

~~P.C.~~
GIT. 62

Judgment
7, 1966

No. 49 of 1964

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

B E T W E E N

NATIONAL AND GRINDLAYS BANK LIMITED
(Defendant)

Appellant

- and -

10 DHARAMSHI VALLABHJI
KESHAVJI DHARAMSHI
BACHULAL DHARAMSHI
MORARJI DHARAMSHI and
RAGHAVJI DHARAMSHI
trading as "DHARAMSHI VALLABHJI
& BROS." (Plaintiffs)

Respondents

CASE FOR THE APPELLANT

RECORD

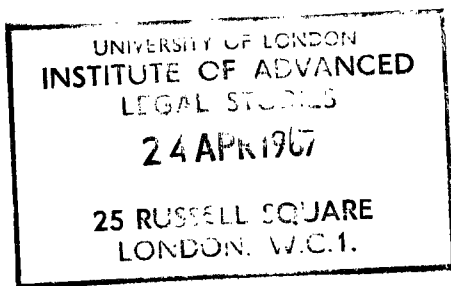
1. This is an appeal by the Defendant, by leave of the Court of Appeal for Eastern Africa (Sir Trevor Gould V.P., Newbold J.A. and Duffus J.A.), from a judgment of that Court given at Nairobi on the 2nd September 1964, allowing the Plaintiffs' appeal from a judgment of the Supreme Court of Kenya (Wicks J.) delivered on the 31st May 1963. pp.323-324
- 20 and Duffus J.A.), from a judgment of that Court given at Nairobi on the 2nd September 1964, allowing the Plaintiffs' appeal from a judgment of the Supreme Court of Kenya (Wicks J.) delivered on the 31st May 1963. pp.303-317
- 30 2. The appeal arises out of an action in which the Plaintiff-Respondents, hereinafter called "the Plaintiffs", who carried on business in partnership in Nairobi, sued the Defendant-Appellant, hereinafter called "the Bank", for, inter alia, damages resulting from a trespass alleged to have been committed by the Bank in taking possession of the Plaintiffs' stock-in-trade, which was the subject of a letter of hypothecation given as a security for an overdraft with the pp.187-219

P.C. 87111

GI-6.2 RECORD

p.18 L.30
 p.116 L.1-10
 p.190 L.17-24

pp.218-219

pp.313, 315,
317.

pp.304-305

pp.325-326

pp.334-337

bank. The trial proceeded on the basis that the only issue to be determined initially was the issue of liability; and that only if that issue was determined in favour of the Plaintiffs would the remaining issues in relation to damages and set-off be investigated. The trial judge gave judgment in favour of the Bank, and held that though the letter of hypothecation was invalid, nevertheless no trespass had been committed, because the Plaintiffs had consented to the Bank's taking possession of the goods. The Court of Appeal, while agreeing with him that the letter of hypothecation was invalid, reversed his decision on the ground that there was no evidence of any such consent.

10

3. It is common ground that the Bank took possession of the Plaintiffs' stock-in-trade on the 6th October 1960, and that its act in doing so amounted to a trespass unless the Plaintiffs authorised or consented to it. The question for decision on the Appeal is whether, by reason of the said letter of hypothecation or otherwise, the Plaintiffs authorised or consented to the Bank's taking possession of the said stock-in-trade.

20

4. So far as is relevant to the issues raised on the Appeal, the facts found by the trial judge were summarised by Newbold J.A., who delivered the leading judgment in the Court of Appeal, as follows:

30

"On the 4th April 1960, the plaintiffs opened a banking account with the bank 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 duly filled in, though it was dated the 9th May, 1960. The letter of hypothecation was neither attested nor

40

10 registered. 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

20 cheques were drawn in excess of the additional limit. 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

40 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 authorising the seizure as the overdraft could not be reduced as promised."

