

G113 20, 1960

1.

IN THE PRIVY COUNCIL

No. 30 of 1959

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

ON APPEAL FROM  
THE COURT OF APPEAL, GHANA

B E T W E E N:

GHANA COMMERCIAL BANK Appellants

50955

- and -

(1) D.T. CHANDIRAM and  
(2) J. MENSAH ... Respondents

CASE ON BEHALF OF THE FIRST RESPONDENT

10 1. This is an appeal from a Judgment and Decree of the Court of Appeal, Ghana, dated the 2nd December, 1958, dismissing the appeal preferred by the Appellants from the Judgment and Decree of the Ghana High Court of Justice (Ollennu, J.), dated the 3rd September, 1957.

Record  
p.41  
p.47

2. The subject matter in dispute is a property in Accra originally owned by one, Holomah.

20 3. On the 16th July, 1954, Holomah deposited with Barclays Bank Limited at Takoradi (hereinafter referred to as "Barclays Bank") the title deeds relating to the property to secure the payment of all moneys due from him. On the same day a Memorandum of Deposit of Deeds was executed by Holomah in favour of Barclays Bank. Clause 1 of the Memorandum is as follows:-

p.62

30 "1. In consideration of your giving time credit and/or Banking facilities and accommodation to me Ebenezer Ofue Holomah of P.O. Box 66 Oda (hereinafter called "the Customer") I/we the undersigned have deposited with you the title deeds and other documents specified in the

Record

Schedule hereto with the intent to create an Equitable Mortgage upon all the hereditaments and property (real or personal) mortgage debts and sums of money comprised therein or to which the same or any of them relate for assuring the payment and discharge on demand of all moneys and liabilities now or hereafter due from or incurred by me/us and/or the Customer (or any or either of us them) to you upon any account or in any manner whatever and whether actually or contingently alone or jointly with others and whether as principal or surety including (but without prejudice to the generality of the foregoing) charges for interest discount commission and other usual banking charges and all costs charges and expenses which you may pay or incur in stamping perfecting or enforcing this security or in obtaining payment or discharge of such moneys or liabilities or any part thereof or in paying any rent rates taxes or outgoings or in insuring repairing maintaining managing or realising the said hereditaments and property or any part thereof and I/we hereby undertake to pay and discharge all such moneys and liabilities as aforesaid on demand. 10

I/We hereby undertake that I/we and all other necessary parties (if any) will on demand at my/our cost make and execute to you or your nominees a valid legal mortgage or registered charge of or on the said hereditaments and property or any part thereof in such form and with such provisions and powers of sale leasing and appointing a Receiver as you may require." 20 30

p.67, 1.19

4. The title deeds (consisting of three documents of title) were held by a solicitor, Mr. Franklin, who held them on behalf of Barclays Bank. On the 4th September, 1954, with the permission of Barclays Bank Mr. Franklin forwarded the title deeds at the request of Holomah to the Appellants. The covering letter included the following:- 40

p.67, 11.30-35

"Mr. Holomah has requested me to hand these to you and I have obtained the permission of my clients to do so against your undertaking to hold them on their behalf. I have endorsed the second copy of this letter with a note to this effect which you will please return to me."

The Appellants endorsed their acceptance of the title deeds as follows:- "Received the three Documents mentioned above to be held on behalf of Messrs. Barclays Bank Limited, Takoradi."

Record  
p.69, 1.18

No payment whatsoever of the debt due by Holomah to Barclays Bank was made by the Appellants at the time of the delivery of the title deeds. There was no formal assignment of Holomah's debt by Barclays Bank to the Appellants at any time.

- 10 5. By Order dated the 25th September, 1954, an Attachment Notice, made in pursuance of a Writ of Fi. Fa., dated the 24th September, 1954, attaching the property in dispute was served upon Holomah. At all material times the said attachment effected on the 25th September, 1954, has remained fully effective. p.69
- 20 6. On the 27th October, 1954, while the attachment was subsisting, Holomah executed a Deed of Mortgage transferring the legal estate in the property in dispute to the Appellants, without leave of the Court. p.41, 1.23
7. On the 16th April, 1955, the property was sold at public auction and was purchased by the First Respondent. p.75
8. The First Respondent called upon the Second Respondent who was in actual occupation of the property to attorn tenant to him. The Second Respondent refused to acknowledge the title of the First Respondent. p.92
- 30 9. Thereupon the First Respondent instituted the present suit against the Second Respondent and the Appellants as first defendant and second defendant respectively in the Supreme Court of the Gold Coast on the 26th September, 1956. p.1
10. The Statement of Claim was filed on the 26th September, 1956. p.2.
- The First Respondent claimed (a) a declaration of title of ownership, (b) damages for trespass, (c) mesne profits, and (d) recovery of possession.
- 40 11. On the 8th October, 1956, the Second Respondent and the Appellants filed their Defences. p.4.  
p.6.

Record

The principal defence was that the claim of the First Respondent was misconceived mainly on the ground that on the date of the attachment in execution the legal estate in the property was vested in Barclays Bank and the only attachable interest the judgment-debtor had in the property was an equity of redemption; alternatively, that the interest of Barclays Bank in the property was transferred during the attachment to the Appellants, when upon the execution of the legal mortgage of the 27th October, 1954, the Appellants paid Holomah's debt to Barclays Bank, and, therefore, the only attachable interest of Holomah in the property purchased by the First Respondent was an equity of redemption. 10

p.25

12. The learned Trial Judge delivered Judgment on the 3rd September, 1957.

He held that -

1. The Appellants had no interest, legal or equitable, in the property on the date of the attachment; 20
2. No issue of priority as between a mortgage debt which may be legal or equitable and a judgment debt which when registered operates as an equitable charge on the judgment-debtor's property arises in this case where the judgment-debtor's property has actually been attached under a writ issued and executed in accordance with Rules of Court;
3. The execution of the mortgage of the 27th October, 1954, without leave of the Court, and while the attachment was subsisting, was in contravention of Order 43 Rule 7. 30
4. The acceptance of the mortgage of the 27th October, 1954, without leave of the Court, and while the attachment was subsisting, was in contravention of Order 43 Rule 7.
5. The mortgage of the 27th October, 1954, was null and void by virtue of Order 43 Rule 11.
6. The First Respondent acquired the whole of the right, title and interest which Holomah had in the property on the 25th September, 1954, that is, the legal estate coupled with the beneficial 40

interest carrying with it the right to immediate possession of the property.

