

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 27 of 1977

Between:

1. A.J.C. PATEL BROS. CO. LTD.
2. THE OFFICIAL RECEIVER OF FIJI

Appellants

- and -

PARSHU RAM s/o Ram Pheran

Respondent

M.C. Gardiner for Appellants

M.S. Sahu Khan for Respondents

Date of Hearing: 7th March, 1978Date of Judgment: 22nd March, 1978.JUDGMENT OF HENRY J.A.

First appellant is a limited liability company duly incorporated under the provisions of the Companies Ordinance (Cap. 216). On March 18, 1965 it executed a Memorandum of Mortgage creating a first charge on two pieces of land of which it was the registered proprietor of the fee simple under the provisions of the Land Transfer Ordinance (Cap.136). This Ordinance has since been repealed and replaced by the Land Transfer Act 1971. The said Memorandum of Mortgage was registered on May 17, 1965 as No. 91351. It secured a principal sum of £750 together with interest. The registered mortgagee was Udham Singh (f/n Bhagwan Singh). On March 10, 1969, an order was made for the winding-up

of first appellant and second appellant was appointed liquidator for the purpose of such winding-up. Udham Singh, for valuable consideration, transferred Memorandum of Mortgage No. 91351 to respondent and a Memorandum of Transfer was duly registered on March 4, 1976. It is common ground that no payments were made by the mortgagor in respect of the sums purported to be secured by mortgage No. 91351.

Appellant contended that, by virtue of section 79 of the Companies Act (Cap.216), the security created by mortgage No. 91351, by reason of non-registration under that provision, became void against the liquidator. It was common ground that section 79 had not been complied with. On the other hand respondent contended that the provisions of the Land Transfer Act 1971 conferred on him an indefeasible title to the mortgage and a right to exercise the remedies thereunder and that section 79 did not apply. A number of declarations were sought by respondent in the Supreme Court but the only order Stuart J. made was a declaration that mortgage No.91351 was not void against second appellant as liquidator. Costs followed the event. Appellants have appealed against this judgment.

Before dealing with the Land Transfer Act it is convenient to set out section 79(1) of the Companies Ordinance. It reads:

"Section 79(1). Subject to the provisions of this Part of this Ordinance, every charge created after the fixed date by a company registered in Fiji and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created or evidenced, or a copy thereof verified in the prescribed manner are delivered to or received by the registrar for registration in manner required by this Ordinance within forty-two days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a charge becomes void under this section the money secured thereby shall immediately become payable."

Subsection (2) defines the charge to which subsection (1) applies. It is not disputed that mortgage No. 91351 comes within the classes of charges set out in subsection (2). It should be noted that the charge may become void against only limited classes of persons, but is not otherwise affected.

Before returning to the question whether section 79(1) does declare mortgage No. 91351 void against second appellant it is necessary to examine the provisions of the Land Transfer Act 1971 which both parties agree is the proper statute to be considered for the determination of this appeal. It is now undoubted law that, except in the case of fraud, the registered proprietor of an estate or interest in land under

the Land Transfer Act has an indefeasible title to the land or estate or interest described in the relative certificate of title. The leading cases are Assets Co. v. Mere Roihi (1905) A.C. 176 and Frazer v. Walker (1967) 1 All E.R. 649. What respondent seeks is to extend that indefeasibility not only to the fact that respondent is the registered proprietor of mortgage No. 91351 but that, by reason of registration, he acquired a valid security by way of charge over the said lands in terms of that mortgage and that section 79 did not operate to render that charge void against the liquidator. Respondent's argument was based mainly on the fact of registration of the transfer of mortgage No. 91351 but he did not abandon a claim that mortgage No. 91351 itself gave to his predecessor in title a similar valid security which passed to him.

Section 63 of the Land Transfer Act 1971 provides that a mortgage registered in accordance with the Act shall have effect as a security but shall not operate as a transfer of the land or of the estate or interest therein charged. Section 65 requires that the form of mortgage shall contain a precise statement of the estate or interest intended to be charged. These provisions are important and therefore to be contrasted with the position of the registered proprietor of land or an estate or interest in land, where, on the issue of a certificate of title, or the registration of a transfer of such an interest in land, the registered proprietor gets an indefeasible title. This is the effect of Assets Co. v. Mere Roihi and Frazer v. Walker (supra).

