

G.H.B. G.L. 20,960

IN THE PRIVY COUNCIL

No. 30 of 1959

ON APPEAL  
FROM THE COURT OF APPEAL OF GHANA

UNIVERSITY OF LONDON  
W.C.1.  
- 7 FEB 1961  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

50954

B E T W E E N  
GHANA COMMERCIAL BANK Appellants  
and  
(1) D.T. CHANDIRAM and  
(2) J. MENSAH Respondents

C A S E FOR THE APPELLANTS

RECORD

10 1. This is an appeal from a decree, dated  
the 2nd December, 1958, of the Court of Appeal  
of Ghana (Korsah, C.J., Van Lare and Sharpe,  
J.J.A.) dismissing, subject to a reduction of  
the mesne profits, an appeal from a decree,  
dated the 3rd September, 1957, of the Land  
Court at Accra (Ollennu, J.), whereby the  
first Respondent was awarded against the  
Appellants (formerly known as "Bank of the  
Gold Coast"); and the second Respondent a  
20 declaration of title of ownership to certain  
premises in Accra, damages for trespass,  
mesne profits and an order for recovery of  
possession of the said premises.

pp. 47-48

p. 32

30 2. The case concerns certain land, and  
the buildings standing on it, in Accra,  
originally owned by one Holomah. On the  
16th July, 1954, Holomah deposited the title  
deeds to this land with Barclays Bank  
(D.C. & O.) in order to create an equitable  
mortgage to secure the repayment of all sums  
due from him to the Bank. He executed a  
memorandum of the deposit of the deeds, which  
was duly registered. On the 4th September,  
1954, these deeds were transferred at  
Holomah's request from Barclays Bank to the  
Appellants, to be held by the Appellants on

pp. 62-65

p.18.11.20-33:  
pp.67-69

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p.19,11.17-25  
pp.75-81

behalf of Barclays Bank. On the 27th October, 1954, the Appellants paid to Barclays Bank (D.C. & O.) the amount due to Barclays Bank from Holomah, who executed a legal mortgage of the land in favour of the Appellants. This mortgage was duly registered.

p.16,11.12-14

3. In November, 1954, Holomah let the land and buildings to the second Respondent, who is the Manager of St. John's Grammar School. The School was thereafter conducted on the premises. 10

p.26,11.22-25

4. On the 27th July, 1954, one Bassil obtained a judgment against Holomah in the Divisional Court at Sekondi. In pursuance of this judgment a Writ of fieri facias was issued on the 24th September, 1954 'for the attachment of the movable and immovable property of the Judgment Debtor'. On the 25th September, 1954 an attachment notice was issued prohibiting Holomah from alienating the property the subject of this appeal. In the Appellants' submission this attachment notice could affect only the interest Holomah then had in the property in question, namely the equity of redemption therein. Holomah obtained a stay of execution of the judgment of the Divisional Court and of the writ of fieri facias pending an appeal. The appeal was eventually dismissed, and on the 25th March, 1955, following a further attachment notice dated the 13th January, 1955, notices were issued by an auctioneer instructed by the Deputy Sheriff that the sale would take place on the 16th April, 1955. 20

p.11,11.28-30

p.70,11.2-4

pp.69-70

pp. 73-74

pp. 83-84

p.27,11.18-21

5. The attachment took place by virtue of Order 43 of the Supreme Court (Civil Procedure) Rules, 1954. The following are the relevant provisions of Order 43: 30

"4. If the judgment be for money, and the amount thereof is to be levied from the property of the person against whom the same have been pronounced, the Court 40

shall cause the property to be attached in the manner following.

. . . . .

10 7. Where the property shall consist of lands, houses, or other immovable property, or any interest therein, either at law or in equity, the attachment shall be made by a written order of the Sheriff prohibiting the judgment debtor from alienating the property by sale, gift, or in any other way, and all persons from receiving the same by purchase, gift, or otherwise, and the Sheriff may also, by direction of the Court, take and retain actual possession thereof.

. . . . .

20 11. After any attachment shall have been made by actual seizure, or by written order as aforesaid, and in case of an attachment by written order, after it shall have been duly intimated and made known in manner aforesaid, any alienation without leave of the Court of the property attached, whether by sale, gift, or otherwise, and any payment of the debt or debts, or dividends, or shares to the judgment debtor during the continuance of the attachment, shall be null and void, and the person making such alienation or payment shall be deemed to have committed a contempt of Court".

