*Privy Council Appeal No.* 71 *of* 1960

**Govindji Popatlal** - - - - - - - - - *Appellant*

*v.*

**Nathoo Visandji** - - - - - - - - - *Respondent*

FROM

## THE COURT OF APPEAL FOR EASTERN AFRICA

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST MAY 1962

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*Present at the Hearing:*
LORD DENNING.
LORD MORRIS OF BORTH-Y-GEST.
LORD GUEST.
[*Delivered by* LORD GUEST]

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This is an appeal from a decision of the Court of Appeal for Eastern Africa dismissing an appeal from the Supreme Court of Kenya whereby the Supreme Court granted the claim of the plaintiff (the respondent in the appeal) in an action filed against the defendant (the appellant in the appeal).

The plaintiff filed a mortgage suit against the defendant in the Supreme Court of Kenya in March, 1957, to enforce a charge over a plot of land of which the defendant is the registered proprietor by the defendant's predecessors in title. The charge purported to have been executed on 10th October, 1953, by three persons who were at that time co-proprietors of the land as security for a sum of Shs. 200,000 borrowed by them from the plaintiff. It is admitted that as from 4th October, 1954, the defendant became sole proprietor of the land having derived his title from the persons who created the charge. The plaint alleged that in breach of specific covenants in the charge the defendant had failed to pay the interest due and to insure the property. The plaintiff claimed *inter alia* (*a*) an account of what was due to the plaintiff, (*b*) the sale of the property in default of payment of the sum found to be due, and (*c*) a personal decree against the defendant for any deficiency in the proceeds of sale, but at an early stage the plaintiff abandoned the claim to a personal decree. The Supreme Court of Kenya granted decree in terms of the claim (without the personal decree) and the Court of Appeal affirmed this decision.

A number of objections were taken before the Supreme Court in the defence to the claim, but the only issues argued before the Board related to two matters.

First, it was argued for the defendant that there was no privity of contract between the plaintiff and defendant, and the original mortgagors who borrowed the money should have been made parties to the suit. Their Lordships consider that there is no substance in this point. The claim for a personal decree against the defendant has been abandoned long since. There is therefore no claim for payment by the defendant personally but a claim for the property to be sold and out of the proceeds of sale for payment of the principal, interest and insurance premiums. The plaintiff by the failure of the defendant to fulfil the conditions of the charge has a right to foreclosure and sale. The interest and insurance premiums are secured on the property charged (Indian Transfer Act, 1882, section 72; *Ganga Ram* v. *Natha Singh* (1924) 51 L.R. Indian Appeals, 377 at page 379). The claim is therefore valid as against the property charged.

The only other point argued before the Board was a contention by the defendant that the plaintiff had failed to prove the execution or attestation of the charge upon which his claim was founded by his failure to call one attesting witness. This contention was based on section 68 of the Indian Evidence Act which is in the following terms:—

> "68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence:
>
> Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied."

It is to be observed that this point was not taken before the Supreme Court, but only arose out of an additional ground of appeal lodged on the day on which the case came on for hearing before the Court of Appeal. The Court of Appeal allowed this additional ground of appeal to be argued, but they rejected it. Their Lordships consider that they were right in so doing.

If the appellant had objected under section 68 to the admission of the charge when this document was tendered in evidence by the respondent, the learned judge would then have had to consider whether the objection was well founded. If he had sustained the objection, the respondent would then have had an opportunity of complying with the terms of section 68 by calling one of the attesting witnesses or by resort to section 69. But no objection was taken by appellant's counsel and no cross examination was directed to the respondent. The case thereafter proceeded upon the footing that the charge had been validly executed and the appellant's argument before the trial judge was principally directed to the point that the charge itself was not in proper form having regard to the terms of section 46 of the Registration of Titles Ordinance and that it could not therefore be registered. The appellant was therefore relying on the form of the charge in order to justify his objection to its validity and his argument involved the assumption that it was validly executed. This point was dealt with by the trial judge adversely to the appellant, but there is no trace in his judgment or in the arguments of counsel that the execution of the charge was ever challenged. Their Lordships consider that where a case has been conducted before the trial judge by both parties upon the footing that a document has been properly admitted in evidence, it is not open to a party on appeal to argue that owing to some defect in the proof the document ought not to have been admitted. The principles governing this matter were stated by this Board in *Gopal Das* v. *Sri Thakurji* A.I.R. (30) 1943 Privy Council 83 at page 87 "Where the objection to be taken is not that the document is in itself inadmissible, but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of Appeal and then complain for the first time of the mode of proof." The charge was not inadmissible, but could according to sections 68 and 69 be proved in a certain manner. The objection could only be to the mode of proof.

