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Judgment 7.1966

IN THE PRIVY COUNCIL

No. 49 of 1964

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

BETWEEN :

NATIONAL AND GRINDLAYS BANK LIMITED (Defendant)
Appellant

- and -

1. Dharamshi Vallabhji
2. Keshavji Dharamshi
3. Bachulal Dharamshi
4. Morarji Dharamshi, and
5. Raghavji Dharamshi trading as "Dharamshi Vallabji and Brothers" (Plaintiffs) Respondents

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CASE FOR THE RESPONDENTS

Record

1. This is an appeal from a Judgment and Order of the Court of Appeal for Eastern Africa at Nairobi, dated the 2nd September, 1964, setting aside a Judgment and Decree of the Supreme Court of Kenya at Nairobi, dated the 31st May, 1963, whereby an action instituted by the Respondents hereinafter also referred to as "the Plaintiffs" against the Appellant Bank (hereinafter also called "the Bank" or "the Defendants") for, inter alia, damages for trespass committed by the Bank in seizing the Respondents' stock-in-trade etc. which, as security for the Respondents' overdraft with the Bank, was the subject of Letters of Hypothecation given by the Respondents to the Bank, was dismissed. pp.303-319 pp.187-220

2. The main issues between the parties in the Appellate Court immediately below were, in the words of Newbold J.A. as follows:-

> "First is the Letter of Hypothecation valid inter partes? p.305,l.39 to p. 306,l.5

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"Secondly, if so, does Clause 9 of the Letter of Hypothecation effectively confer on the Bank a power of seizure and was this power properly exercised?

"Thirdly, if not, does the letter of the 6th October, authorizing the seizure provide a good defence to the Bank against some or all of the Plaintiffs?

"Fourthly, if neither the Letter of Hypothecation nor the letter of the 6th October entitles the Bank to seize the goods is there any other authority which justifies the seizure"?

Of these the main issues for determination on this appeal would appear to be the first and third.

3. Portions of the Chattels Transfer Ordinance (C.281) (hereinafter referred to as "the Ordinance") are included in an Annexure hereto.

4. The facts, in the words of Newbold J.A. who delivered the leading Judgment in the Court immediately below, are as follows:-

p.304,ll.8-24 "On the 4th April, 1960, the Plaintiffs" [i.e. the present Respondents] "opened a banking account with the Bank" [the present Appellant] "and the Bank undertook to provide overdraft facilities to the Plaintiffs. The limit of the overdraft facilities then agreed was Shs. 140,000/- and the conditions attached thereto were that the amount was repayable on demand, that the account had to be conducted to the satisfaction of the Bank and that the agreement was to come up for review on the 30th April, 1961. As security for such overdraft facilities, the Plaintiffs gave to the Bank, inter alia, a Letter of Hypothecation over their stock-in-trade and certain other articles specified in the Letter. This Letter of Hypothecation was signed by the Plaintiffs on the 4th April, 1960, after the printed form had been filled in, though it was dated the 9th May, 1960.

"The Letter of Hypothecation was neither attested nor registered".

5. Continuing his narrative of the relevant facts, the learned Judge of the Appellate Court (Newbold J.A.) said:

"Subsequently, on the 13th May, 1960, the Bank wrote to the Plaintiffs confirming the overdraft facilities. On a number of occasions the Plaintiffs exceeded the limits of the overdraft facilities and, on the 29th September, 1960, the Bank extended the limit of the overdraft facilities by Shs. 10,000/- to Shs. 150,000/-, but this extension was for a period only until the 3rd October, 1960. In consideration of this extension, certain documents, including an extension of the limit set out in the letter of Hypothecation, were handed to the Plaintiffs for signature on the understanding that they would be returned to the Bank. These documents were not returned and cheques were drawn in excess of the additional limit. p.304,ll.24 to 38

6. Newbold J.A's narrative of the facts continued as follows:- p.304,l.38 to p.305,l.13

"On the morning of the 6th October, 1960, an official of the Bank went to the premises of the Plaintiffs with fresh documents and with instructions either to have the original documents, if signed, returned to the Bank or to obtain the signature of the Plaintiffs to these fresh documents. That morning the Plaintiffs signed the fresh documents, which included an extension of the Letter of Hypothecation and a new guarantee. Later that morning two of the Plaintiffs went to the bank and showed to an official of the Bank a draft letter setting out that the Plaintiffs were unable to pay their creditors, whereupon the Plaintiffs were asked to reduce their overdraft to the agreed limit of Shs. 140,000/- and stated that they were unable to do so. Following upon, and consequent upon, this, the Bank, without any formal notice, caused the stock-in-trade and other articles of the Plaintiffs to be seized under a power contained in the Letter of Hypothecation on the afternoon of the 6th October, and during the course of the seizure two of the Plaintiffs, voluntarily and with knowledge of its contents, signed a letter, dated 6th October, referring to the Letter of Hypothecation and authorizing the seizure as the overdraft could not be reduced as promised".

