

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 0033 OF 1998S
(High Court Civil action No.246 of 1990)

BETWEEN:

SHAUKAT ALI

Appellant

AND:

ABDUL RAZAK
HASHIM ALI
RAHIM BUKSH

Respondents

Coram:

The Hon. Sir Moti Tikaram, President
The Hon. Mr Justice Savage, Justice of Appeal
The Hon. Justice Sir David Tompkins, Justice of Appeal

Hearing:

Tuesday, 16 November 1999, Suva

Counsel:

Mr. V. Mishra for the Appellant
Dr. S. Khan for the Respondents

Date of Judgment:

Friday, 26 November 1999

JUDGMENT OF THE COURT

Introduction

This appeal concerned land described as LD 4/13/ 638 being part of Lot 2 on BDSW 521 Subdivision of Lot 13 R.R. 1136 Naqalau, Vatumani, Nadevo, Ba ("the land"). The appellant Shaukat Ali was the owner of the land. He gave a mortgage over the land ("the mortgage 1890") to the first respondent Abdul Razak as mortgagee. He transferred the mortgage to the second respondent Hashim Ali. He, in exercise of his powers under the mortgage, sold the land to the third respondent Rahim Buksh.

Two actions came before the High Court. Shaukat Ali brought proceedings against all three respondents challenging the validity of the mortgage 1890. Alternatively he sought to recover whatever was due to him following the mortgagee sale. In a second action

Buksh, the ultimate purchaser, sought vacant possession from Shaukat Ali and damages for Shaukat Ali remaining in possession. These two actions were consolidated.

In a decision delivered on 15 May 1998, Lyons J held that Shaukat Ali's claim against the respondents challenging the validity of the mortgage failed and was dismissed. In respect of Shaukat Ali's alternative claim for the balance due to him following the mortgagee sale by Hashim, he held Shaukat Ali was entitled to judgment against Hashim Ali for \$18,438.51 including interest plus costs. In Buksh's action, the defenses raised by Shaukat Ali failed, with the result that Buksh was entitled to an order for possession. Buksh's claim for damages failed through lack of proof.

From this decision, Shaukat Ali has appealed against the dismissal of his action challenging the validity of the mortgage and the order for possession in Buksh's favour. There was no challenge to the judgment in Shaukat Ali's favour against Hashim Ali following the mortgagee sale.

Factual background

In or about April or May 1981 Shaukat Ali and his father Ahmed Ali were considering the purchase of the land from its then owner for \$56,000. Shaukat Ali became the purchaser. To fund the deposit he borrowed \$5,000 from Razak. At that stage there was a friendly relationship between Razak, Ahmed and Shaukat Ali. Following events not relevant to the issues on this appeal, on 21 August 1985 Shaukat Ali, Ahmed, Buksh and Razak attended at the offices of solicitors. Shaukat Ali executed the mortgage 1890 over the land securing repayment upon demand of \$12,300.00. Razak was the mortgagee. Interest was payable at 13.5%. It was submitted to the Divisional Surveyor Western on behalf of the Director of Lands

for consent. On 3 October 1985 Shaukat Ali wrote to the Divisional Surveyor requesting that he not consent to the registration of the mortgage. But on 6 November 1985 he wrote again to the Divisional Surveyor and withdrew his letter of 3 October 1985. On 27 January 1986 the Director of Lands gave consent. On 18 April 1987 the mortgage under number 1890 was registered with the Registrar of Deeds.

Shaukat Ali became in default under the mortgage. On 2 March 1988 solicitors acting for Razak and Hashim Ali wrote to solicitors acting for Shaukat Ali, with a copy to Shaukat Ali, demanding payment of \$12,300.00 plus interest. If payment were not made, Razak would exercise his rights under the mortgage.

Because Shaukat Ali's father Ahmed required some money in relation to court proceedings, and because the mortgage contained a recital that was not correct (to which we later refer) the parties, no doubt acting on legal advice, decided to draw up a further mortgage to replace the mortgage 1890. The principal sum was to become \$18,600. On 1 November 1989 the solicitors acting for Shaukat Ali, Ahmed and Razak wrote to the Divisional Surveyor Western seeking consent to the second mortgage. However it appears, for reasons that were not apparent and probably not relevant, that the transaction did not proceed and the second mortgage was not executed.