A distinction has been drawn by me between an interest in land and a security or charge over land under a mortgage. In this connection it is necessary to deal with section 2 of the Act which is the interpretation section defining certain terms unless the context otherwise requires. A "proprietor" means the registered proprietor of land or of any estate or interest therein. An "estate or interest" includes (inter alia) a mortgage. The purpose of these definitions is to make general machinery provisions applicable to a mortgage. As an instance Part XI, which deals specifically with mortgages, has no provisions for transfers. This is done under section 44 which deals generally with all transfers. Section 44 says that the proprietor of any land or estate or interest in land may transfer the same in the manner provided. Thus by reference to section 2 a mortgage is included. This distinction was overlooked by the learned Judge when he said:

"Frazer v. Walker involved a mortgage and at p.653 of the report Lord Wilberforce says:

'Although a mortgage of a fee simple does not take effect as a transfer of the fee simple it does create a charge on the land which the Act treats as an estate or interest in the land (see the definitions of estate or interest and 'proprietor').'

It seems to me that on this reasoning Udham Singh had an estate or interest in land by virtue of his mortgage, as soon as he had registered it against the land and by virtue of that registration he acquired a right against which only the exceptions mentioned in The Land Transfer Act 1971 could prevail."

In my respectful opinion Lord Wilberforce purposely used the word "treats" by reference to section 2 and was not purporting to derogate from the clear words of section 63 which expressly exclude the transfer of the land or any estate or interest therein. A mortgagee never creates more than a security by way of a charge.

Section 44(3) provides for the effect of a transfer. It reads:

"Section 44(3). Upon the registration of a transfer, the estate and interest of the transferor as set forth in the instrument of transfer, with all rights, powers and privileges thereof belonging or appertaining, shall pass to the transferee, and the transferee shall thereupon become the proprietor thereof and shall be subject to and liable for all requirements and liabilities to which he would have been subject and liable if he had been the former proprietor of such estate or interest."

From the above references to statutory provisions it follows that respondent got no more than a transfer of the estate or interest of the mortgagee in mortgage No.91351 and all the rights, powers and privileges contained in the mortgage. In short the respondent as transferee become the registered proprietor of a mortgage and by subsection (3) and subsection (4) as transferee he may sue for and recover any debt, sum of money or annuity thereunder and all rights and powers under the transferred mortgage vest in him as the transferee.

Section 18 provides that every instrument of title duly authenticated shall be conclusive evidence that the person named therein or in any entry thereon is seized or possessed of the land for the estate or interest specified in the instrument. By section 2 as in the case of "estate or interest" "instrument of title" also includes a mortgage so, by reference to section 63 such person is conclusively the person entitled to the mortgage but it has effect as a security only. In short the original mortgagee or his transferee is conclusively to be deemed to be the registered proprietor of the mortgage and all persons may deal with him on that basis. This does not give him any greater status than being the registered proprietor of a mortgage - it in no way guarantees or gives greater validity or effect to the contract evidenced by the mortgage. The powers of the mortgagee and the security given by the mortgagor under the mortgage contract remain the same upon transfer except that the transferee has a conclusive title and is the mortgagee for all purposes.

Section 21 must be next considered. By subsection (2), on registration, the person named as the proprietor or as becoming the proprietor shall be deemed to be the registered proprietor, in this case, of mortgage No.91351. This section merely deals with the time of passing of title and does not advance any argument in the present case.

Section 38 is the first provision which deals with indefeasibility. It reads:

"Section 38. No instrument of title registered under the provisions of this Act shall be impeached or defeasible by reason or on account of any informality or in any application or document or in any proceedings previous to the registration of the instrument of title."

It does not apply to the present case.