7. On the 12th September, 1961, the Plaintiffs instituted the present proceedings against the Bank in the Supreme Court of Kenya at Nairobi. p. 1

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After giving details of the wrongful acts of the Bank (including the said wrongful seizure of goods) the Plaintiffs said, in paragraphs 15 and 16 of their plaint, as follows :-

pp. 5 - 6

"15. By reason of the premises and the Defendants' aforesaid wrongful acts the Plaintiffs suffered great loss and damage and were unable to carry on their business and had to close down their shop and suffered loss of profits, and after the Defendants' said letter of 24th October, 1960", /which, in the preceding paragraph, they said had caused damage to their credit and reputation/ "they the Plaintiffs were forced by their financial difficulties caused by the Defendants' said wrongful acts to call and hold a meeting of their creditors and had to make a Deed of Arrangement with their creditors on or about the 15th day of November, 1960.

"16. The Plaintiffs say that neither of the said Letters of Hypothecation" /i.e. the original Letter executed on the 9th May, 1960 and the extension of that Letter, dated the 6th October, 1960/ "were valid and that the Defendants are not entitled to act thereunder, and even if they were valid, the Defendants were not entitled, having regard to the premises, to seize or remove the Plaintiffs' said goods and chattels on the said 6th October, 1960, and further, as stated above, the whole of the said goods and chattels seized and removed by the Defendants were not included in or covered by the said Letters of Hypothecation".

p. 6

The Plaintiffs' prayer was, for, inter alia, damages (general and special), interest, costs, etc.

pp. 7-13
pp.13-16
p.17

The Defence, dated the 1st November, 1961, containing denials of material allegations in the plaint, the Reply to the Defence, dated the 21st December, 1961, and an Amendment of the Reply, dated the 1st October, 1962, are printed on pages 7 to 17 of the Record.

8. The case came up for trial before Wicks J. who after considering the oral and documentary evidence in the case which both sides had produced, determined the issue of liability in favour of the Bank and, by his Judgment, dated the 31st May, 1963 dismissed the action with costs.

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The learned Trial Judge held that the Letter of Hypothecation, not having been attested as required by the mandatory provisions of Section 15 of the Ordinance, was invalid, that it conferred no power on the Bank to seize the goods, but that the Bank had committed no trespass in seizing the goods as two of the Plaintiffs had, in a letter, dated the 6th October, 1960, expressly agreed to the goods being seized by the Bank as security for the overdraft

p.216,ll.21-28
p.218,ll.13-23
p.219,ll.14-21

9. A Decree in accordance with the Judgment of the learned Trial Judge was drawn up on the 31st May, 1963 and against the said Judgment and Decree, the Plaintiffs appealed to the Court of Appeal for Eastern Africa at Nairobi.

pp.219,220

The Defendants (i.e. the Bank, the present Appellant) cross-appealed asserting that the said Letter of Hypothecation was valid.

10. The appeal and cross-appeal came up for hearing in the Court of Appeal before a Bench consisting of Gould V.P. and Newbold and Duffus JJ.A. who, by their Judgments, dated the 2nd September, 1964, set aside the Judgment and Decree of the Supreme Court of Kenya and allowed the appeal, with costs (including the costs arising out of the cross-appeal).

pp.303-317

The learned Judges of the Court of Appeal remitted the case to the Supreme Court with a direction that the remaining issues should be decided on the basis that the issue of liability had been decided against the Bank.

p.319,ll.7-11

11. Delivering the main Judgment of the Court of Appeal, Newbold J.A. (with whom Gould V.J. and Duffus J.A. agreed) referred to the four issues which arose in the appeal and cross-appeal. These have already been stated in paragraph 2 hereof.

pp.305-306

On the first and main issue the validity of the Letters of Hypothecation inter partes - the learned Judge referred to Section 15 of the Ordinance (which contains madatory provisions for the attestation of instruments such as the two Letters of Hypothecation in this case) and to the argument advanced on behalf of the Bank, based upon decisions in the Courts of New Zealand (from which

p.307,l.13 to p.310,l.43
Annexure

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Country Kenya was alleged to have adopted the Ordinance) that lack of attestation does not invalidate a Letter of Hypothecation inter partes. For reasons that he gave, the learned Judge rejected the argument. In his view the

p.309,ll.25-27 determination of the first issue hinged upon whether the provisions of the said Section 15 were mandatory or directory and in deciding that they were mandatory he said:-

p.309,ll.28-35 "If the provisions are mandatory then the absence of any words specifically declaring the instrument void is immaterial. As Vice-Chancellor Page Wood said in Liverpool Borough Bank v. Turner, 70 E.R. 703, at page 707, 'if the Legislature enacts that a transaction must be carried out in a particular way, the words that otherwise it shall be invalid at law and in equity are mere surplusage'.

p.310,ll.9-43 Annexure The learned Judge was of opinion that the provisions of the said Section 15 were designed to protect not only third parties but also parties to the instrument; and he held therefore that under those provisions lack of attestation invalidates an instrument for all purposes - inter partes or in relation to the rights of third parties.

