Privy Council Appeal No. 10 of 1979

Chandrika Prasad s/o Guddu Lal – – – – *Appellant*

v.

Gulzara Singh s/o Hari Singh and Others – – – *Respondents*

FROM

THE FIJI COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH JULY 1981

Present at the Hearing:

LORD FRASER OF TULLYBELTON

LORD RUSSELL OF KILLOWEN

LORD SCARMAN

LORD ROSKILL

[*Delivered by* LORD RUSSELL OF KILLOWEN]

This is an appeal by the plaintiff in an action brought by him in the High Court of Fiji against a moneylender mortgagee from him (D.1), the Native Land Trust Board (D.2 " NLTB ") and the Trustees of Tabia Sanatan Dharam School Committee (D.3, D.4 and D.5 " the School Trustees ").

In brief on various grounds he contended that a lease from NLTB to him of certain land had wrongfully come into the hands of the School Trustees as registered proprietors thereof. His action was dismissed by Williams J. and his appeal was dismissed by the Court of Appeal (Gould V.P., Henry J.A. and Marsack J.A.). The plaintiff now appeals to Her Majesty in Council.

On 16th October 1967 NLTB granted provisional approval (under file No. 4/9/1135) of an application by the appellant to lease a piece of agricultural land (" the land ") of some 11 acres for 30 years from 1st July 1965. This was not the grant of a lease in law. This it could not be until registration of a lease: it was an agreement to grant a lease conditional upon certain payments and the land required survey before a registrable lease could be granted. It was the view of the courts below that this constituted an equitable lease in favour of the appellant, and their Lordships accept that view. It follows from that, of course, that any mortgage of his interest in the land could only be an equitable mortgage of that equitable interest. The terms of the provisional approval for a lease included a term that the appellant might not (*inter alia*) mortgage the lease without written approval of NLTB.

On 22nd February 1968 the appellant and D.1 executed a contract relating to the land. (The appellant denied executing it but he was disbelieved.) This was for the purposes of the Moneylenders Ordinance. The date of the loan was given as 22nd February 1968. The principal sum was described as composed of £684 under a Crop Lien Book 67 folio 1308 dated 5th July 1967: £70 under two promissory notes (described with their numbers and dates): £150 lent and advanced on 16th November 1967: £30 under a further numbered promissory note dated 14th December 1967 "(the indebtedness whereof I [*i.e.* the appellant] hereby admit and acknowledge) And in consideration of the sum of £463.9.0 this day advanced to me by [D.1] making the total advance to me in the sum of £1,397.9.0.". Rate of interest was stated as 12% per annum. By the contract the appellant, to secure the repayment of the said sum and interest, agreed to give to D.1 a mortgage to secure the repayment of the £1,397.9.0. in the form of the mortgage annexed to the contract.

The form of mortgage annexed was in the form in fact appropriate to a legal mortgage of a registered title to a legal estate in land, being taken from a form suited to the purpose in the relevant statutory provision. And indeed it recited that the appellant was the registered proprietor of the land, which he was not. This according to the courts below is quite a common practice when mortgaging a mere equitable and unregistered estate in land, and their Lordships accept this. The mortgage was plainly intended to operate then and there as an equitable charge on the equitable leasehold interest, and not only as a charge if and when, after any necessary survey, the title to the land was registered. The mortgage was noted on 21st March 1968 as approved by NLTB: see the requirement of NLTB consent to a mortgage noticed earlier.

The appellant covenanted to pay the sum of £1,397.9.0. upon demand and interest at 12% per annum. The fourth covenant expressly preserved the power of foreclosure. The sixth covenant envisaged the exercise by D.1 of a power of sale. The seventh covenant provided that the term "one calendar month" referred to in section 61 of the Land (Transfer and Registration) Ordinance (Cap. 136) shall for all the purposes of this security be reduced to "seven days". That section as is to be expected dealt with a case of a registered mortgage: it provided that in case of default by the mortgagor "continued for one month or for such other period of time as is therein [in the mortgage] expressly fixed" the mortgagee might serve notice in writing requiring the default to be remedied. Section 62 provided that if the money was payable on demand, a demand in writing serves as the section 61 notice in writing. Section 63 provided that if default continued after notice for one month, the mortgagee might sell the encumbered land. By a memorandum signed by D.1 (though not by the appellant) annexed to the mortgage, D.1 "Acknowledge and undertake" that if it became necessary to exercise the powers of sale under the provisions of section 63 that would require the prior consent in writing of NLTB as lessor of the within described Native Lease No. 4/9/1135. That notation was a file notation of NLTB: it was not a number for a registered lease.

A question in this appeal is whether D.1 had by agreement express or implicit in the construction of these documents a power to do what he later purported to do, viz: to sell the equitable leasehold interest in the land. There is no question here of D.1 purporting to sell any legal leasehold interest. Their Lordships have already observed that the form of mortgage is inappropriate in a case where the intention is to create an equitable charge over an equitable interest in land. But in their Lordships' opinion the correct inference from what was done was *not* that the mortgage was to take effect only as a legal charge (when

registered) on a legal leasehold (when granted and registered), but rather that the intention was to create a presently effective equitable charge on the equitable interest carrying with it the equivalent rights including a power of sale of that equitable interest. The exercise of that power would require consent of NLTB by virtue of the undertaking already recited—a consent which was duly given—but would not require an order of the Court: the case would be different if it was sought under an unregistered equitable charge to sell a registered legal estate.

