

1.

14/1962

IN THE PRIVY COUNCIL

No. 71 of 1960

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N

GOVINDJI POPATLAL (Defendant)

Appellant

- and -

NATHOO VISANDJI (Plaintiff)

Respondent

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES

29 MAR 1963

25 RUSSELL SQUARE
LONDON, W.C.1.

68162

CASE FOR THE APPELLANT

Record

- 10 1. This is an appeal by the Defendant-Appellant (hereinafter called "the Appellant") from the Judgment and Order of the Court of Appeal for Eastern Africa, dated the 10th June 1960, dismissing with costs the Appellant's appeal from the Judgment and Decree of the Supreme Court of Kenya, dated the 19th December 1958, whereby the Supreme Court granted the claim of the Plaintiff-Respondent (hereinafter called "the Respondent") in a Suit filed against the Appellant. pp.56 - 66
- 20 2. The action from which this appeal arises is a mortgage Suit filed by the Respondent against the Appellant in the Supreme Court of Kenya in March 1957 to enforce a Charge alleged to have been created over a plot of land (hereinafter called "the suit property"), of which the Appellant is the registered proprietor, by the Appellant's predecessors in title. The Charge was alleged to have been executed on the 10th October 1953 by three persons who were at that time the co-proprietors of the suit property as security for a sum of Shs.200,000 borrowed by them from the Respondent. The Respondent pleaded (and this is admitted by the Appellant) that on or about the 4th October 1954 the Appellant became the sole proprietor of the suit property having derived his title from the persons alleged to have created the said Charge. pp.1 - 6
p.1, 1.33 -
p.2, 1.23
- 30 It was alleged that in breach of specific covenants p.3, 11.41-42
p.4, 11.4-23

Record

contained in the said Charge, the Appellant had failed to pay the interest due and to insure the suit property. The Respondent claimed inter alia the following reliefs: (a) an account to be taken of what was due to the Respondent, (b) the sale of the suit property in default of payment of the sum found to be due, and (c) a personal decree against the Appellant for the shortfall in case the proceeds of sale were insufficient to pay the amount found to be due.

10

p.16, 11.11-20

3. After the trial of the Suit had commenced, the Respondent obtained leave of Court to add as a party Defendant the Standard Bank of South Africa in whose favour the Respondent had created an equitable charge in August 1956 over the suit property and to amend the Plaintiff. On the 13th May 1958, the amended Plaintiff was filed naming as the Second Defendant, the Standard Bank of South Africa. In regard to the equitable charge in favour of the Bank, the Respondent pleaded that the debt for which the equitable charge was security was fully paid by the 1st January 1957, although the discharge was executed on the 20th February 1958 and registered in the Registry of Titles on the 22nd February 1958.

pp.1 - 6

p.4, 1.42 -
p.5, 1.14

20

p.7, 1.15 -
p.8, 1.40

4. In his Defence, filed on the 23rd May 1957, the Appellant pleaded, inter alia, that:

p.7, 11.26-32

(a) the so called legal charge was neither legal nor valid, nor conformed to the requirements of the law so as to create the security pleaded;

30

p.8, 11.1-8

(b) the Respondent had not taken the requisite steps to demand recover or enforce the payment of any sum claimed in the Plaintiff.

p.8, 11.15-21

(c) the Appellant had incurred no liability to pay interest, or to repay the loan alleged to have been borrowed or to insure the suit property.

p.9, 11.13-14

5. In reply to the Appellant's defence, the Respondent pleaded:

(a) that the Appellant bought the suit property subject to the legal charge;

40

p.9, 11.17-29

(b) that by reason of the fact that the transfers to the Appellant were executed with the consent of the Respondent and of the fact that the Appellant

had paid interest up to and including the 31st December 1956, the Appellant was estopped from denying his liability to fulfil the obligations referred to in the Plaint; and

(c) that the Appellant had accepted the obligations created by the legal Charge and had represented himself to be bound by it. p.9, 11.29-34

10 6. The learned trial Judge framed the following issues and having answered them in the manner indicated below gave judgment for the Respondent and granted him the reliefs sought in the Plaint except the claim for a personal decree which had been withdrawn in the course of the trial: p.14, 11.25-38
p.18, 11.29-44
p.38, 1.31 -
p.39, 1.20

Issue 1. Is the document of charge relied on by the Plaintiff validly executed and registered?