For reasons that he gave, he held that "by reason of lack of attestation, the Letter of Hypothecation of the 9th May 1960, (as well, of course, as the extension of such letter executed on the 6th October, 1960) is invalid between the parties and confers no rights upon either of the parties thereto"

p.310,l.44 to p.311,l.14 12. As to the second issue on appeal - the validity of the seizure by the Bank under Clause 9 of the Letter of Hypothecation - the learned Judge of the Court of Appeal (Newbold J.A.) said that having regard to his views on the first issue it was not necessary for him to deal with the second issue; but, because the matter had been argued at length before him, the learned Judge, without

p.311,ll.6-14 giving any reasons, stated his view, that "if the Letter of Hypothecation had been valid, the power conferred by Clause 9 thereof - which is merely a power to seize at any time - was both effective and validly exercised in the circumstances of this case even though in other circumstances such a power might not properly be exercised in view of

the principle referred to by Cockburn, C.J. in Stirling v. Maitland, 122 E.R. 1043 at p.1047". Report

13. On the third issue - as to whether or not the letter of the 6th October, 1960, written by two of the Plaintiffs authorising seizure by the Bank as the overdraft could not be reduced provides a good defence to the Bank - the learned Judge of the Court of Appeal, for reasons that he gave, rejected the argument advanced on behalf of the Bank that the two Plaintiffs who had authorised the seizure must be regarded as having had implied authority from the other three to consent to the seizure on their behalf. The learned Judge was satisfied that the said letter did not provide the Bank with a good defence against any of the Plaintiffs. p.311,l.15 to p.312,l.35 p.312,ll.33-35

14. As to the fourth issue - whether, apart from the Letters of Hypothecation or the said letter of the 6th October, 1960, the Bank was entitled to make the seizure - the learned Judge of the Court of Appeal (Newbold J.A. with whom Gould V.P. and Duffus J.A. agreed) said:-

"It is not clear to me precisely how this issue is relevant as Mr. O'Donovan" /Counsel for the Bank/ "did not seek to justify the seizure on any ground other than the Letter of Hypothecation and the consent. The issue may have arisen by reason of the decision of the Trial Judge. Assuming, but not deciding, that, either at common law or in equity, movables can be made security for a loan in a manner not affected by the provisions of the Ordinance and without the possession of the movables being given to the lender, I am quite satisfied that without express agreement such a transaction would not per se confer a right of seizure without legal proceedings. In this case apart from Clause 9 of the Letter of Hypothecation, there was no evidence of any such agreement and any such evidence would in any event have been inadmissible. Accordingly I am satisfied that there was no other authority which justified the seizure". p.312,l.37 to p. 313,l.6 Annexure

15. In a separate Judgement, Gould V.P., for reasons that he gave, expressed his agreement with the reasons and conclusions of Newbold J.A. He was clear that the requirements of attestation by at least one witness contained in Section 15 of the Ordinance was mandatory and that if the pp.314-315 Annexure

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requirement was not fulfilled invalidity of the instrument must follow. He said:

p.315,ll.17-22 "I think that the essence of the whole matter is this - that to justify the seizure the Bank relied upon the Letter of Hypothecation and nothing else, that such reliance was upon the document as creating a security and that as such it was invalid under the Ordinance".

pp.316-317 16. Duffus J.A., also in a separate Judgment, agreed with the Judgments of Newbold J.A. and Gould V.P. He said:-

p.316,ll.27-35 Annexure "The provisions of Section 15 of the Chattels Transfer Ordinance are in my opinion absolute and mandatory and the proper attestation of the execution of an instrument under that Ordinance is essential to its validity.

"In this case there has been no attempt to carry out the provisions of the Section and as the Ordinance clearly applies to instruments such as the Letters of Hypothecation in this case, it follows that the document is invalid.

p.316,l.36 to p.317,l.6 "The document, however, covers a transaction that is in itself lawful and its illegality would not taint any collateral agreement; I believe that the learned Trial Judge had this in mind when he considered the effects of an oral agreement but, as Gould V.P. points out in his Judgment, the Bank relied on Section 9 (Clause 9) of the Letters of Hypothecation to justify the seizure and this was an invalid document".