50 5. The trial judge's findings of fact were challenged by the Plaintiffs in the Court of Appeal, but after hearing a careful analysis of the evidence by Counsel for the Plaintiffs the Court of Appeal declined to interfere

RECORD

with those findings. The Bank will contend that, in view of the concurrent findings of fact by the trial judge and the Court of Appeal, it is not open to the Plaintiffs to challenge those findings on this Appeal.

p.164 L.32
to
p.167 L.33

6. Before the trial judge the principal submissions on behalf of the Plaintiffs were as follows:

(1) The point to be decided was whether the Bank's seizure of the goods on the 6th October 1960 was wrongful. 10

(2) So far as the Bank relied on the letter of hypothecation dated the 9th May 1960:

pp.168-173

(a) This document was an "instrument" within the Chattels Transfer Ordinance (cap. 281 of the Laws of Kenya), it was not attested, and it was accordingly wholly invalid under s.15 of that Ordinance, which is in the following terms: 20

"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."

p.168 L.1-27

(b) The document was inadmissible because s.15. of the Chattels Transfer Ordinance required it to be attested, and s.68 of the Indian Evidence Act provided that it could not be "used as evidence" unless the attesting witness was called, which condition was not (and could not be) fulfilled in the present case. 30

p.176 L.11-48

(c) If the document was valid, it still afforded not defence to a suit for wrongful seizure, because the Bank agreed with the Plaintiffs that the loan should not be repayable until the 30th April 1961, and the provision in the letter of hypothecation which purported to give the Bank a right to seize the goods at any time was inconsistent with and overridden by this agreement. 40

(3) So far as the Bank relied on the letter dated the 6th October 1960:

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES

24 APR 1961

25 RUSSELL SQUARE
LONDON, W.C.1.

RECORD

- (a) It was signed by two only of the Plaintiffs, and they had no authority to authorise the Bank to seize the goods. p.177 L.5-18
- (b) The signature of the letter was obtained by a misrepresentation of its nature. p.177 L.34 to p.178 L.27
- (c) There was no consideration for the grant of this authority to seize. p.178 L.43
7. Before the trial judge the principal submissions on behalf of the Bank were as follows:
- 10 (1) The letter of hypothecation was not an "instrument" within the Chattels Transfer Ordinance. pp.155-158
- (2) If it was such an instrument, s.15 of the Ordinance did not render it invalid as against the Plaintiffs, who were the grantors under the instrument; for the primary object of the Chattels Transfer Ordinance was to protect lenders, not borrowers. p.145 L.24 to p.150
- 20 (3) The Bank never agreed that the credit facilities made available to the Plaintiffs should remain available until the 30th April 1961 in all circumstances; if the account was not satisfactorily conducted or the Bank's security over the stock-in-trade was in danger; the Bank was entitled to call in the overdraft and to seize the goods. pp.141-145
- 30 (4) The Plaintiffs consented to the Bank's taking possession of the goods, and the letter of the 6th October 1960 evidencing such consent was signed voluntarily. p.152 L.11 to p.153 L.5
8. Wicks J. Held:
- (1) That the letter of the hypothecation was an "instrument" within the Chattels Transfer Ordinance; p.215 L.6 to p.216 L.2
- (2) That the operation of s.15 of the Ordinance was quite unrestricted, and accordingly the letter of hypothecation was wholly invalid because it was not attested; p.216 L.2-28
- 40

RECORD

p 211 L.7-10

p.212
L.35-44

(3) That the agreement between the parties was that the Plaintiffs be granted overdraft facilities repayable on demand, that it was a fundamental condition of the agreement that the Plaintiffs should conduct their account in a satisfactory manner, that the Plaintiffs were in breach of this condition, and that the Bank was accordingly entitled to demand repayment of the overdraft;

p.213 L.15.
p.219 L.5-13

(4) That the letter of the 6th October 1960 was signed voluntarily and not as the result of duress or misrepresentation, and that the two Plaintiffs who signed it were acting on behalf of all the Plaintiffs; 10

p.218 L.12
to
p.219 L.4

(5) That even though the letter of hypothecation was not enforceable in a court of law, the Plaintiffs expressly agreed that the Bank should take possession of the goods, that this was evidenced in writing by the said letter of the 6th October 1960, and that the goods were seized in pursuance of this agreement. 20

p.219 L.20

Accordingly he dismissed the action with costs.

