

29 MAR 1963

25 RUSSELL SQUARE
LONDON, W.C.1.

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14/1962

IN THE PRIVY COUNCIL

No. 71 of 1960

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA - 68161

B E T W E E N :

GOVINDJI POPATLAL (Defendant) Appellant

- and -

NATHOO VISANDJI (Plaintiff) Respondent

CASE FOR THE RESPONDENT

1. This appeal is from a Judgment of the Court of Appeal for Eastern Africa dated the 10th June, 1960, dismissing an appeal from a Judgment of the Supreme Court of Kenya, dated the 19th December, 1958, in favour of the Respondent for the enforcement of a legal charge over a parcel of land in Nairobi. Record
p. 56
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2. The principal issues which arise for determination of this appeal are the following :- p. 31
- (1) Whether the Court of Appeal was right in rejecting a contention raised on the appeal by the Appellant (hereinafter called the Defendant) that the Respondent (hereinafter called the Plaintiff) had failed to prove his case, by non-compliance with the requirements of Section 68 of the Indian Evidence Act and omission to prove the execution or attestation of the legal charge on which the claim was founded.
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- (2) Whether the Plaintiff was entitled (as was held by both Courts below) to enforce his security against the land notwithstanding that there was no privity of contract between the Plaintiff and the Defendant, and the original mortgagors, from whom the Defendant derived his title, were not made parties to the action.
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- p.68
p.20
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p.33, 1.30
p.30, 1.32
p.69, 1.40
p.20, 1.37
p.21, 1.8
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p.78, 1.27
p.79, 1.11
p.79, 1.20
3. The legal charge sought to be enforced, dated the 10th October, 1953, was by way of security for the repayment, with interest, of the sum of Shs. 200,000/- lent by the Plaintiff to three brothers, the then registered owners of the land charged, which they held in equal undivided shares. (The said registered owners are hereinafter called the original mortgagors). The charge was registered in the Land Titles Registry on the 30th October, 1953. 10
4. By three transfers made respectively on the 6th October, 1954, the 6th October, 1954, and the 2nd August, 1956, the shares of the original mortgagors were transferred to the Defendant, who thereby became the sole registered proprietor of the land.
5. The Defendant paid interest due on the loan to the end of 1956 in accordance with the terms of the charge but did not pay interest for the first quarter of 1957 which fell due on the 1st January, 1957. 20
6. It was provided by the terms of the charge (Clause 3) that "the borrowers" (meaning the original mortgagors their heirs executors administrators and assigns) should keep the property insured against loss or damage by fire. This provision was complied with until the end of 1956, but the Defendant failed to pay the premium for such insurance in respect of the year 1957, and the Plaintiff himself paid it. 30
7. The Plaintiff by a letter from his advocates to the Defendant dated the 9th February, 1957, demanded payment of Shs. 6,000/- being interest on the loan for the first quarter of 1957, in accordance with the terms of the charge, and called upon the Defendant to submit the Insurance Policy for the year 1957. The penultimate paragraph of the said letter was as follows :-
- "In conclusion we wish to inform you that unless the sum of Shs. 6,000/- mentioned in paragraph three hereof and the Insurance Policy mentioned in paragraph six hereof are received in this office up to the 15th instant our instructions are to notify you:- 40
- (a) that our client will exercise his rights

under clause 8 of the said Instrument of Charge, that is to say, he will call upon you to pay the whole principal sum of Shs. 200,000/- together with interest and all other moneys due therein;

10 (b) that he would proceed to insure the said premises with an Insurance Company of his choice to the insurable value of Shs. 300,000/- against loss or damage by fire and hold you responsible for the premiums under Clause 5 of the said Instruments of Charge."

8. The default clause (Clause 8) of the Legal charge, mentioned in the said letter dated the 9th February, 1957, reads as follows :- p.71

20 "8. That in the event of the Borrowers making any default in the payment of interest or of the rents and outgoings or in performance of any of the covenants or agreements herein contained or implied and on their parts to be performed and observed it shall be lawful for but not obligatory on the part of the Lender to demand recover and enforce immediate payment of the said principal sum of Shillings Two hundred thousand (Shs. 200,000/-) together with interest and all moneys that may be owing by them to the Lender on this security." p.71, 1.15

30 9. By a further letter, dated the 23rd February, 1957, the Plaintiff through his advocates informed the Defendant that, as no Insurance Policy had been produced to him, he had himself paid the sum of Shs. 814/50 in respect of the premium and stamp duty, and demanded payment of that sum by the Defendant. p.80
p.81, 1.4
p.81, 1.7

10. Finally, the Plaintiff's advocates sent to the Defendant a letter dated the 6th March, 1957, containing the following paragraph:-

40 "As you have not complied with the terms stated in the penultimate paragraph of our letter dated the 9th February 1957 our client now calls upon you not only to pay the sum of Shs. 6,000/- and Shs. 814/50 but also he demands from you the sum of Shs. 200,000/- and unless you pay all these sums on or before the 10th instant our instructions are to institute legal proceedings against you for the recovery thereof without further reference to you." p.81, 1.29

Record
p.21, l.14

The Defendant did not pay the sums so demanded or any part thereof.