As to the said letter of the 6th October, 1960 the learned Judge of the Court of Appeal said:-

p.317,ll.16-27 "I agree with Newbold J.A. that the letter did not create any new right but only confirmed the rights which the parties believed already existed under the invalid Letters of Hypothecation. The letter specifically referred to the Letters of Hypothecation and in effect authorised a seizure under the terms of that document. I am of the view therefore, that this letter would not justify the seizure by the Bank as the document under which the seizure was in fact made by the Bank was illegal and void".

pp.318-319 17. An Order in accordance with the Judgments of the learned Judges of the Court of Appeal was drawn

up on the 2nd September, 1964, and against the said Judgment and Order, this appeal to Her Majesty in Council is now preferred, the Appellant Bank having been granted leave to appeal by two Orders of the Court of Appeal, dated the 26th October, 1964, and the 27th November, 1964. Report pp.320,323

The Respondents respectfully submit that the Appeal should be dismissed, with costs throughout, for the following among other

R E A S O N S

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1. Because the requirement of attestation of an instrument contained in Section 15 of the Ordinance is mandatory and invalidates inter partes and for all purposes any unattested instrument.

2. Because the first Letter of Hypothecation dated the 9th May, 1960, and the second Letter of Hypothecation dated the 6th October, 1960 (extending the first Letter) being "instruments" within the meaning of the said Section 15 were
20 invalid and ineffective because of lack of attestation (as was decided by both Courts below) and consequently the Bank's seizure of the Respondents' stock-in-trade, etc, which was expressly effected thereunder was wrongful.

3. Because the said letter of the 6th October, 1960, by which, because of the Respondents' inability to reduce the overdraft as promised, the 1st and 2nd Respondents purported to empower the Bank to seize the Respondents' stock-in-trade, etc.
30 did not, and could not, grant any new rights to the Bank and was, in effect, a mere confirmation of, or acquiescence in, the Bank's right of seizure under the said Letters of Hypothecation both of which, however, were invalid and ineffective and incapable of conferring any rights upon the Bank.

4. Because apart from the said Letters of Hypothecation (both of which were invalid) the Bank did not, and could not, possess any power of
40 seizure, there being no evidence of any valid and binding agreement between the parties as to such right of seizure and/or no Order of a Court authorising the same.

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5. Because, for the reasons stated therein, the Judgments of the learned Judges of the Court of Appeal for Eastern Africa at Nairobi were correct and ought not to be disturbed.

E.F.N. GRATIAEN

R.K. HANDOO

ANNEXURE

CHATTELS TRANSFER ORDINANCE (C.281)

Interpretation

2. - In this Ordinance, unless the context otherwise requires - "Chattels" means any movable property that can be completely transferred by delivery, and includes machinery, stock and the natural increase of stock as hereinafter mentioned crops, and wool, but does not include -

(a) title deeds, choses in action, negotiable instruments;

(b) shares and interestin the stock, funds or securities of any government or local authority;

(c) shares and interest in the capital or property of any company or other corporate body; or

(d) debentures and interest coupons issued by any government, or local authority, or company, or other corporate body;

.....

"instrument" means any instrument given to secure the payment of money or the performance of some obligation and includes any bill of sale, mortgage, lien, or any other document that transfers or purports to transfer the property in or right to the possession of chattels, whether permanently or temporarily, whether absolutely or conditionally, and whether by way of sale, security, pledge, gift, settlement or lease, and also the following -

(a) inventories of chattels with receipt thereto attached;

(b) receipts for purchase money of chattels;

(c) other assurances of chattels;

(d) declarations of trust without transfer;

(e) power of attorney, authorities or licences to take possession of chattels as security for any debt;

(f) any agreement, whether intended to be

followed by the execution of any other instrument or not, by which a right in equity to any chattels, or to any charge or security thereon or thereover, is conferred;

"instrument" does not include the following -

(a) Securities over, or leases of, fixtures

.....

(e) transfers of chattels in the ordinary course of business of any trade or calling;

.....

AS TO INSTRUMENTS GENERALLY

Instrument to be attested

15. Sealing shall not be essential to the validity of any instrument; but every execution of an instrument shall be attested by at least one witness, who shall add to his signature his residence and occupation.

No. 49 of 1964

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FOR EASTERN AFRICA AT NAIROBI

NATIONAL AND GRINDLAYS BANK
LIMITED

- and -

1. Dharamshi Vallabhji
2. Keshavji Dharamshi
3. Bachulal Dharamshi
4. Morarji Dharamshi, and
5. Raghavji Dharamshi trading as "Dharamshi Vallabji and Brothers

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CASE FOR THE RESPONDENTS

MERRIMAN, WHITE & CO.,
3, King's Bench Walk,
Inner Temple,
London, E.C.4.