Section 39 is important because it is this section which grants indefeasibility and makes the estate of the registered proprietor paramount. I propose to set out such part of this section as relates to a mortgage. It reads:

"Section 39. Notwithstanding the existence in any other person of any estate or interest the registered proprietor of any estate or interest (in land subject to the provisions of the Act) shall, except in the case of fraud hold the same subject to such encumbrances as may be notified on the folium of the register, constituted by (the mortgage) but absolutely free from all other encumbrances whatsoever...."

Then follow a number of exceptions which do not apply. "Encumbrances" are defined in section 2 as follows:

" 'encumbrances' includes all prior estates, interests, rights, claims and demands which can or may be had, made or set up in respect of land, and includes a mortgage:"

Applied to this case it means that respondent became the registered proprietor of a mortgage free from any claim by any other person to any estate or interest in the mortgage and free from all prior encumbrances as defined earlier,

These provisions, where the instrument is a title to land or any estate or interest therein, give the registered proprietor, except in cases of fraud, an indefeasible title to such land or such estate or interest in land:

Frazer v. Walker (supra). By the same reasoning the registered proprietor of a mortgage has a similar title to the mortgage of which he is the registered proprietor and persons may deal with him and acquire from him such title to the mortgage. But nothing in the Act declares or provides that the security is indefeasible title to the mortgage and no more. This is to be contrasted with the case of title to land where that title guarantees the interest in the land set out in the certificate of title. In respect of a mortgage all that is guaranteed is a title to a mortgage, which creates a security only. The enforceability of the security as far as concerns the powers given by and covenants of the mortgagor remain in terms of the mortgage contract.

Mortgage No.91351, having been given by a company, was subject to section 79 of the Companies Ordinance. It was, through non-compliance with section 79, a mortgage which would, so far as it operates as a security,

become void against a liquidator in the event of the mortgagor being wound-up. No provision in the Land Transfer Act has been cited (I will deal with section 3 in a moment) which has the effect of declaring that upon registration the security evidenced by a mortgage remains at all times, enforceable in terms of the mortgage document as it appears on the register. A simple illustration is that a mortgagor may pay off the whole or part of the moneys owing. An innocent transferee would not by registration, acquire a right to enforce the covenant to pay the sum stated in the mortgage nor to exercise the power of sale. In my judgment this principle applies to the mortgage contract as a whole including the charge it created. It has no more force than it originally had at the time when the mortgage was executed. Such a transferee can say no more than that he, to the exclusion of all others, is the registered proprietor of that mortgage in terms of the entries made by the Registrar of Titles on his mortgage which is "the root of his title" (as has been said in some of the cases). That does not give him any greater rights over the mortgagor in respect of the extent of the security which the original mortgagee had. The argument of respondent is that registration of his transfer ensured that all rights under the original contract contained in the mortgage still existed and are still enforceable. The Land Transfer Act does not make any such provision in respect of mortgages but in respect

of land or any estate or interest in land registration protects the actual interest in the land. It is to be noted that section 71 et seq enable a mortgagee, on the exercise of the power of sale, to give a good title to a transferee in respect of the estate or interest charged by the mortgage.

The remaining provision of the Land Transfer Act which requires consideration is section 3 which reads:

"Section 3. All written laws, Acts and practice whatsoever so far as inconsistent with this Act shall not apply or be deemed to apply to any land subject to the provisions of this Act or to any estate or interest therein."

This section was cited in the judgment of the Court below but counsel for respondent did not press it in this Court. However, it was dealt with by counsel for appellants. The question was whether section 79 was inconsistent with the Land Transfer Act in that both provided for a system of registration which included mortgages of interests in land. Section 79 simply provides that a mortgage shall be void against certain persons unless it is registered in accordance with its provisions. In every way such a mortgage is a completely valid transaction at least until the period of 42 days have elapsed. It is then still a valid transaction between the parties but the charge by way of security may be or become void against the named persons. Section 79 and the provisions of the

Land Transfer Act are not inconsistent. Whether or not registration under the Land Transfer Act should be sufficient compliance with section 79 is a matter which might be brought to the attention of the appropriate authorities for consideration.