Answer: Yes.

Issue 2. Is the Plaintiff's suit maintainable?

Answer: Yes.

20 Issue 3. Is a demand for payment a condition precedent to the accrual to the Plaintiff of a right to sue?

Answer: No.

Issue 4. If the answer to the question in Issue 3 is in the affirmative, did the Plaintiff make such demand before the institution of the proceedings?

30 Answer: This Issue does not arise in view of my conclusion as to Issue 3, but I have found as a fact that the Plaintiff did make a demand for payment in writing through his Advocates prior to the institution of the proceedings.

Issue 5. Does the charge executed by the Plaintiff in favour of the Standard Bank of South Africa affect his rights in the present proceedings?

Answer: No.

Issue 6. To what relief, if any, is the Plaintiff entitled?

Answer: A decree in terms of paragraphs A, B and C of the prayer in the amended Plaint.

40 7. The Judgment of the Supreme Court (Mayers, J.) contains the following findings:

- Record
p.34, 11.1-9 (a) The Defendant through his Advocate paid interest upon the loan up to the year 1956 but has subsequently failed to pay any interest and has failed to insure the suit property against damage by fire.
- p.34, 11.28-31 (b) Clause 8 of the Charge empowered the Respondent to make demand for the repayment of the principal but cast upon him no obligation to do so before instituting proceedings.
- p.34, 11.33-45 (c) The Respondent's Advocates wrote to the Appellant alleging failure on the Appellant's part to pay interest and to keep the premises insured and demanding the repayment of the capital sum. 10
- p.35, 1.1 -
p.36, 1.29 (d) The charge is not invalid for non-compliance with the forms prescribed in section 46 of the Registration of Titles Ordinance (Chapter 160) because it is substantially in conformity with the prescribed form and is therefore protected by the express provisions in section 33 of the said Ordinance and section 36 of the Interpretation and General Provisions Ordinance (Ordinance 38 of 1956.) 20
- p.37, 11.7-28 (e) An action for enforcing a charge is in no way affected by the absence of privity which would be fatal to a claim for a personal decree. In the present case the claim for a personal decree was abandoned.
- p.37, 11.27-38 (f) Under the provisions of section 85 of the Indian Transfer of Property Act, the only necessary parties to a mortgage suit are persons having an interest in the subject matter of the mortgage. The mortgagors have wholly parted with their respective interests in the land to the Appellant. 30
- p.37, 1.39 -
p.38, 1.30 (g) The creation of the equitable charge, although giving rise to rights in the Bank against the Respondent, in no way diminished the rights of the Respondent as against the proprietor for the time being of the suit property. Moreover, as equity regards as done what ought to have been done, the Bank could not, after full payment had been made, enforce the formally undischarged equitable charge and, therefore, the equitable charge was for all practical purposes spent at the time the proceedings were commenced. 40
- pp.42 - 43 8. The Appellant appealed to the Court of Appeal

Record

for Eastern Africa and at the hearing of the Appeal obtained leave to argue a fresh ground under Issue 1, namely, that the Respondent has, despite Issue No.1 having been framed, failed to prove his case, by non-compliance with the mandatory provisions of section 68 of the Indian Evidence Act and by omitting to prove the execution or attestation of the material instrument of charge.