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p.14, l.21

11. On the 25th March, 1957, this suit was commenced by a Plaint in the Supreme Court. As originally constituted, it was an action against the Defendant alone. On the 20th February, 1958, when the case came on for hearing, the Plaintiff by his Counsel informed the Court that he had charged his interest in the land in favour of the Standard Bank of South Africa Limited, that the Bank had signed a discharge, but that the latter had not been registered. The Court then framed issues, the fourth of which reads as follows:-

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p.14, l.25

"(4) Does the charge executed by the Plaintiff in favour of the Standard Bank of South Africa, Limited affect his rights in the present proceedings?"

p.14, l.38

In view of that issue, the Plaintiff applied for and was granted, an adjournment with a view to joining the Standard Bank of South Africa Limited, as a party to the suit or registering the discharge. On the 9th May, 1958, the Plaintiff applied for leave to join the Bank as a defendant and amend the Plaint. This application was granted. Accordingly the Plaint was amended on the 13th May, 1958.

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p.15, l.9
p.16, l.12
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p.5, l.30

p.6, l.1

p.6, l.12

p.14, l.18
p.18, l.3

12. The Amended Plaint alleged against the Defendant (therein called "the first Defendant") the facts which are set out above in paragraphs 3 to 11. The relief sought was for an account to be taken to ascertain the amount due at a date to be fixed by the Court and that the sum due should carry interest at 12 per cent until realisation, and, in the event of non-payment, for sale of the property charged to satisfy the Plaintiff's claim. There was also a prayer for a personal decree, if the proceeds of sale were insufficient to pay the amount due to the Plaintiff in full, but this was abandoned on the 20th February, 1958, prior to the amendment of the Plaint, and on the hearing of the suit.

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p.4, l.33
p.19, l.28

p.4, l.42

13. As regards the Standard Bank of South Africa Limited, who were made the second Defendants, the Amended Plaint (as further amended later) alleged that on the 24th July, 1956, the Plaintiff executed in favour of the Bank a Memorandum of Charge by Deposit of Title to secure loans, that prior to the 1st January, 1957, he had fully repaid the loans

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	and all interests and charges, and accordingly the Bank at all material times were prepared to execute a Discharge. It was further alleged that on the 20th February, 1958, such Discharge was duly executed and that the same was registered in the Registry of Titles on the 22nd February, 1958. No relief was sought against the Bank.	p.5, 1.7
	14. The Defendant, by his Defence dated the 23rd May, 1957, stated <u>inter alia</u> , as follows:-	p.5, 1.26
10	(a) That the Plaintiff discloses no cause of action against him.	p.7
	(b) That he does not admit that the charge relied upon is legal or valid or conforms to the requirements of the law so as to create the security as alleged by the Plaintiff.	p.7, 1.23
	(c) That he does not admit being or having become liable to the Plaintiff under the charge.	p.7, 1.27
20	(d) That with regard to the default clause (Clause 8), he does not admit that the Plaintiff has taken any requisite steps "to demand recover and enforce" payment of the sums claimed.	p.7, 1.33
	(e) That he does not admit having incurred any liability to the Plaintiff with regard to insurance or interest.	p.8, 1.1
	15. By a Reply dated the 31st May, 1957, the Plaintiff pleaded <u>inter alia</u> that the Defendant bought the property in question subject to the legal charge, that by his having paid interest up to the 31st December, 1956, the Defendant is estopped from denying liability under the charge, and that by complying with the terms and conditions of the charge the Defendant approbated and accepted the obligations created by the charge.	p.8, 1.15
30		p.9
		p.9, 1.25
		p.9, 1.29
40	16. The hearing of the suit began on the 4th December, 1958, before Mayers, J. At the outset, an Order was made by consent that the Standard Bank of South Africa Limited be dismissed from the suit on the Plaintiff agreeing to pay their costs. The learned Judge then amended the issues which had been framed on the 20th February, 1958.	p.17 p.17, 1.34
		p.18, 1.25
		p.18, 1.27
	17. The Plaintiff gave evidence, which was not	pp.20-21