In my judgment section 79 rendered the charge contained in mortgage No.91351 void against the liquidator and that nothing in the Land Transfer Act 1971 conferred on respondent an indefeasible right to exercise the contractual and other powers expressed or implied in the mortgage document.

It was stated at the Bar that respondent is now in possession of the proceeds resulting from the exercise of the power of sale and that entitlement to these funds is in issue between the parties. This Court can make no order in that respect. I would allow the appeal and set aside the judgment in the Court below and make a declaration that mortgage No.91351 became void against the liquidator at the date of liquidation. Respondent should pay costs in both Courts.

(T. Henry)
JUDGE OF APPEAL

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M.C. Gardiner for the Appellants
M.S. Sahu Khan for the Respondent

Date of Hearing: 7th March, 1978
Delivery of Judgment: 22nd March, 1978

JUDGMENT OF GOULD V.P.

I have had the advantage of reading the judgment of Henry J.A. in this appeal and agree that the outcome should be as arrived at and expressed by him. As I have come to this conclusion on a slightly different basis I will add a few words of my own. There is no need to repeat the facts, which are set out fully in the judgment of Henry J.A.

It will be necessary to make a few observations upon some of the sections of the Land Transfer Act, 1971. Section 63 is as follows:

"63. A mortgage registered in accordance with the provisions of this Act shall have effect as a security, but shall not operate as a transfer of the land, or of the estate or interest therein, charged."

I agree entirely that the effect of that section is that a mortgage takes effect as a security but although it does not operate as a transfer of the land or of the estate or interest of the estate or interest of the proprietor thereof it nevertheless creates in the mortgagee his own estate or interest as such. The essential purpose of the section, I think, is to effect a change in the traditional system of conveyancing, in which the legal estate passed to the mortgagee, and limit the effect of a mortgage to that of a charge or security. By definition in section 2 of the Act "estate or interest" includes any mortgage, "mortgagee" means the proprietor of a mortgage, and "proprietor" means the registered proprietor of land, or of any estate or interest therein.

I agree that sections 38 and 63 of the Act result in the person named in a mortgage as mortgagee being conclusively entitled to the mortgage. I also agree with Henry J.A. that section 38 has no relevance to the question before the Court.

The question which we are called upon to answer in this appeal depends upon the effect of section 3 of the Act which is in the following terms:

"3. All written laws, Acts and practice whatsoever so far as inconsistent with this Act shall not apply or be deemed to apply to any land subject to the provisions of this Act or to any estate or interest therein."

If section 79 of the Companies Act is found to be inconsistent with the Land Transfer Act (and the learned Judge in the Supreme Court has so held) it must be deemed to have no application. In my opinion, whether section 79 is inconsistent depends upon whether its enforcement would cut across any relevant provision of the Land Transfer Act. This raises the question of indefeasibility, as it is in that area that conflict is said to occur.

The sections of the New Zealand Land Transfer Act which were considered in the leading case of Frazer v. Walker [1967] 1 All E.R. 649 have their counterpart in Fiji (with some modifications) in sections 39 and 42 of the Land Transfer Act. Section 42 was in fact the more important section, on my reading of the judgment, but I do not think that it has any application in the present case. The opening words are -

"No action for possession, or other action for the recovery of any land subject to the provisions of this Act, or any estate or interest therein, shall lie or be sustained against the proprietor in respect of the estate or interest of which he is registered
"

Then follow certain exceptions. There is no such action in being or in contemplation in the present circumstances. Any action which the official

liquidator might bring for the possession of the land would be against the registered proprietor thereof, not the proprietor of the mortgage. So far as can be seen no principle of indefeasibility arises under this section which the mortgagee could point to as being contravened by section 79.

The opening words of section 39(1) are as follows:

"39.-(1) Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of any land subject to the provisions of this Act, or of any estate or interest therein, shall, except in case of fraud, hold the same subject to such encumbrances as may be notified on the folium of the register, constituted by the instrument of title thereto, but absolutely free from all other encumbrances whatsoever except - "

Then follow three exceptions which are not relevant in the present circumstances. The question therefore is whether the provision that the registered proprietor of the mortgage shall hold the same "absolutely free from all other encumbrances whatsoever" is something which the effect of section 79 of the Companies Ordinance would contravene. In my opinion, in accordance with sections noted above, it is the estate or interest of the mortgagee as such, in other words his charge or security which must be affected.

