Privy Council Appeal No. 32 *of* 1964

Coast Brick & Tile Works Limited and others – – – *Appellants*

v.

Premchand Raichand Limited and another – – – – *Respondents*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 31ST JANUARY 1966

Present at the Hearing:
LORD MORRIS OF BORTH-Y-GEST
LORD UPJOHN
LORD PEARSON
(*Delivered by* LORD UPJOHN)

Between December 1955 and February 1956 the 1st appellants Coast Brick & Tile Works Limited, a private company incorporated in Kenya, borrowed Shs. 1,000,000 from the 1st respondents who are licensed money-lenders. Repayment of that sum was, together with interest thereon at the rate of 16% per annum (reduced in 1959 to 12% per annum), by a document expressed to be dated 31st January 1956 charged upon certain land in the neighbourhood of Mombasa belonging to the 1st appellants. Their Lordships will refer to this document as the Charge. Repayment of the principal and interest was by the same document guaranteed by seven individuals, six of whom are the second to seventh appellants (the remaining guarantor never having been served with any proceedings) and one of whom also charged certain shares in the 1st appellants with repayment of the debt and interest. The second respondent is a holder of an admittedly valid second mortgage on the premises charged by the Charge and was joined because he had an interest in the property, no relief being claimed against him. He has not appeared before their Lordships' Board.

Although by the terms of the Charge the principal sum was repayable by 10 instalments of Shs. 100,000 each at varying dates between the 31st October 1956 and 31st October 1959 together with interest thereon, only Shs. 40,000 have been repaid on account of principal leaving Shs. 960,000 due on that account, and interest is very seriously in arrear. So by a plaint dated 21st September 1960 the 1st respondents (who will be referred to as the respondents for the remainder of their Lordships' judgment) sued the appellants for an account of what was due to them and for sale of the land charged. The appellants, by their defence, set up a number of defences and the action was tried before Rudd A. C. J. for seven days in February 1962 and on 16th March 1962 he delivered a reserved judgment in favour of the respondents and made an order for the usual preliminary mortgage decree with costs.

The appellants appealed to the East African Court of Appeal which appeal was dismissed on 5th March 1964. Before the Acting Chief Justice much time was occupied with evidence as to the attestation of the signatures of the guarantors and with certain other matters pleaded in the defences, all of which he decided against the appellants. In the Court of Appeal some time was also spent upon the question of attestations of the guarantors' signatures but these matters have not been pursued before their Lordships and in the end the real and substantial issues between the parties were as follows:—

First the respondents were admittedly money-lenders and prima facie the transaction was a money-lending transaction to which the Money-Lenders Ordinance would apply unless exempted by section 3 of the Ordinance. Unless so exempted it was common ground that the Charge was unenforceable for none of the provisions of section 11 of the Ordinance (which requires a note or memorandum in writing of the contract to be made and signed personally by the borrower within seven days of the making of the contract) had been complied with.

Section 3 of the Ordinance is in these terms:—

" 3. (1) The provisions of this Ordinance shall not apply—

(*a*) to any money-lending transaction where the security for repayment of the loan and/or interest thereon is effected by execution of a chattels transfer in which the interest provided for is not in excess of nine per cent per annum;

(*b*) to any money-lending transaction where the security for repayment of the loan and/or interest thereon is effected by execution of a legal or equitable mortgage upon immovable property or of a charge upon immovable property or of any bona fide transaction of money-lending upon such mortgage or charge.

(2) The exemption provided for in this section shall apply whether the transactions referred to are effected by a money-lender or not."

Upon this section two points were taken:—

(*a*) The original loan of Shs. 1,000,000 was advanced in eight different instalments of varying amounts the first being on 1st December 1955 and the last on 24th February 1956, and of these eight instalments six were made well before the execution of the Charge. It was therefore argued that these advances must be treated as a series of independent and isolated transactions which did not fall within the exempting words of section 3 (1) (*b*).

The respondents on the other hand argued that on the facts these series of advances must be regarded all as part of one transaction, which from start to finish contemplated that all such advances should be secured on the immovable property charged by the Charge.

(*b*) That alternatively section 3 (1) (*b*) applied only where the whole or sole security was that falling within section 3 (1) (*b*) i.e. a mortgage or charge on immovable property and as admittedly in the present case additional security was provided by the existence of seven guarantors and by a charge on certain shares in the respondents, the section did not exempt the transaction from the provisions of the Money-Lenders Ordinance.

Secondly while it was conceded that the seal of the respondents was properly affixed in accordance with Article 114 of the Articles of Association of the respondents in the presence of two directors and the secretary of the respondents but it was argued that to constitute a valid mortgage this was not sufficient and that the seal should have been affixed in the presence of two additional independent witnesses.

Their Lordships should add that some additional point was mentioned though hardly argued before their Lordships that the guarantors were not bound by the Charge for they gave no consideration. Their Lordships do not understand this point which seems to be entirely without substance.

