BARCLAYS BANK D.C.O. v. B.D. KALIL AND SONS and SOLITA KALIL

Court of Appeal (Cole, C.J., Cornelius Harding and Percy Davies, JJ.A.): February 2nd, 1972
(Civil App. No. 15/70)

[1] **Mortgage—foreclosure or sale—foreclosure of equitable mortgage—mortgage by deposit of title deeds with express or implied agreement for legal mortgage gives mortgagee right to foreclosure:** An equitable mortgagee by deposit of title deeds is entitled to foreclosure where the deposit is accompanied by an agreement on the part of the mortgagor, whether express or implied, to execute a legal mortgage (page 20, lines 22—29).

[2] **Mortgage—mortgagee in possession—appointment of receiver by court—court may appoint receiver where circumstances just and convenient:** A mortgagee in possession may relieve himself of his position and responsibility by appointing a receiver; and the court may appoint a receiver after a mortgagee has taken possession if the circumstances render it just and convenient: for example, if the mortgagee in possession refuses to satisfy equitable interests, or if there is a strong *prima facie* case for setting the conveyance to him aside; but not otherwise, unless the rents and profits are in danger (page 20, lines 30—37).

[3] **Mortgage—mortgagee in possession—appointment of receiver by mortgagee—mortgagee may appoint receiver for relief of his responsibility:** See [2] above.

[4] **Mortgage—receivers—receiver appointed by court—court may appoint receiver where mortgagee in possession if circumstances just and convenient:** See [2] above.

[5] **Mortgage—receivers—receiver appointed by mortgagee in possession—equitable mortgagee may appoint receiver for relief of his responsibility:** See [2] above.

The appellants brought an action in the High Court against the respondents to have a lease set aside and to have a receiver appointed.

The first respondents, B.D. Kalil & Sons, were granted a lease of premises for a term of 50 years. In 1959 they deposited the deed of lease with the appellants and drew up a memorandum of deposit of deeds which created an equitable mortgage in favour of the appellants. Three years later the first respondents leased part of the premises to Solita Kalil, the second respondent. She later sublet this part of the premises to a firm of merchants. By 1964 the first respondents owed the appellants Le44,000 in overdraft loans. The appellants, instead of exercising their rights under the memor-

andum of deposit of deeds, instituted proceedings against the first respondents and obtained a consent judgment for the amount owing. When this amount was still not paid in 1968 they brought garnishee proceedings against the first respondents, but these were dismissed.

The appellants next instituted the present proceedings in the High Court to have the lease made between the first and second respondents set aside, to have paid to them all the rents already received by the second respondent from her tenants and all future rents, and to have a receiver appointed. They alleged that the first respondents still owed them most of the amount of the judgment debt, but they failed to produce an accurate statement of accounts between them and the first respondents as requested. The High Court held that the appellants had failed to produce any evidence that could have justified the court in making an order to set aside the deed of lease between the first and second respondents; that the appellants had failed in every other respect to prove their case against the first respondents; and that as there had never been a business transaction between the appellants and the second respondent, the court could not grant the relief sought against her, nor could it make an order against the tenants of the premises since they were not parties to the action. The action was dismissed with costs to the respondents.

The appellants appealed, *inter alia*, on the grounds that (a) the learned trial judge was wrong in law in not considering whether the action of the first respondents in leasing the mortgaged premises to the second respondent was in breach of their undertaking, as set out in the memorandum of deposit of deeds, not to do so without the appellants' written consent; and (b) the learned trial judge had failed to consider whether, when she sub-let the premises, the second respondent had had notice of the equitable mortgage of the premises to the appellants. The court also considered the appellants' application to have a receiver appointed and the course of action the appellants were entitled to take against the respondents.

S.H. Harding and *Coker* for the appellants;
Marcus-Jones for the respondents.

COLE, C.J.:

This appeal arose in this wise: the first respondents, B.D. Kalil & Sons, on November 18th, 1957 were granted a lease of premises

known as Nos. 33, 33A and 33B Kissy Street, Freetown, for 50 years certain. On August 4th, 1959 the first respondents deposited this lease with the appellants and at the same time executed a memorandum of deposit of deeds in favour of the appellants. This memorandum was Exhibit A in the court below.

[The learned Chief Justice then set out the contents of the memorandum of deposit and continued:]

The intention of the parties to this memorandum is the creation of an equitable mortgage upon the aforementioned premises for the purpose of securing the payment and discharge on demand by the appellants of all debts then owing or incurred or which might in future be owed or incurred by the first respondents to the appellants. This memorandum was registered on August 11th, 1959.

On November 1st, 1962 the first respondents leased part of the aforementioned premises, namely —

"All that portion of premises No. 33 Kissy Street, Freetown comprising of:

A. Basement shop numbered 33 with three doors;

B. All the second floor of the said premises No. 33 Kissy Street, Freetown aforesaid which said second floor comprises five rooms and a large sitting room, two baths and lavatories"

— to Solita Kalil, the second respondent, for a term of 20 years. It is alleged in the statement of claim that the second respondent was "the wife of B.D. Kalil of B.D. Kalil & Sons." In para. 7 of her defence she pleaded as follows:

"Save as hereinbefore specifically admitted, this defendant denies each and every allegation contained in the statement of claim as though the same were herein set out and traversed seriatim."