<u>Record</u>		
pp.20-21	challenged, and produced documents, to prove the relevant facts as pleaded. Evidence in support of his case was given by a clerk from the Land Registry, who produced the file relating to the land in question, and by a clerk from the Standard Bank of South Africa Limited.	
pp.22-23		
pp.23-24		
p.24, 1.15	18. No witnesses were called on behalf of the Defendant.	
p.27, 1.11	19. The Defendant's principal contention was that the suit is not maintainable, on three grounds, namely:-	10
p.27, 1.13	(1) That there was no privity of contract either pleaded or proved between the Plaintiff and the Defendant.	
p.27, 1.17	(2) That the original mortgagors were necessary parties and had not been brought on the record.	
	(3) That at the date of the Institution of the suit the Plaintiff's entire interest in the property the subject of the charge was vested in the Standard Bank of South Africa Limited.	20
p.32	20. The Judgment of the Supreme Court was delivered on the 19th December, 1958. The learned trial Judge, after finding the relevant facts, as set out above, then disposed of certain contentions of law put forward on behalf of the Defendant which do not arise for consideration on this appeal. He then dealt with the Defendant's principal contention, and the three grounds advanced in support thereof, as follows :-	
pp.33-34 pp.34-36		
p.37, 1.20	(1) The absence of privity of contract between the Plaintiff and the Defendant does not in any way affect an action to enforce the security, although it would be fatal to a claim for a personal decree. He observed that in this suit the prayer for a personal decree had been abandoned.	30
p.37, 1.7		
p.37, 1.27	(2) He rejected the contention that the original mortgagors were necessary parties. By Section 85 of the Indian Transfer of Property Act, which applies to Kenya, the only necessary parties to a mortgage suit are persons having an interest in the property the subject of the mortgage. (The said Section is set out in the Annexure hereto).	40

10 (3) As regards the argument based upon the charge in favour of the Standard Bank of South Africa Limited, the learned Judge held that (i) the creation of the equitable charge in favour of the Bank in no way diminished the Plaintiff's rights under the legal charge as against the proprietor for the time being of the land charged, and (ii) as equity regards that as done which ought to have been done, and as the debt secured by the equitable charge had been repaid before the date of the commencement of this suit, the equitable charge could not have been enforced in any legal proceedings and therefore, for practical purposes, was spent.

The learned Judge therefore answered the issues which had been framed, in the following terms:-

20 Issue 1: Is the document of charge relied on by the Plaintiff validly executed and registered?

p.38, l.31

Answer: Yes.

Issue 2: Is the Plaintiff's suit maintainable?

Answer: Yes.

Issue 3: Is a demand for payment a condition precedent to the accrual to the Plaintiff of a right to sue?

Answer: No.

30 Issue 4: If the answer to the question in Issue 3 is in the affirmative did the Plaintiff make such demand before the institution of the proceedings?

Answer: This issue does not arise in view of my conclusion as to Issue 3, but I have found as a fact that the Plaintiff did make a demand for payment in writing, through his advocates prior to the institution of the proceedings.

40 Issue 5: Does the charge executed by the Plaintiff in favour of the Standard Bank of South Africa affect his rights in the present proceedings?

Answer: No.

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Issue 6: To what relief, if any, is the Plaintiff entitled?

Answer: A decree in the terms of paragraphs A, B and C of the prayer in his amended plaint.

- p.39 et seq. Judgment was therefore given for the Plaintiff and a Decree issued accordingly.
- pp.42-43 21. In a Memorandum of Appeal dated the 5th June, 1959, the Defendant set forth the grounds upon which he sought to challenge the said Judgment of the Supreme Court. These were directed principally to the question of the absence of privity of contract between the Plaintiff and the Defendant, and the further question whether the original mortgagors were necessary parties to the action. 10
- p.45, l.36 However, the Court of Appeal for Eastern Africa (Forbes V.-P., Windham and Gould J.J.A.) permitted the Defendant to argue another point of law which had not been raised specifically in the Supreme Court and which is set out in an Additional Ground of Appeal dated the 5th May, 1960, in the following terms:- 20
- p.44
1. That the Respondent has, despite, Issue No.1 having been framed and placed on record, by agreement of the parties, failed to prove his case, by non-compliance with the mandatory requirements of Section 68 et seq of the Indian Evidence Act, and omitting to prove the execution or attestation of the material instrument or instruments of charge, whereon his claim in the suit was founded. 30
- Section 68 of the Indian Evidence Act, in the form in which it applies in Kenya, reads as follows:-
- "68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence." 40
- p.60, l.27 It is common ground that, although the legal charge the subject of this suit is duly registered under the Registration of Titles Ordinance, neither of the attesting witnesses was called to prove the execution thereof and no evidence was adduced as to
- p.60, l.31

whether either of them was alive and subject to the process of the court and capable of giving evidence.