Record

The learned Trial Judge accordingly awarded the First Respondent a declaration of title of ownership to the property in dispute.

13. The learned Trial Judge further awarded £100 as damages for trespass and £2,925 as mesne profits, and ordered recovery of possession with effect on the 15th September, 1957. p.30, 1.17 to p.31, 1.10

10 The learned Judge's reasoning on the issue of trespass is contained in the following passage:-

"Trespass is a wrong which carries with it liability to damages even when the owner whose possession is disturbed did not suffer any actual loss. The interference with the possession or the right of possession of the Plaintiff, e.g. the mere entry upon or adverse occupation of the land without leave and licence is itself an injury or damage and the Plaintiff need not prove any actual injury before he could become entitled to award of damages. p.30, 1.26 to p.31, 1.10

20 "If however, in addition to, or in consequence of the trespass some actual damage is caused, the Plaintiff is entitled to full compensation to the extent of that loss - see Halsbury 3rd Edition Volume 11 page 266, paragraph 441.

30 "As I have already held, the Defendants in this case became trespassers by their act of resisting the Plaintiff's exercise of his right of immediate possession from the day that the said right accrued to the Plaintiff, namely, the 16th day of April, 1955. In addition to that injury the two Defendants have deprived the Plaintiff of the enjoyment of the profits which he would have derived from his property.

40 "The evidence satisfies me that the minimum lawful profits which the Plaintiff would have realised from the property in dispute is £75 a month, namely, the monthly rent which the 1st Defendant School has been paying for the premises. He is therefore, entitled to recover compensation or mesne profits assessed at that rate for the duration of the trespass."

- Record  
p.32 14. A Decree in accordance with the Judgment was made on the 3rd September, 1957.
- p.33 15. The Appellants and the Second Respondent appealed from that Judgment and Decree to the Court of Appeal of Ghana by Notice of Appeal dated the 10th September, 1957.
- p.36 16. The appeal was heard by the Chief Justice Korsah, Mr. Justice Van Lare and Mr. Justice Sharpe. The Judgment of the Court of Appeal was delivered by Mr. Justice Van Lare, on the 2nd December, 1958. 10
- p.41
17. The Court of Appeal held that -
- p.42, 11.37-45 1. Barclays Bank did not transfer their interest in the property in dispute to the Appellants when the title deeds were handed over to the Appellants who thereupon held the title deeds as custodians for Barclays Bank in the same way as Mr. Franklin had held them.
- p.43, 11.1-3 2. By the mere custody of the title deeds the Appellants did not become a mortgagee by deposit of title deeds without becoming a mortgagor's creditors at that time. 20
- p.43, 11.26-32 3. In the absence of a formal assignment of the mortgagor's debt to the Appellants by Barclays Bank, the Appellants could not step into the shoes of Barclays Bank, who were the only party interested in the equitable charge on the property on the date of the sale.
- p.43, 11.33-38 4. The execution of the legal mortgage on the 27th October, 1954, was a transaction as between the Appellants and the mortgagor to the exclusion of Barclays Bank and there can be no question of any transfer of interest by Barclays Bank to the Appellants by the execution of that mortgage. 30
- p.45, 11.9-21 5. On the 27th October, 1954, the property was then under attachment under a due process of law, and the judgment-debtor was prohibited from alienating the property in any way, including by way of mortgage (Order 43 Rule 7) and any alienation without leave of the Court was null and void (Order 43 Rule 11), and, accordingly, the legal mortgage of the 27th October, 1954, was null and void. 40

7.

6. At the date of the sale on the 16th April, 1955, the legal interest in the property was vested in the original owner, the judgment-debtor, and that was the interest which passed to the purchaser, and accordingly, the Appellants could have no interest whatsoever to vie with the estate or interest purchased by the First Respondent at the Court Sale. Record  
p.45, 11.21-29
- 10 7. This is not a case where the Appellants paid off the debts of the mortgagor to Barclays Bank in consideration of collecting the title deeds with intent to create an equitable mortgage. p.46, 11-26-31
18. The Court of Appeal accordingly dismissed the appeal subject to a minor variation agreed to by which the amount of mesne profits was agreed at £2,175 and not £2,925.
19. A Decree in accordance with the Judgment was made on the 2nd December, 1958. p.47
- 20 20. The Appellants obtained Special Leave to Appeal against the Judgment and Decree of the Court of Appeal of Ghana on the 29th July, 1959. p.49
21. The First Respondent humbly submits that this appeal be dismissed with costs for the following among other

R E A S O N S

1. BECAUSE the Judgments of the Courts below are right in their reasoning for the reasons therein stated.
- 30 2. BECAUSE by holding the title deeds on behalf of Barclays Bank without paying off the debts of the mortgagor to Barclays Bank no interest in the property in dispute either legal or equitable passed to Mr. Franklin or to the Appellants.

S.P. KHAMBATTA ✓

JOSEPH DEAN. J

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- and -

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and Another  
Respondents

C A S E

ON BEHALF OF THE FIRST RESPONDENT

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