The allegation in the statement of claim that the second respondent was the wife of B.D. Kalil of B.D. Kalil & Sons was not specifically admitted by the second respondent. She therefore must be taken to have denied it. I have searched the evidence in vain to find any evidence in support of this allegation.

On December 31st, 1965 the second respondent sublet the portion of the aforementioned premises leased to her to a firm of merchants (who were not parties to this action) for a term of five years commencing January 1st, 1966.

By para. 3 of the memorandum of deposit of deeds the first

respondents had no power to lease, or part with possession of, all or any part of the aforementioned premises without the express agreement of the appellants, such agreement to be expressed in writing. I can find no evidence that the appellants did not give such written consent in respect of the sublease by the first respondents to the second respondent. This fact was not specifically pleaded in the statement of claim, nor was it specifically admitted in the defence of the second respondent.

In 1964 the first respondents were indebted to the appellants to the extent of Le44,000 by virtue of over-draft facilities granted to the first respondents. The appellants, instead of pursuing the provisions set out in the memorandum of deposit of deeds, instituted legal proceedings against the first respondents and on December 18th, 1964 a consent judgment was obtained by the appellants against the first respondents for the sum of Le43,674.76 and interest at the rate of 4% per annum as from December 18th, 1964.

On April 9th, 1968 garnishee proceedings brought by the appellants against the first respondents and two others in respect of the amount involved in the aforesaid consent judgment were dismissed.

On May 1st, 1968 the appellants instituted proceedings in the High Court claiming against the respondents by their generally indorsed writ of summons —

"(a) to have a deed of lease dated November 1st, 1962 and made between B.D. Kalil & Sons and Solita Kalil set aside;

(b) to have a receiver appointed."

In the statement of claim the appellants claimed:

"(a) an order setting aside the deed of lease dated November 1st, 1962 and made between B.D. Kalil & Sons and Solita Kalil with all consequential orders.

(b) an order that Solita Kalil do repay all rents already paid to her by Pantap Stores and International Traders and furnish the plaintiffs, Barclays Bank D.C.O., an account of such rents received.

(c) that the tenants of 33 Kissy Street, Freetown, to wit — (i) P. Choithram & Sons, Pee Cee & Sons (Pantap Stores) and (ii) International Traders S.L. Ltd. — do pay the rents payable in respect of the said premises direct to the plaintiffs, Barclays Bank D.C.O., unless within 14 days of the service of this order upon them

they show cause why the order should be discharged."

At the trial, which began on July 1st, 1970, three witnesses gave evidence for the appellants. No witness was called for and on behalf of the first respondents or the second respondent. On November 9th, 1970 the learned trial judge gave judgment in which he dismissed the action with costs to the respondents.

In the course of that judgment the learned trial judge said:

"The issues in this action must be determined by the pleadings . . . In para. 2 of the statment of claim it was alleged that the first defendants owed the sum of Le39,096.49 out of the judgment debt of Le40,016.67. It is the duty of the plaintiffs to prove the case against the first defendants. No accurate statement of accounts was produced to show the transaction between the plaintiffs and the first defendants as requested. The present action appears to be another means of reviving a previous action which had been disposed of under Civil Case No. 304/63. The first defendants alleged that no evidence was produced to contradict the statement of the second defendant in para. 3 of the defence. Although Mr. Williams, the plaintiffs' witness, admitted that correspondence existed between the plaintiffs and the first defendants on the question of overdraft he was unable to produce it. He could not therefore say whether the deposit of title deeds was made on granting an additional overdraft of Le50,000 or whether that amount had been paid off. Another question which the plaintiffs left unanswered was why it was necessary to ask the first defendants to execute a legal mortgage on the property and at what stage in the business relationship between the plaintiffs and the first defendants.

Exhibit A is headed 'Memorandum of Deposit of Deeds'. The plaintiffs described the document in para. 2 of the statement of claim as the mortgage agreement, in which case notice appears irrelevant. Particulars of fraud were not supplied and para. 3 cannot be entertained. No evidence was given on this aspect of the case. The plaintiffs did not appeal against the dismissal of garnishee proceedings. The order therefore stands.

The plaintiffs had not produced any evidence to satisfy the court to make an order to set aside the deed of release made between the first defendants and the second defendant.

As the plaintiffs' witness admitted that there was no business transaction between the plaintiffs and the second

defendants, the court cannot grant the relief sought against the second defendants.

The tenants of 33 Kissy Street were not joined as parties to this action and no order can therefore be made against them. The action is dismissed."

It is from this judgment that the appellants have appealed on the following grounds, as amended by this court, namely:

"1. That although the learned trial judge correctly stated the law when he said — "the issues in this action must be determined by the pleadings", he never directed his mind to the issues raised by the pleadings in this action.