p.44, 11.1-44

p.45, 11.37-41

10 9. The Court of Appeal for Eastern Africa (Forbes Ag. President, Gould J.A. and Windham J.A.); by its Judgment and Order, dated the 10th June 1960, dismissed the Appellant's appeal with costs. The judgment of Windham J.A., with whom the rest of the Court agreed, dealt with the grounds of appeal as follows:

p.56, 1.10 -

p.66, 1.15

20 (a) With regard to the ground added by leave of Court, Windham J.A. took the view, with some hesitation, that the Charge upon which the Respondent based his claim would have inadmissible in evidence for non-compliance with section 68 of the Indian Evidence Act but for the special provisions contained in sections 1(2), 23 and 32 of the Registration of Titles Ordinance. In his view these provisions were inconsistent with the requirements of Section 68 of the Indian Evidence, and being provisions in a later Ordinance, prevailed. The legal effect of section 23, according to his construction of the section, was that the registration under the Ordinance of a Charge, if duly proved, 30 was conclusive of the validity of the document effecting it, including that which is prerequisite of its validity, namely, its due execution, unless the lack of execution is specifically pleaded and proved within the framework of the Ordinance.

p.60, 11.35-43

p.61, 1.17 -

p.63, 1.10

40 (b) With regard to the defence covered by the first and third grounds in the memorandum of Appeal, namely, that the action failed because the mortgagors were not made parties to the action, Windham J.A. took the view that privity of contract was not necessary in an action against the proprietor for the time being of the land charged if a personal decree is not claimed. He held that the mortgagors are not necessary parties because they did not have, at the time the proceedings were commenced, an interest in the land, the subject of the mortgage.

p.63, 1.11 -

p.64, 1.12

(c) With regard to the argument that the cause of action

Record

p.64, l.13 -
p.65, l.12

was based upon non-compliance of the covenants in the Charge by the Appellant and not by the Mortgagors, and that such a cause of action was misconceived, Windham J.A. held that it was implicit in the Plaint that the insurance had not been effected nor the interest paid at all whether by the Respondents or the mortgagors, "for if they had been paid or effected by the latter, the Respondent could not have and would not have sued at all." Further, he held that this defence was not specifically pleaded and that the Court would not allow a party to take advantage of the evasiveness of his pleadings in such a way. 10

10. It is respectfully submitted that the Judgments of the Supreme Court and of the Court of Appeal are erroneous for the following reasons:

(a) The cause of action was clearly based upon the alleged default of the Appellant of alleged contractual obligations under the terms of the Charge pleaded, and when the Appellant denied liability on that basis, the Respondent clearly understood the legal position taken up by the Appellant as is evident from the reply to the defence wherein the Respondent joined issue with the Appellant on the denial of liability and re-asserted the Appellant's liability to perform the covenants on the footing that he had accepted the terms of the Charge and that the consent given by the Respondent together with the Appellant's conduct estopped him from denying his "liability as to matters pleaded in paragraphs 3 to 11 (both inclusive) of the plaint.." 20 30

(b) The inference that the Respondent would not have brought the action if the interest had been paid could not properly be used to make up the lack of evidence on the point.

(c) There is no inconsistency between sections 1(2), 23 and 32 on the one hand and Section 68 of the Indian Evidence Act on the other such as would render the latter inoperative in regard to the proof of the Charge upon which the suit was founded. 40

(d) The mortgagors were necessary parties to the action.

11. It is respectfully submitted that this Appeal should be allowed with costs throughout for the

following among other

R E A S O N S

1. BECAUSE the cause of action on which proceedings were based was misconceived.
2. BECAUSE the action could not be maintained without the mortgagors being made parties.
3. BECAUSE the Respondent has not proved the alleged Charge upon which the proceedings were based.
- 10 4. BECAUSE the Judgments in the two Courts below are erroneous and should be reversed.

WALTER JAYAWARDENA.

IN THE PRIVY COUNCIL

No.71 of 196

ON APPEAL
FROM THE COURT OF APPEAL FOR
EASTERN AFRICA

B E T W E E N

GOVINDJI POPATLAL (Defendant)
Appellan

- and -

NATHOO VISANDJI (Plaintiff)
Responden

CASE FOR THE APPELLANT

T.L. WILSON & CO.,
6, Westminster Palace Gardens,
London, S.W.1.

Solicitors for the Appellant.