This principle was given effect to by Dawson Miller, C. J., in *Baijnath Singh* v. *Brijraj Kuar* A.I.R. 1922 Patna 514 at pages 523–4 (disapproving of an earlier case of *Shib Chandra Singha* v. *Gour Chandra Pal* (1921) 27 Calcutta Weekly Notes 134; see also *Ambar Ali* v. *Lutfe Ali* (1918) I.L.R. 45 Calcutta 160 at 167). In the whole circumstances their Lordships are satisfied having regard to the conduct of the trial the appellant must be held to have waived any objection to the admissibility of the charge.

Their Lordships however consider that the grounds upon which the Court of Appeal disposed of the appellant's argument on this aspect of the case

were well founded. Section 23 of the Registration of Titles Ordinance is in the following terms:

> "23. The duplicate certificate of title issued by the registrar to any purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon and the title of such proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party. And a certified copy of any registered instrument, signed by the registrar, and sealed with his seal of office, shall be received in evidence in the same manner as the original."

and section 32 provides as follows:—

> "32. No instrument, until registered in manner hereinbefore described, shall be effectual to pass any land or any interest therein, or render such land liable as security for the payment of money, but upon the registration of any instrument in manner hereinbefore prescribed the land specified in such instrument shall pass, or, as the case may be, shall become liable as security in manner and subject to the agreements, conditions and contingencies set forth and specified in such instrument, or by this Ordinance declared to be implied in instruments of a like nature."

It is also provided by section 1 (2) as follows:

> "1. (2) Except so far as is expressly enacted to the contrary no Ordinance in so far as it is inconsistent with this Ordinance shall apply or be deemed to apply to land whether freehold or leasehold which is under the operation of this Ordinance."

It is therefore clear, that if there is any inconsistency between the provisions of section 68 of the Indian Evidence Act and this Ordinance the latter is to prevail. In the present case the original of the charge and a certificate of title endorsed with a memorial of the charge were produced in evidence by the respondent. The certificate of title was in terms of section 23 conclusive evidence of the title of the mortgagee to the property. The charge when registered under section 32 has by section 46 the effect of a legal mortgage which transfers the property to the mortgagee leaving only an equity of redemption to the mortgagor. Upon the production of the charge and the certificate of title with the memorial of the charge endorsed thereon it became unnecessary for the respondent to comply with the terms of section 68 of the Evidence Act. In the view of their Lordships sections 23 and 32 of the Registration of Titles Ordinance superseded section 68 of the Evidence Act in regard to any requirement as to proof of the charge. Their Lordships are able to adopt without qualification this observation of Windham, J. A., in the Court of Appeal.

> "Any other conclusion would violate the general principle of the sanctity of the register, which is the foundation of all legislation based, as the Registration of Titles Ordinance is, upon the Torrens system of registration."

Their Lordships consider that for these additional reasons this ground of appeal must fail.

Their Lordships will humbly advise Her Majesty that this appeal be dismissed. The appellant must pay the respondent his costs of this appeal.

(85127) Wt. 8233/71 100 5/62 Hw.

**In the Privy Council**

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**GOVINDJI POPATLAL**

*v.*

**NATHOO VISANDJI**

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DELIVERED BY

LORD GUEST

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