2. That the learned trial judge misdirected himself in holding that the plaintiffs had not produced any evidence to satisfy the court to make an order to set aside the lease made between the first defendants and the second defendant.

3. That the learned trial judge misdirected himself in holding that particulars of fraud were not given, and was wrong in law in not considering whether the action of the first defendants in leasing the mortgaged premises to the second defendant, at the time they did, was in breach of the first defendants' undertaking not to do so without the consent in writing of the plaintiffs.

4. That the learned trial judge failed to consider whether, at the time of the lease to the second defendant, the second defendant had notice of the equitable mortgage of the premises to the plaintiffs.

5. That the learned trial judge erred in law in his application of the burden of proof in the trial as a whole.

6. That the decision was against the weight of evidence produced at the trial."

With regard to grounds 2 and 3, I find no merit in them. As I have already pointed out, no evidence was brought by the appellants to show that the second respondent was the wife of B.D. Kalil of B.D. Kalil & Sons, the first respondents, nor was there any evidence to show that the appellants never gave the first respondents their written consent to sublet. The question of fraud therefore does not even arise.

As regards ground 4, it is an acknowledged and elementary fact that registration of the memorandum of deposit of deeds is notice to the whole world including the second respondent. If, however,

the appellants had, as one would reasonably have expected, followed their rights under the memorandum of deposit of deeds, the second respondent would probably have had no answer. It is my considered view in the circumstances that the learned trial judge came to the right conclusion when he held that on the evidence before him "the plaintiffs had not produced any evidence to satisfy the court to make any order to set aside the deed of lease made between the first defendants and the second defendant" — that is to say, between the first and second respondents.

I now turn to the question of appointment of a receiver. Quite apart from the general law on the point, the memorandum of deposit of deeds made between the appellants and the first respondents say this in para. 2:

> "We hereby undertake that we and all other necessary parties (if any) will on demand at our own 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."

There is no evidence that the appellants took the agreed course of action as outlined. Furthermore, it is my considered view that although a mortgagee has not taken a formal mortgage, but only a charge, yet if this is accompanied by an agreement, express or implied, on the part of the mortgagor to execute a legal mortgage, as in the present case, the remedy is foreclosure. Hence the depositee of title deeds, as in this case, is entitled to foreclosure where the deposit is accompanied by an agreement to execute a legal mortgage.

Again, a mortgagee in possession may relieve himself of his position and responsibility by appointing a receiver; and the court may appoint a receiver after a mortgagee has taken possession if the circumstances render it just and convenient: for example, if the mortgagee who has taken possession refuses to satisfy equitable interests, or if there is a strong *prima facie* case for setting the conveyance to him aside; but not otherwise, unless the rents and profits are in danger. The present case does not fall into any of these categories. I find no merit in the other grounds of appeal.

The action was, in my view, misconceived. I would dismiss this appeal without prejudice to the exercise by the appellants of such rights as they may have under and by virtue of the memorandum

of deposit of deeds.

CORNELIUS HARDING and PERCY DAVIES, JJ.A. concurred.

Appeal dismissed.

WURIE v. SIERRA LEONE SELECTION TRUST LIMITED

Court of Appeal (Forster, J.S.C., Cornelius Harding and Percy Davies, JJ.A.): February 3rd, 1972
(Civil App. No. 6/71)

[1] **Civil Procedure—pleading—matters which must be specifically pleaded—plaintiff alleging breach of statutory duty must plead statutory provision relied on and set out as separate cause of action:** Where, in an action for negligence, the plaintiff also alleges a breach of statutory duty, the correct pleading is for each to be set out as a separate cause of action and the particular statutory provision relied on must be specifically referred to or identified (page 25, lines 27—34).

[2] **Evidence—presumptions—presumption of law—omnia praesumuntur rite esse acta—trailer used on public road presumed lawfully licensed—plaintiff alleging contrary must rebut presumption:** A trailer used on a public road is presumed to be licensed as required by reg. 11(4)(i) of the Road Traffic Regulations, 1960, and it is for a plaintiff who alleges the contrary to rebut the presumption of regularity (page 27, lines 7—41).

[3] **Road Traffic—licensing of motor vehicles—trailer used on public road presumed lawfully licensed—plaintiff alleging contrary must rebut presumption:** See [2] above.

The plaintiff (now the appellant) brought an action against the defendants (now the respondents) to recover damages for negligence and breach of statutory duty arising out of a road accident.

The appellant was driving his bus down a hill when he saw a low loader driven by the respondents' servant on a bridge at the bottom. He tried to stop but his brakes failed and he swerved into the bridge and collided with the low loader. He brought an action in the Supreme Court to recover damages from the respondents for the negligence of their servant and for breach of statutory duty. He claimed that he expected an escort to warn of the approach of a low loader of such size and that in any case the respondents' vehicle exceeded the size and weight stipulated by the Road Traffic Regulations, 1960 and should not have been allowed on the public highway. He contended that this breach of statutory duty gave him a right of action for damages against the respondents.