40 6. In April, 1955, the Appellants saw the advertisements of the sale of the property, and in consequence instructed their Solicitor. On the 4th April, 1955, the Appellants' Solicitor wrote to the Deputy Sheriff, informing him of the Appellants' interest in the land under the mortgage of the 27th October, 1954, and asking him to institute interpleader proceedings. The Deputy Sheriff gave notice of the Appellants' claim to Bassil, and on the 13th April, 1955

p.19,11.26-29  
p. 86  
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p. 90  
pp. 95-96

Bassil replied disputing the claim. The Deputy Sheriff did not institute interpleader proceedings, but on the 15th April, 1955 instructed the auctioneer to proceed with the sale on the following day. The sale accordingly took place, and on the 16th April, 1955 the auctioneer purported to sell the land and buildings to the first Respondent.

p.16,11,34-35  
p.18,11,3-5

7. The second Respondent refused to attorn tenant or to pay rent to the first Respondent. He always paid the rent into Holomah's account with the Appellants. 10

pp. 1-3  
pp. 3-4

8. The first Respondent issued a Writ on the 26th September, 1956, against the second Respondent and the Appellants. By his Statement of Claim, he claimed that he had bought the land at the auction of the 16th April, 1955, and alleged that the second Respondent had refused to attorn tenant to him because the Appellants had requested that all rents be paid to them. He also alleged that the second Respondent was in wrongful occupation of the land and buildings. The first Respondent claimed a declaration of his title of ownership to the premises, possession of the premises, damages for trespass and mesne profits. The second Respondent, by his Defence, dated the 8th October, 1956, averred that he was paying rent to the Appellants as the holders of the legal estate in the premises, and was in occupation under his tenancy agreement with Holomah. He denied that he was liable to pay rent to the first Respondent. The Appellants, by their Defence, also dated the 8th October, 1956, alleged that, at the time of the attachment and the auction sale, the only interest of Holomah in the land which could be attached or sold was the equity of redemption. They averred that the interest of Barclays Bank (D.C. & O.) had been transferred to them, when they had taken over Holomah's liabilities and paid Barclays Bank, and Holomah had executed the mortgage of the 27th October, 1954 in their favour. 20  
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pp. 4-6

pp. 6-9

9. The action was tried by Ollennu, J., in the Land Court at Accra, and evidence was given of the facts set out above. The learned Judge delivered judgment on the 3rd September, 1957. Having set out the facts, he held that Barclays Bank never transferred their equitable mortgage to the Appellants, but merely created the Appellants their agents for custody of the Title Deeds. Consequently, the Appellants had never acquired any legal or equitable interest in the property, and both the legal estate and the beneficial interest had been vested on the 25th September, 1954 in Holomah. The execution of the legal mortgage of the 27th October, 1954 without the leave of the Court had, in the learned Judge's view, been a contravention of Order 43, r.7, with the result that that mortgage was null and void. He therefore held that the first Respondent had acquired the legal estate and the beneficial interest in the property, carrying with it the right to immediate possession. The learned Judge then discussed the questions of damages and mesne profits, and awarded the first Respondent a declaration of his title of ownership to the property in dispute, £100 damages for trespass, mesne profits amounting to £2,925 and an order for recovery of possession on the 15th September, 1957.

pp. 25-31  
pp. 25-28  
p.28,11.30-45

pp.29,1.1-p.30  
1.9.

p.30,11.10-16

pp.30-31

10. The Appellants and the second Respondent appealed from this judgment to the Court of Appeal. Their Notice of Appeal, dated 10th September, 1957, set out (in effect) the following grounds:-

pp. 33-36

- (1) That the learned Judge had erred in holding that the interest bought by the first Respondent had been the legal estate, and not merely the equity of redemption;
- (2) That on payment to Barclays Bank of the debt owing by Holomah the Appellants had stepped into the shoes of Barclays Bank, the equitable mortgage had become vested in the Appellants, and thereupon the mortgage of the 27th October, 1954 had been

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executed to convert that equitable mortgage into a legal mortgage;

- (3) That the learned Judge had erred in holding that the mortgage of the 27th October, 1954 contravened Order 43, rr. 7 and 11.

pp. 36-40  
pp. 41-47  
p.42, ll.1-12

11. The appeal was argued on the 25th and 26th November, 1958, and judgment was given on the 2nd December, 1958. Van Lare, J.A., who gave the leading judgment, 10

p.42, ll.13-21

said the law was clear that a purchaser under the execution of a writ of fi.fa. acquired no more than the right, title and interest of the judgment debtor. The case was complicated because Barclays Bank, the party interested in the incumbrance, had disappeared from the picture before the date of sale. The

p.42, l.22-p.43,  
l.26

learned Judge held that the Appellants had received the Title Deeds from Barclays Bank merely as custodians on behalf of Barclays Bank. Whether or not Holomah had later turned them into 20

p.43, ll.26-38

securities in favour of the Appellants was, in his view, immaterial. There was no evidence that Holomah owed money to the Appellants before the execution of the legal mortgage on the 27th October, 1954, and there could be no mortgage between Holomah and the Appellants before he owed them money. The learned Judge held that in the absence of a formal 30

p.44, l.2-p.45,  
l.24

assignment of Holomah's debt by Barclays Bank, it could not be contended that the Appellants had stepped into the shoes of Barclays Bank. The Appellants had contended that the first Respondent had become entitled only to an equity of redemption. This presumed that the Appellants held a valid mortgage, but the learned Judge held that the 40

p.45, ll.25-41

mortgage of the 27th October, 1954 was null and void by virtue of Order 43.