With regard to point (*a*) of the first issue, namely whether each advance was a separate and isolated transaction or was all part of one transaction which contemplated that all advances should be secured upon the immovable property charged by the Charge, their Lordships propose to deal with this matter very shortly. It is a question of fact and both the Acting Chief Justice and the Court of Appeal reached the clear conclusion that each advance was part of one overall transaction. Although their Lordships do not normally disturb concurrent findings of fact, their Lordships permitted Counsel for the appellants to open the relevant facts and they have no doubt that both Courts below reached the right conclusion. They would not wish to add anything to the very clear and detailed findings on this point of Gould, V. P. who delivered the leading judgment in the Court of Appeal.

Their Lordships turn then to point (*b*), namely the true construction to be placed upon section 3 (1) (*b*), and in particular the precise meaning to be placed upon the two words " the security " in the opening part of the sub-paragraph. But before proceeding to a detailed consideration of this matter their Lordships would point out that the paragraph of the sub-section itself shows signs of slovenly drafting in relation to the later phrase " or of any bona fide transaction of money-lending ". This was considered in *S. N. Shah v. C. M. Patel and others* [1961] E.A. 397(C.A.), where the President in effect omitted the word " of ". However the true construction of that phrase does not arise in this case for it is clearly with the earlier words of the sub-paragraph that their Lordships are concerned.

The true construction of the section is by no means easy. " the security " is ambiguous, both in sub-paragraph (*a*) and in sub-paragraph (*b*). A possible meaning grammatically is " the sole security ", but this would lead to the result that if there was only one security for repayment of the loan which fell either within sub-paragraph (*a*) or sub-paragraph (*b*) the transaction would be exempt from the provisions of the Ordinance, but if the money-lender took two securities one which fell within sub-paragraph (*a*) and the other within sub-paragraph (*b*) the transaction would not be exempt and Parliament cannot have intended that.

The possible alternative ways of construing the section are either to read " the " as " a " or to omit " the " altogether.

In these circumstances, in the case of *S. N. Shah v. C. M. Patel and others* (supra) the Court of Appeal examined the policy behind the Ordinance and the mischief at which it was aimed, to assist in reaching a conclusion upon the construction of the section.

At the foot of page 409 Gould, J. A. said:

> " That being so it is necessary to come to a conclusion as to the meaning of the words ' the security ' in s. 3 (1) (*b*). I do not think that the use of the definite article necessarily favours Mr. Mandavia's argument for the purpose of which he must insert, as he did in argument, the word ' only '. On the other hand, a construction which would permit the operation of the section where the mortgage or charge was not the only security, would also necessitate reading the word ' the ' as ' a ', or some similar modification. Either construction appears to be open on the existing wording and I think that it must be resolved by a consideration of the intention of the legislature so far as it can be gathered from the section as a whole.
>
> The first of the two exemptions from the operation of the Ordinance which the section creates is that contained in para. (1) (*a*) thereof, relating to transactions where the security is upon chattels and the interest does not exceed 9 per cent. per annum. Sub-section (2) makes it clear that both exemptions apply whether the lender is a money-lender or not. I think that it is a legitimate deduction (and not pure speculation) from the nature of the two exemptions that the legislature considered that borrowers who could put up these types of security were more likely to be men of some substance not requiring to the fullest extent in the case of chattel owners, or at all in the case of owners of immovables, the protection of this type of legislation. They would be less subject to extortionate practices as, offering securities of this nature, they could expect to find lenders outside the ranks of professional money-lenders, willing to lend at reasonable rates of interest.
>
> It is, I think, advantageous to envisage a money-lending transaction secured both upon immovable property and chattels. If the interest rate were 12 per cent. per annum, there would appear at first glance to be conflict in that the transaction would be outside the scope of the Ordinance by virtue of s. 3 (1) (*b*) but within it by virtue of s. 3 (1) (*a*). If, however, the legislature considered that a borrower who could put up immovables as security needed no protection, the conflict is more apparent than real, for he could not be more in need of protection because he was able to put up both forms of security. On the other

hand, if the interest rate on such a loan were 6 per cent. per annum then a strict application of the construction urged by Mr. Mandavia would defeat the object of the section completely. If each of the paras. (*a*) and (*b*) is to be read as referring to the ' only ' security, the inclusion of any other security in either case, would negative the exemption.

With these considerations in mind I conceive the position to be shortly this; that the words of the section allow of two alternative constructions; that the legislature plainly did not consider that a borrower offering immovables as security required the protection of the Ordinance; and that there can be no possible reason for imputing to the legislature a desire to bring such a borrower back within the protection of the Ordinance merely because he is able to provide other security in addition to the immovables. I would therefore hold that where, as in the present case, a money-lending transaction is secured by a mortgage or charge of immovable property, it is taken out of the scope of the Ordinance, whether or not security other than the immovable property has also been provided. For these reasons I agree that Mr. Mandavia's contentions fail and s. 3 (1) (*b*) applies."