pp.223-230

p.231

9. From this decision the Plaintiffs appealed to the Court of Appeal on a large number of grounds, of which some challenged the judge's findings of fact and others challenged his decision in law. The Bank cross-appealed, challenging the judge's decision that, by reason of lack of attestation, the letter of hypothecation was invalid as against the Plaintiffs. The issues which arose on the appeal were summarised by Newbold J.A. as follows: 30

p.305 L.39
to
p.306 L.5

"First, is the letter of hypothecation valid inter partes?

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? 40

Thirdly, if not, does the letter of 6th October authorising 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?"

10. Before the Court of Appeal the Bank did not dispute that the letter of hypothecation was an "instrument" within the Chattels Transfer Ordinance. The submissions on behalf of the Bank followed those mentioned in sub-paragraphs (2), (3) and (4) of paragraph 7 above, and emphasised that the only question was whether the Plaintiffs consented at the time the Bank took possession of the goods. As regards the letter of hypothecation it was submitted that the letter would have afforded a valid defence at common law, and that the Chattels Transfer Ordinance contained nothing which affected the validity of it as between the parties to it; and reliance was placed on certain decisions of the New Zealand courts on the effect of the New Zealand Chattels Transfer Act, upon which the Kenya Ordinance was based.

pp.247,
270, 292

pp.249-251
258-259;
271-273,
278;
294-295,
301-302

11. Before the Court of Appeal the Plaintiffs expressly abandoned the contention that the letter of hypothecation was inadmissible by reason of s.68 of the Indian Evidence Act. As an alternative to their claim that the Bank was liable in trespass for seizing the goods, they attempted to raise a claim based on detinue or on a conversion subsequent to the seizure, alleging that even if the Plaintiffs had consented to the seizure of the goods, they were entitled to revoke their consent and the Bank's refusal to return the goods on demand was tortious; but the Court of Appeal held that it was not open to them to raise these new claims at that stage, as the pleadings neither averred the refusal of a demand nor claimed the return of the goods, the trial had not been conducted on the basis that the claim arose out of detinue or a conversion subsequent to the seizure, the judge did not so deal with it, and there was no ground of appeal relating to any such claim. As regards the validity of the letter of hypothecation, the Plaintiffs contended that the object of the Chattels Transfer Ordinance was to protect every kind of person

p.250 L.33;
p.272 L.37

p.252 L.4
to p.253 L.10;
p.274 L.1-21;
p.296 L.17 to
p.297 L.5

p.306 L.23

pp.254-256;
275-276;
297-299

RECORD

p.243 L.30-40;
pp.267-268;
pp.289-290

who needed protection, including the creditor and the debtor, and the requirement of s.15 that the instrument should be attested went to the root of the matter whoever was concerned. They further contended that the letter of the 6th October 1960 amounted to a licence to remove goods as a security, and was also invalid for want of attestation; and that as the parties had purported to reduce their agreement to writing, if the agreement was invalid it was not open to them to prove an oral agreement by reason of s.97 of the Evidence Ordinance; and that no oral agreement was pleaded. 10

12. The Court of Appeal allowed the appeal with costs.

p.310 L.27-43;
p.314 L.22-30;
p.316 L.27-35

On the first issue referred to in paragraph 9 above, all three members of the Court held that the provisions of s.15 of the Chattels Transfer Ordinance were mandatory and that the lack of attestation rendered the letter of hypothecation invalid even as against the Plaintiffs, but they all stated that they reached this conclusion with reluctance. 20

p.309 L.25
to
p.310 L.43

Newbold J.A., in delivering the leading judgment of the Court, with which Gould V.P. and Duffus J.A. agreed, based his decision partly on the wording of s.15, with which he contrasted the wording of other provisions of the Ordinance, and partly on the view, which he took after examining the Ordinance, that its object was to protect not only third parties but also the parties to any instrument. He accepted that when Kenya adopted the New Zealand legislation regard should be had to the decisions of the New Zealand courts on the equivalent section; but he did not consider that the New Zealand cases relied on by the Bank compelled the Kenya Courts to come to a different conclusion. 30 40

p.308 L.50

p.311 L.5-10

Having regard to its views on the first issue, the Court did not find it necessary to deal with the second issue at any length; but Newbold J.A. stated that, if the letter of hypothecation had been valid, the power conferred by clause 9 thereof (which was a power to seize at any time) would in his view have been both effective and validly exercised in the circumstances of this case.