22. The principal Judgment in the Court of Appeal was given by Windham, J.A., the other members of the Court concurring. The learned Justice of Appeal dealt first with the new point based upon Section 68 of the Indian Evidence Act. He held that the requirements of that Section, which relate only to mode of proof, may be overridden by specific and conflicting provisions of substantive law contained in some other enactment. He then referred to the Registration of Titles Ordinance, Section 1(2) of which provides that - "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." The learned Justice of Appeal then turned to Sections 23 and 32 of the same Ordinance, which deal respectively with the conclusiveness of a certificate of title issued by the registrar to the purchaser of land, and the effect of registration of an instrument affecting land, and stated his conclusion in the following terms:-

"The effect of these two sections of the Registration of Titles Ordinance, as I see it, is that the registration under the Ordinance of a mortgage or charge on land, if duly proved, shall be accepted by the courts as conclusive of the validity of the document affecting it, including that which is a pre-requisite of its validity, namely its due execution; and such proof of execution dispenses, to my mind, with the conflicting and more general requirements regarding proof of execution of certain documents laid down by Section 68 of the Indian Evidence Act. While registration does not afford irrebutable proof of due execution, it raises a presumption which can only be rebutted if lack of due execution is specifically pleaded and proved within the framework of the Ordinance."

(Sections 23 and 32 of the Registration of Titles Ordinance are set out in the Annexure hereto.)

The learned Justice of Appeal also mentioned the view, which derives support from at least one of the Indian authorities dealing with the effect of

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Section 68 of the Indian Evidence Act, that where (as in the present suit) a defendant fails to object when the mortgage document is tendered in evidence, the requirements of the section must be taken to have been waived, and the objection cannot be taken on the appeal. He expressed no concluded opinion as to this view, which the Plaintiff submits is right.

p.63, 1.11 23. The Judgment of Windham J.A. also rejected the contention that the suit is misconceived, based upon the absence of privity of contract between the Plaintiff and the Defendant and the non-joinder of the original mortgagors as defendants, upon reasoning similar to that of the learned trial Judge. 10

p.64, 1.13 24. A further argument raised on behalf of the Defendant, namely, that the Plaint is defective in that it contains no specific allegation that the original mortgagors have defaulted, but only an allegation that the Defendant has defaulted, was rejected on three grounds, viz: (1) the allegation that the interest and the insurance money had not been paid at all, i.e. either by the original mortgagors or the Defendant, is implicit in the Plaint, (ii) the point was not raised in the Defence, and (iii) the Plaintiff in evidence stated that at the date of the filing of the suit the interest was owing and he had had to pay the insurance premium himself, thereby establishing that there had been no payment by anyone. 20

p.64, 1.30

p.64; 1.40
p.65, 1.4

It was ordered that the Appeal be dismissed with costs. 30

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p.66 25. On the 22nd November, 1960, Final Leave to Appeal to Her Majesty in Council was granted.

26. The Plaintiff respectfully submits that this Appeal should be dismissed with costs for the following, amongst other

R E A S O N S

1. BECAUSE the Judgment of the Supreme Court is right.
2. BECAUSE the Judgments in the Court of Appeal for Eastern Africa are right. 40
3. BECAUSE the Defendant did not object to the

admission of the legal charge dated the 10th October, 1953, when the same was tendered in evidence, and it was not open to him on the appeal to seek to exclude it under the provisions of Section 68 of the Indian Evidence Act.

4. BECAUSE on the evidence the Plaintiff is entitled to the relief granted to him by the Decree of the Supreme Court.

RALPH MILLNER.

A N N E X U R E

INDIAN TRANSFER OF PROPERTY ACT

Section 85.

85. Parties to suits for foreclosure, sale and redemption.

Subject to the provisions of the Code of Civil Procedure, section 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage: Provided that the plaintiff has notice of such interest.

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REGISTRATION OF TITLES ORDINANCE

Section 23.

23. Certificate of title to be held conclusive evidence of proprietorship.

The duplicate certificate of title issued by the registrar to any purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon and the title of such proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party. And a certified copy of any registered instrument, signed by the registrar, and sealed with his seal of office, shall be received in evidence in the same manner as the original.

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Section 32.

32. Unregistered instrument invalid.

No instrument, until registered in manner hereinbefore described, shall be effectual to pass any land or any interest therein, or render such land liable as security for the payment of money, but upon the registration of any instrument in manner hereinbefore prescribed the land specified

in such instrument shall pass, or, as the case may be, shall become liable as security in manner and subject to the agreements, conditions and contingencies set forth and specified in such instrument, or by this Ordinance declared to be implied in instruments of a like nature.

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(Defendant) Appellant

- and -

NATHOO VISANDJI
(Plaintiff) Respondent

CASE FOR THE RESPONDENT

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