The same Court adopted the reasons given by Gould, J. A., just quoted, when considering a similar section in the Money-Lenders Ordinance of Uganda, see *Buganda Timber Co. Ltd. v. Mulji Kanji Mehta* [1961] E.A. 477 (C.A.).

Their Lordships entirely agree with the reasoning of Gould, J. A., and with his conclusion. The Money-Lenders Ordinance is designed to protect the public from money-lenders but it seems reasonably clear that Parliament thought that the borrower would require no such protection if the security was of a chattel interest and interest was limited to 9% per annum or without such limitation of interest if the security was upon immovable property; no doubt because in such a case the borrower would almost invariably be advised by his solicitor and the exact terms of repayment would be apparent on the face of the mortgage or charge.

In the result their Lordships are of opinion that " the security " should be read as " a security ", a variation which in a poorly drawn section does not do great violence to the language used. So this point of defence fails.

In the present case the charge on the immovable property was the predominant part of the security. No question arises as to whether the exemption under section 3 (1) (*b*) of the Ordinance could be obtained by the creation of an insignificant or relatively unimportant charge on immovable property.

With regard to the second main issue there was much controversy in the Court of first instance and for some days in the Court of Appeal as to whether the land charged was subject to the Land Titles Ordinance or to the Registration of Titles Ordinance, but the appellants finally conceded that the land was subject to the operation of the latter Ordinance.

Reference to some sections of this Ordinance must now be made.
Section 1 (2) provides

" 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."

Section 58 provides for the attestation of every signature to an instrument requiring to be registered. Briefly, subsection (1) provides for attestation by *one* witness holding certain qualifications, but subsection (3) provides

" The provisions of this section shall not apply to any instrument executed by the Governor, or any duly registered company by means of its common seal affixed in accordance with the memorandum and articles of association."

It is not in dispute that the Charge has been executed in accordance with the provisions of section 58 and if no more is required the Charge is a valid registered charge. The appellants contend, however, that to render the

document a valid mortgage, further attestation was required by two witnesses under and by virtue cf section 59 of the Indian Transfer of Property Act 1882 which is applicable to Kenya.

The first paragraph of section 59 of the Transfer of Property Act is in these terms

> " Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses."

Counsel for the respondents conceded that the signatures of the directors and secretary do not satisfy section 59 as their signatures are part of the act of execution by the Company and not as witnesses, see *Deffell v. White* L.R. 2 C.P.144.

While the terms " mortgage " and " charge " are synonymous for nearly all purposes in English law this is not so under the Transfer of Property Act.

Counsel for the appellants conceded that if the Charge is a " charge " and not a " mortgage " then section 59 has no application and his point fails. While their Lordships think there is something to be said for the view that this is a charge and not a mortgage no point has been taken upon it in the Courts below and their Lordships will assume, rightly or wrongly, that the Charge is a simple mortgage as defined in the Transfer of Property Act.

It also appears from the judgment of Rudd A. C. J. that he doubted whether section 59 applied at all where the mortgage was executed by a company and not by an individual on behalf of a company, and those doubts may be well founded, but no point has been taken thereon, and again their Lordships are prepared to assume that it does so apply.

The question is of the shortest; does the assumed requirement of section 59 that to create a valid mortgage there must be two attesting witnesses, apply to documents to be registered under the Registration of Titles Ordinance?

The appellants argue that this requirement is merely an additional requirement and not one which is " inconsistent " for the purposes of section 1 (2) of the Registration of Titles Ordinance.

Both Rudd A. C. J. and the Court of Appeal overruled the appellants' contention. The Acting Chief Justice held that section 58 of the Registration of Titles Ordinance overrode section 59 of the Transfer of Property Act and Gould V. P. in the Court of Appeal thought it was abundantly clear that section 58 provided a complete code in relation to attestation of instruments requiring to be registered under the Ordinance.

Their Lordships entirely agree with both expressions of opinion. Section 1 (2) of the Ordinance made it plain that the Ordinance is really a code for the relevant purpose. The Registrar charged with the administration of the Registry would have an impossible task if he had to satisfy himself that a document submitted for registration had, in relation to its execution, to comply not merely with the provisions of the Ordinance but with the requirements of some other Act or Ordinance. Further it seems to their Lordships that the requirement of section 59 is inconsistent with the requirement of section 58, for section 58 states by necessary implication that no attesting witness is required if executed by a company in accordance with its Articles while section 59 says two witnesses are required. Accordingly section 58 overrides section 59 by virtue of section 1 (2).

This defence also fails. In the result the appeal fails and is dismissed with costs. The respondents may have liberty to add their costs of this appeal and of the costs awarded to them in the Courts below to their security.

(93424) Wt. 8052/124 80 2/66

In the Privy Council

COAST BRICK AND TILE WORKS LIMITED AND OTHERS

v.

PREMCHAND RAICHAND LIMITED AND OTHERS

DELIVERED BY
LORD UPJOHN

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