RECORD

10 On the third issue Newbold J.A. held that the letter of the 6th October 1960 did not create any new rights but merely confirmed the position which created rights under the letter of hypothecation; so that if the letter of hypothecation was invalid, the letter of the 6th October 1960 did not amount to an effective consent. If he was wrong in this view, he held that the letter itself was an instrument within the Ordinance, and therefore void because it was not attested.

p.311 L.15.
to
p.312 L.35

20 Gould V.P., agreeing with him on this issue, said that the letter amounted to "no more than an absence of opposition to the exercise of such rights as the Bank might possess", and fell short of a true consent which would afford a defence in trespass; and Duffus J.A. said that "the letter did not create any new right but only confirmed the rights which the parties believed existed under the invalid letter of hypothecation".

p.315 L.38-41

p.317 L.17-19

30 On the fourth issue Newbold J.A. said that it was not clear to him how this issue was relevant, but he was satisfied that, if movables could be made security for a loan in a manner not affected by the provisions of the Ordinance and without possession being given to the lender, such a transaction would not without express agreement confer a right of seizure without legal proceedings; that there was no evidence of any such agreement, and that in any event any such evidence would have been inadmissible.

p.312 L.36
to
p.313 L.6

40 13. The Bank respectively submits that both the trial judge and the Court of Appeal erred in holding that the letter of hypothecation was invalidated as between the Plaintiffs and the Bank by s.15 of the Chattels Transfer Ordinance. It is well settled that the similar provision in s.10(1) of the Bills of Sale Act, 1878, does not render a bill of sale which is within that Act invalid as between the grantor and grantee: Davis v. Goodman, 5 C.P.D. 128. The Kenya Chattels Transfer Ordinance is almost identical in all material respects with the Chattels Transfer Act, 1924, of New Zealand, from which it was adopted; S.20 of that Act, which is identical with S.15 of the Kenya Ordinance was derived from S.49 of the Chattels, Transfer Act, 1889, which was in the following

50

terms:

"49. Sealing shall not be essential to
"the validity of any instrument; but
"every execution of an instrument or
"memorandum of satisfaction shall be
"attested by one witness, to whose sign-
"ature shall be added the residence and
"occupation of such witness"

and before the Kenya Ordinance was enacted it was well settled in New Zealand that the latter section did not render a bill of sale void as 10. between the parties to it: see R v. Dibb Ido, 15 N.Z.L.R. 591, a decision of the New Zealand Court of Appeal, and Lee v. Official Receiver, 22 N.Z.L.R. 747. The object of both the English Bills of Sale Act 1878 and the New Zealand legislation was to prevent frauds upon creditors by secret bills of sale of personal chattels, and the Bank submits that the Kenya Ordinance plainly had the same object. The stringent provisions of ss.8 and 20 9 of the English Bills of Sale Act 1878 (Amendment) Act, 1882, which have been held to invalidate unattested bills of sale even as between the original parties, are not reproduced in the New Zealand legislation (as was pointed out in Lee v. Official Receiver, supra) nor in the Kenya Ordinance; and an examination of the Kenya Ordinance shows that it was concerned only with the rights of creditors in relation to goods 30 remaining in the possession of the grantor of a bill of sale. The effect of s.15 of the Kenya Ordinance (and of the corresponding provision in s.34(2) which requires a memorandum of satisfaction to be attested and is also derived from s.49 of the New Zealand Chattels Transfer Act 1889) is, in the Bank's submission, to render an unattested instrument (or an unattested memorandum of satisfaction) incapable of registration, and 40 such an instrument is thus incapable of being made binding on third parties so long as the goods remain in the possession of the grantor of the instrument. There is nothing in the Ordinance which justifies the interpretation placed on s.15 by the trial judge and the Court of Appeal, which led to their reluctantly holding (in the words of Gould V.P.) "that a document between two parties, admittedly signed by one of them, cannot be relied 50 upon by the other for lack of an attesting witness".