p.45, l.42-p.46,  
l.47

There was, in his view, no doubt that at the date of the sale the legal interest in the property had been vested in Holomah, and it was this legal interest which the first Respondent had bought. Counsel for the Appellants had argued that the Appellants had succeeded to the interest of Barclays Bank in the 50

equitable mortgage, so that the first Respondent had acquired the property only subject to that mortgage. The learned Judge rejected this argument on the ground that there had been no formal assignment of the debt to the Appellants, and the Appellants had not paid Holomah's debt to Barclays Bank with intent to create a legal mortgage. He added that his observations on this point had to be regarded as obiter in case the Appellants might be advised to institute other proceedings concerning the alleged equitable interest. The learned Judge therefore held that, subject to an agreed reduction of the mesne profits to £2,175, the appeal should be dismissed. Korsah, C.J. and Sharpe, J.A. agreed with this judgment.

pp. 46-47

12. The Appellants respectfully submit that the Courts below have misinterpreted the effect of an attachment notice. Such a notice can affect only property belonging to the judgment debtor. The attachment notices in this case accordingly could affect only Holomah's interest in the land in question, which at all material times was only the equity of redemption. All that could be sold, and was sold, on the 16th April, 1955 was Holomah's equity of redemption.

13. The Appellants respectfully submit that the prohibition of alienation in the Rules and the notices applies only to a judgment debtor's interest, which in this case was the equity of redemption. In the circumstances of this case neither a transfer of an equitable mortgage nor the creation of a legal mortgage would, it is submitted, fall within this prohibition.

14. The Appellants respectfully submit that the Courts in Ghana were wrong in holding that the rights of Barclays Bank under the equitable mortgage were not transferred to the Appellants. The Title Deeds deposited by Holomah with Barclays Bank were handed over by Barclays Bank to the Appellants. Whatever the terms may have been on which these deeds were originally handed over, shortly



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afterwards the Appellants paid to Barclays Bank the money owed by Holomah. The Appellants submit that an equitable mortgage can be transferred without any formality to a transferee who pays off the original mortgagee and takes delivery of the Title Deeds. Both Ollennu, J. and the learned Judges of the Court of Appeal seem to have held that in such a case a 'formal assignment of the debt' is also required. The Appellants respectfully submit that this is wrong. They also submit that, since they took over the Title Deeds from Barclays Bank and subsequently paid Holomah's debt to Barclays Bank and retained the Deeds, it should be inferred that they intended to hold the Deeds as security for Holomah's debt to them. The Appellants thus became entitled to the equitable mortgage originally held by Barclays Bank. If the subsequent attempt to create a legal mortgage was ineffective, this equitable mortgage, in the Appellants' submission, remains valid.

15. The Appellants respectfully submit, however, that a valid legal mortgage in their favour was created by Holomah on the 27th October, 1954. On that date, for the reasons set out above, the Appellants were the holders of an equitable mortgage which had existed before the attachment of the property on the 25th September, 1954. Thus, at the time of the attachment, the land was held subject to a mortgage, and the mortgagee was entitled to call at any time, if he chose, for the conversion of that mortgage into a legal mortgage. The Appellants submit that such a conversion does not constitute an alienation for the purposes of Order 43, since it is not the creation of a right in the property which did not exist before, but only a conversion of an equitable right into a legal right. The Appellants further submit that, on the view put forward by the first Respondent, Order 43 has produced a serious modification of the rights of equitable



mortgagees, since on that view a subsequent attachment of the land deprives an equitable mortgagee of his right to call for a legal mortgage. In the Appellants' submission, the language of Order 43 indicates that it was not intended to have any such effect.

10 16. The Appellants respectfully submit that the decision of the Court of Appeal of Ghana was wrong and ought to be reversed, and the first Respondent's action ought to have been dismissed, for the following amongst other

R E A S O N S

- 20 (1) BECAUSE the only property of Holomah attached was his equity of redemption:
- (2) BECAUSE a valid legal mortgage was granted by Holomah to the Appellants on the 27th October, 1954:
- (3) BECAUSE all that the first Respondent bought on the 16th April, 1955 was Holomah's interest in the said land, that is, his equity of redemption:
- (4) BECAUSE the equitable mortgage in favour of Barclays Bank was transferred to the Appellants:
- 30 (5) BECAUSE on paying Holomah's debt to Barclays Bank the Appellants stepped into the shoes of the said Bank:
- (6) BECAUSE the first Respondent has no right to the declaration of title granted to him in the Courts below:
- (7) BECAUSE the Appellants are entitled to the property in dispute subject only to the first Respondent's equity of redemption.

PHINEAS QUASS  
J.G.Le QUESNE

cc.  
✓  
✓

No. 30 of 1959

IN THE PRIVY COUNCIL

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B E T W E E N

GHANA COMMERCIAL BANK  
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(1) D.T. CHANDIRAM and  
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C A S E FOR THE APPELLANTS

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