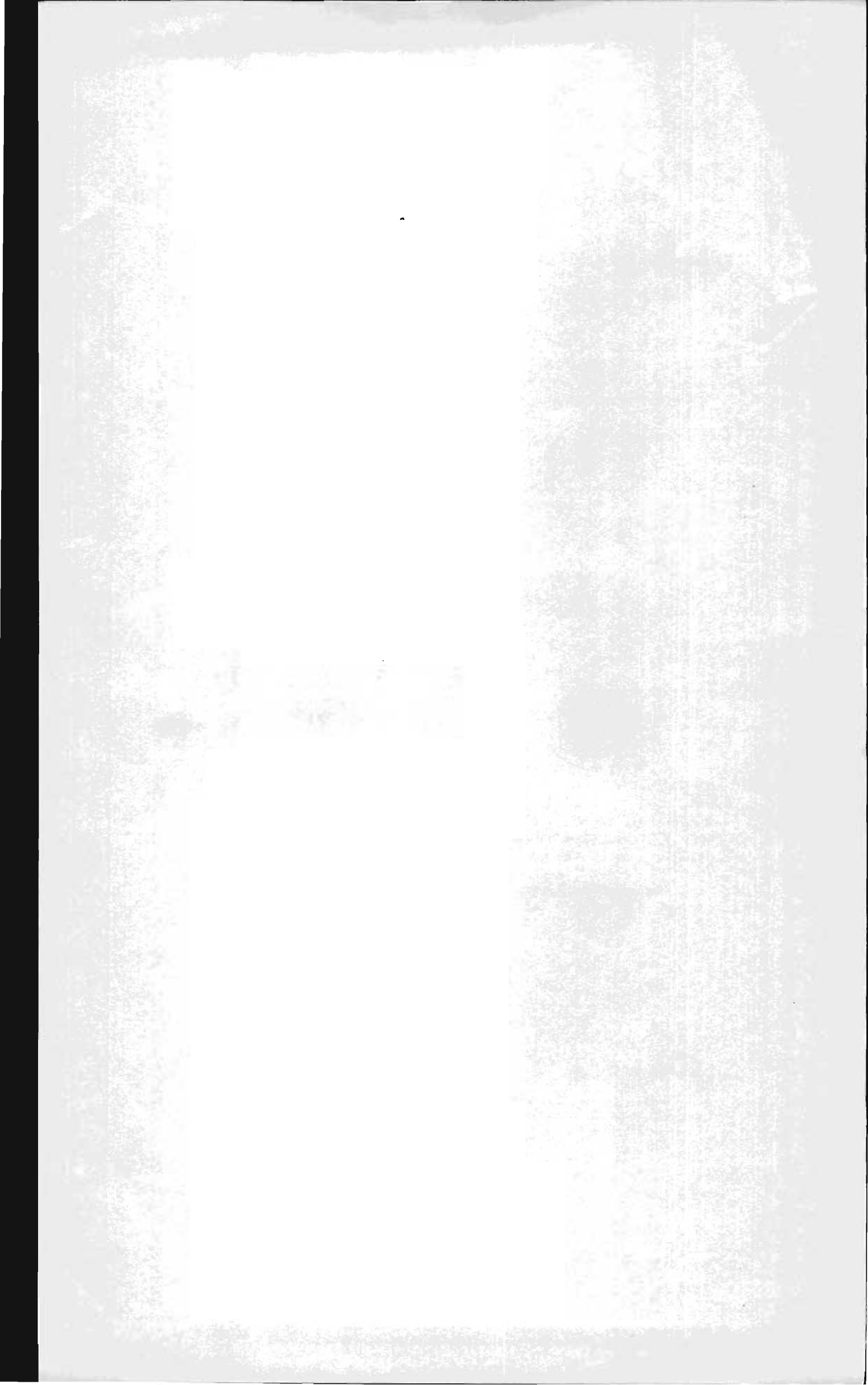
On the 3rd January, 1924, the respondent acquired for Rs.5,000 the interest of Ekappa Chettiar in the mortgage, and he brought the present suit to enforce the mortgage on the 14th March, 1927.

The only question in the appeal is whether the mortgage of 1916 is binding on the interest of the appellant in the property mortgaged. There can be no doubt that, in accordance with the principles established by this Board, the respondent, as plaintiff in the suit, is required either to show that there was necessity for the loan, or that the mortgagee made reasonable enquiry as to the

necessity for the loan and that the facts represented to him were such as, if true, would have justified the loan. The reason for the loan, as alleged in the mortgage in suit, was the discharge *pro tanto* of debts due by the family business in Colombo. This involves two questions of fact, namely, the continued existence of the family business in Colombo in 1916, and the indebtedness of such business.

In the opinion of their Lordships there is no evidence sufficient to establish—even *prima facie*—these facts, and there is no evidence of any enquiry made by the mortgagee, Ekappa Chettiar, as to the truth of the representations made to him by the mortgagor, defendant No. 1. The statements of the latter in his written statement, which were not supported in evidence, are of no value as against the appellant. The respondent relied on three documents, exhibits G, H and J, all dated the 30th July, 1910, but these are of little or no relevance; they are, if anything, more suggestive of the Colombo business having been wound up in 1910, than of its continuation as a going business after Chokalingham's death. There is literally no evidence as to the position in 1916, and their Lordships find themselves unable to agree with the construction that the High Court have placed on the written statement of the appellant. Their Lordships are unable to read the appellant's pleading as otherwise than a complete denial of both the continuance of the Colombo business and of the existence of debts of such business in 1916. Nor are their Lordships able to agree with the criticisms of the learned Judges as to the non-production of the business books. In answer to the order for discovery, the appellant filed an affidavit on the 16th November, 1927, to the effect that these documents were not, and never had been, in his possession, or under his control. On the 23rd November, 1927, defendant No. 1 filed an affidavit to the effect that the accounts had been given to the two Panchayatdars, both of whom were dead, and that he did not know in whose possession the documents were. On the 5th December, 1927, the following entry appears on the order sheet, "petition by plaintiff to direct defendants 1 and 2 to discover on oath. Statements filed may be taken to be sufficient. Petition closed." The respondent appears to have taken no further steps in the matter. The learned Judges of the High Court held that the defendants had deliberately withheld this evidence from the Court, which was peculiarly within their knowledge, and that the inference was irresistible that had it been produced, it would have been fatal to their case. Their Lordships agree with the view of the Subordinate Judge. The evidence, acquiesced in by the respondent, negatives any deliberate withholding on the part of either defendant; there is no reason why the appellant should have ever had the documents, or have known what they contained, and there is no ground for any adverse inference. There seems little doubt that, if they had not been affected by this point and the construction that they placed upon the written statement of the appellant, the learned Judges would have agreed, as their Lordships do, with the Subordinate Judge's dismissal of the suit as against the appellant.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, that the decree of the High Court so far as it relates to the appellant, should be set aside, and that the respondent should pay the appellant's costs of this appeal and in the High Court.



In the Privy Council

RAMANATHAN CHETTIAR

2.

M. Ar. Rm. VISWANATHAN CHETTIAR

DELIVERED BY LORD THANKERTON

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