Everything turns upon the meaning of the word "encumbrances". It is defined in section 2 of the Act as follows:

"'encumbrances' includes all prior estates, interests, rights, claims and demands which can or may be had, made or set up in respect of land, and includes a mortgage."

The word "prior" in that definition has significance. Section 39 must be looked at first in relation to the mortgage itself, which means as at the date of its registration. Section 79 may operate in favour of the official liquidator or of a creditor but there is no evidence that any creditors existed at the date of registration. Certainly the official liquidator had then no existence relative to the appellant company. Even if there had been a creditor proved to be in existence at that date, section 79 only comes into operation after failure to register for 42 days, and he could hardly be said to have had a prior right to that of the mortgagee at the time of registration.

I turn to the question of the transfer of the mortgage to the present respondent. At the date of registration of the transfer the official liquidator was in a position to seek to take advantage of section 79. The 42 days' had already expired. This claim, if given effect to, would defeat the security of the mortgagee in toto, so the question must be answered whether it is a prior right giving it the status of an encumbrance. It does not give the official liquidator any security of his own but would defeat that held by the mortgagee pursuant to his transfer.

One is inclined to envisage an encumbrance as something detracting from, or postponing the estate to which it is subject. That does not necessarily follow under section 39, which includes estates or interests which may be paramount. The effect of section 79 of the Companies Ordinance, in my opinion, is that it would operate more by way of defeasance than as an encumbrance in the true sense. It is necessary to look again at the definition of encumbrance. To bring section 79 within its terms the official liquidator must show that it gives him a prior estate, right or claim in respect of land. It does not seem that he can do this. The definition of "land" in section 2 is not widened by the use of any such words as "any estate or interest therein" and section 79 does not give the official liquidator any right in relation to the land itself. It merely extinguishes the mortgagee's charge. The transferee of the mortgage cannot point to any person in whom a right against land has been created. In my opinion therefore the defeasance effected by section 79 is not an encumbrance within the meaning of section 39 of the Land Transfer Act.

For these reasons I consider that section 79 has not deprived the transferee of the mortgage of any protection which might flow from the provisions of the Land Transfer Act and that therefore section 79 is not inconsistent with its terms. All members of the Court being of the opinion that the appeal should be allowed it is so ordered and there will be the further orders suggested in the judgment of Henry J.A.

(Sgd.) T.J. Gould
VICE-PRESIDENT

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M.S. Sahu Khan for Respondent.

Date of Hearing: 7th March, 1978.Date of Judgment: 22nd March, 1978JUDGMENT OF MARSACK, J.A.

I have had the advantage of reading the judgments of the learned Vice President and Henry J.A. and agree with the result proposed in those judgments. As I see it, the main issue involved in this appeal is the construction of section 79 of the Companies Ordinance read in conjunction with section 3 of the Land Transfer Act, both of which sections are quoted in full in the judgments to which I have referred. This issue was largely argued on the basis that the two sections concerned were in conflict, and that the duty lay on the Court to rule which of the two sections should be held to override the other. But in the view I take there is no real conflict between them. Section 79 may, in my opinion, be regarded as supplementary, making special provisions applying to certain circumstances

which cannot be dealt with in an enactment of general application such as section 3. As I see it, there is nothing inconsistent with the overall purpose of section 3 in providing that in the case of a mortgage given by a company certain additional safeguards should be necessary to make it effective as against one person, and one person only, the Official Liquidator.

With regard to the question of indefeasibility arising under section 39 of the Land Transfer Act I am in agreement with the conclusion which has been reached by my learned brethren, and do not find it necessary to comment on the reasoning which leads to that conclusion.

Accordingly I agree that the appeal should be allowed with the consequences set out in the judgment of Henry, J.A.

(Sgd.) C.C. Marsack
JUDGE OF APPEAL

SUVA,

22nd March, 1978.