Accordingly if there be no other valid objection D.1 had a power of sale over the equitable leasehold interest of the appellant.

D.1, with the consent of NLTB, the appellant being in default with repayment, advertised the equitable interest of the appellant in the land for tender for sale. The School Trustees successfully tendered and paid to D.1 the price. Subsequently on 8th March 1971 NLTB granted a lease of the land to the School Trustees in recognition of their acquisition under the power of sale of D.1., the land by then having apparently been fully surveyed, and that lease of the land was then registered in the names of the School Trustees. This registration conferred on them an unassailable title to the leasehold interest under the Torrens system—see section 14 of the Land (Transfer and Registration) Ordinance—unless they were proved to have been guilty of fraud or misrepresentation, which is not, or not now, suggested. This in itself disposes of any claim by the appellant to ownership or occupation of the land, subject to one other point taken for the appellant. Reference was made to, and reliance placed upon, the Agricultural Landlord and Tenant Act (Cap. 242). This legislation has as its object protection of an agricultural tenant against his landlord. It has no bearing whatever on a case such as this where an agricultural tenant has in effect dispossessed himself of his rights in the land in favour of a third party by the processes of mortgage, default and sale. Their Lordships accordingly dismiss this point.

It is now necessary to turn to other aspects of the appeal.

The first of these is the contention against D.1 that the contract of 22nd February 1968, being a moneylending contract, was vitiated in that it did not contain all the terms: it was said that it should specifically have contained reference to an earlier contract and proposed mortgage of the land dated 16th November 1967 (not in the event approved by NLTB) which were superseded by the 22nd February 1968 transactions. Their Lordships have already summarised the 22nd February 1968 documents and consider that they amply recite the existing transactions of loan.

A more difficult point arises on the pleadings—whether at the time of any transaction of loan in 1967 and 1968 D.1, admittedly a moneylender, was not licensed as such. Paragraph 7 of the Statement of Claim reads as follows:—

> "The first defendant is, and has been, at all material times, a practising moneylender within the meaning of the Moneylenders Ordinance Cap. 210, but was not duly licensed under the provisions of the same, having paid no licence fees for the year 1967 until the 9th February, 1968 and having paid fees for the year 1968 on the 4th day of March, 1968."

Paragraph 7 of the Defence of D.1 reads as follows:—

> "THAT as to paragraph (7) of the Statement of Claim he says:
>
> (*a*) that he admits that he has been a moneylender within the meaning of the Moneylenders' Ordinance Cap. 210 but says that he had entrusted the payment of the licence fees in cash for the year 1967 in 1967 to one Ram Rattan (s/o Charlie

Algu) who had fraudulently converted the said monies to his own use and that the 1st defendant did not learn about it until 1968 when he paid licence fees for the year 1968. That in the result he had to make a second payment in the year 1968.

(*b*) that except as herein expressly admitted he denies each and every allegation contained in paragraph (7) of the Statement of Claim."

Both the NLTB and the School Trustees denied paragraph 7 of the Statement of Claim.

Whether at any particular time or date a moneylender is or is not a licensed moneylender is readily discoverable from the Fiji Gazette where they are listed from time to time. No attempt was made on behalf of the appellant to show by production of copies of the Gazette that at any material time D.1 did not hold a moneylender's licence. Nor was any attempt made by that means on behalf of D.1 (who did not himself give evidence) to prove the contrary.

While it may well be said that the pleadings on this point (as between the appellant and D.1) have a degree of looseness or obscurity—as indeed also on other points—their Lordships are not satisfied that they suffice as an admission by D.1 that he was not licensed on 22nd February 1968, and in this they have the unanimous support of the four judges in Fiji. The appellant took the chance that the obscure pleading of D.1 might be held to operate as a plain admission of lack of licence on 22nd February 1968 rather than take the obvious step of showing absence of licence by production of copies of the Fiji Gazette.

The appellant, whose aim in this part of the case was to claim that for the proceeds of sale of the equitable leasehold interest D.1 was accountable to him, sought in the alternative to contend that there was anyway on the pleadings a plain admission that D.1 was unlicensed in respect of the advances made in 1967, and that accordingly there should be an apportionment which denied the ability of D.1 to retain out of the proceeds of sale the amount of the 1967 advances. This point was not suggested in either of the Courts below and their Lordships decline to permit it to be taken before this Board.

In summary therefore (*a*) the attack on D.1 based upon the alleged insufficiency of particularity in the February 1968 documents fails, as does the attack based upon the lack of a moneylenders licence, (*b*) the attack on the sale of the equitable leasehold interest fails on the grounds both that there was a power of sale and that the School Trustees have an unassailable registered lease of the land and (*c*) the attack based upon the provisions of the Agricultural Landlord and Tenant Act (Cap. 242) also fails.

Their Lordships would add a footnote upon indefeasibility of a registered title. This does not serve to protect a registered owner against rectification of the register in a case where in equity a contract upon which the registration was based was itself rectifiable on grounds of mutual mistake: see the Appeal from Malaysia in *Oh Hiam and Others v. Tham Kong* (Privy Council Judgment No. 18 of 1980) and *Frazer v. Walker* [1967] A.C.569. But those matters are irrelevant to this appeal.

Accordingly their Lordships will humbly advise Her Majesty that this appeal be dismissed with costs.

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In the Privy Council

CHANRIKA PRASADs/o
GUDDU LAL

v.

GULZARA SINGH s/o HARI SINGH
AND OTHERS

DELIVERED BY
LORD RUSSELL OF KILLOWEN

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