p.314
L.12-14

14. If the above submission is accepted, the Bank submits that Newbold J.A. was correct in his view that the power conferred by clause 9 of the letter of hypothecation was effective and validly exercised in the circumstances of this case, having regard to the concurrent findings of fact that the overdraft was repayable on demand.

p.311
L.6-10

p.211
L.7-10
p.304 L.13

10 15. If the Bank's submission on the effect of s.15 of the Chattels Transfer Ordinance is not accepted, the Bank submits that possession of the goods was nevertheless taken with the consent of the Plaintiffs, and that such consent was evidenced both by the letter of the 6th October 1960 and by their conduct at the time the Bank took possession, and affords a good defence to the Plaintiffs' claim in trespass. It is unnecessary for the Bank to show that there
20 was consideration for the giving of consent, or that the consent amounted to a fresh agreement, as was contended by the Plaintiffs; and it is submitted that Newbold J.A. and Gould V.P. erred in holding that, in order to afford a defence to an action for trespass, the letter consenting to the seizure had itself to be attested under s.15 of the Chattels Transfer
30 Ordinance. The Bank submits that the trial judge was entitled to come to the conclusion that, quite apart from the letter of hypothecation, the Plaintiffs expressly agreed with the Bank that the latter should take possession of the goods, and that the goods were seized in pursuance of such agreement; and that the Court of Appeal erred in holding that there was no evidence, or no admissible evidence, of such agreement.

p.312 L.27-29
p.315 L.14-17

p.218 L.12
to
p.219 L.4

p.212 L.30-32

40 16. The Bank accordingly submits that this appeal ought to be allowed and the Decree of the Supreme Court of Kenya dated the 31st May 1963 ought to be restored for the following amongst other

pp.219-220

R E A S O N S

(1) BECAUSE the Bank's act in taking possession of the stock-in-trade on the 6th October 1960 was authorised by the letters of hypothecation dated the 9th May
50 1960 and the 6th October 1960 and

RECORD

accordingly did not amount to a trespass to the Plaintiffs' goods;

- (2) BECAUSE the said letters of hypothecation were valid as between the Plaintiffs and the Bank, and as between them were not rendered void for lack of attestation by s.15 of the Chattels Transfer Ordinance;
- (3) BECAUSE, even if the said letters of hypothecation were void as against the Plaintiffs, the Plaintiffs consented to the Bank's taking possession of their stock-in-trade, such consent being evidenced by the said letter dated the 6th October 1960; 10
- (4) BECAUSE the said letter dated the 6th October 1960 was not rendered ineffective as a consent to the taking of the stock-in-trade by s.15 of the Chattels Transfer Ordinance, but affords a sufficient defence to the Plaintiffs' claim in trespass; 20
- (5) BECAUSE Wicks J was right in finding that the Plaintiffs expressly agreed that the Bank should take possession of the stock-in-trade, and the Court of Appeal ought not to have departed from his finding in this respect;
- (6) BECAUSE the decision of the Court of Appeal was wrong and ought to be reversed. 30

B. O'DONOVAN

E.G. NUGEE

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

O N A P P E A L
FROM THE COURT OF APPEAL FOR EASTERN
AFRICA AT NAIROBI

B E T W E E N

NATIONAL AND GRINDLAYS
BANK LIMITED Appellant

-- and --

DHARAMSHI VALLABHJI &
OTHERS Respondents

CASE FOR THE APPELLANT

SANDERSON LEE MORGAN PRICE & CO.,
77 Bishopsgate,
E.C.2.

Solicitors for the Appellant.