By a transfer dated 2 March 1990 Razak sold the mortgage 1890 to Hashim Ali for \$19,788.16 being the principle sum and accrued interest. The consideration was the transfer by Hashim Ali to Razak of a tractor, trailer, tiller, car and plough by way of exchange and equality in value. It was the view of the lawyers acting for the parties that consent to this transfer of mortgage was not required. That issue was taken to the High Court which held that consent

was required. On appeal this Court held that it was not. These proceedings caused delay in finalising the sale and purchase of the mortgage.

Later in 1990 Hashim Ali decided to exercise his power of sale. On 25 August 1990 he called for tenders by an advertisement placed in the Fiji Times. By a transfer dated 14 November 1991 Hashim, acting under his powers as mortgagee, sold the land for \$35,000.00 to Buksh. That amount was paid by a loan from Gulzara Bano of the full purchase price of \$35,500.00 secured by mortgage over the land, signed by Buksh on 14 November 1991. Bano is Razak's wife.

The application for leave to call evidence

On the morning of the day fixed for the hearing of this appeal, Mr Mishra on behalf of Shaukat Ali filed a notice of motion under r.22 of the Court of Appeal Rules seeking leave to call further evidence consisting of documents evidencing the result of a search of the register relating to the motor vehicle, tractor and trailer that were claimed to have passed as consideration for the transfer of mortgage 1860 from Razak to Hashim. The motion also sought an order that the time for service of the motion be reduced or dispensed with.

After hearing counsel, the Court dismissed the motion, advising that the reasons for doing so would be given in the judgment to be delivered. It was dismissed for two reasons.

This Court has consistently adopted the three conditions that must be fulfilled before an application for leave to call evidence on appeal will be granted, as set out in *Ladd v Marshall* [1954] 3 All ER 745:

“First it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or, in other words, it must be apparently credible though it need not be incontrovertible.”

This evidence could have been obtained with reasonable diligence at the trial. Even if, as Mr Mishra submitted, the documents relating to the transfer of the mortgage had not been discovered as they should have been, they were certainly referred to at the trial. The hearing took place on 12 March 1997, 15 December 1997 and 20 January 1998. The last day was for submissions. Hence there was ample time for Shaukat Ali's advisers to investigate the transaction relating to the transfer of the mortgage. But they did not do so until only a few days before the hearing of the appeal.

We do not consider that this evidence would have had an important influence on the result. All it shows is that, if there had been a transfer of ownership of the three vehicles, that transfer had not been registered. It does not show that there had not been a transfer. There was quite detailed evidence given, not only of the transfer of the vehicles but also of the steps that Razak took to sell them at a later date. The evidence now sought to be produced certainly does not establish that that evidence must have been false.

The second reason for declining the application is that it was made so late - on the morning of the hearing of the appeal. There was no good reason for the delay. Further, the affidavit in support was inadequate. Mr Mishra, recognising these shortcomings, asked for an adjournment. That was opposed by Dr Khan. That Shaukat Ali's counsel was late in filing the application does not, in the circumstances of the present case and having regard to the nature of

the evidence sought to be called, justify an adjournment of the appeal. The application for adjournment was refused.

The challenge to mortgage 1890

The Judge, after examining the grounds upon which the fraud allegation was made, held that it failed. In this Court that decision was challenged on several grounds. We deal with each in turn.

The advance of the principal sum

Mr Mishra submitted that there was no sufficient evidence that money had been advanced by Razak to Shaukat Ali on 21 August 1985 as stated in mortgage 1890. The initial intention was that the monies or part of them were to be advanced to Shaukat Ali's father Ahmed, who at that time was intended to be the buyer of the land. That the monies were advanced to Ahmed should have been reflected in the mortgage. That the mortgage did not so reflect is fatal to its validity. There should have been a third party mortgage stating that the mortgage was to secure Razak's loan to Ahmed.

We do not accept these submissions. Even if the original intention was for the monies to be advanced to Ahmed because he was to be the buyer of the land, when that intention changed and Shaukat Ali became the purchaser, the reality was that the money was advanced to Shaukat Ali and was used by him in part payment of the purchase price. The mortgage therefore accurately reflected the real position.

The wording of the mortgage 1980

The second reason advanced turns on a letter dated 1 November 1989 from the solicitors then acting for Shaukat Ali and Razak addressed to the Divisional Surveyor Western. As this letter is central to this and the next submission we set it out in full.

*“re: LD REFERENCE 4/13/638
APPLICATION FOR CONSENT TO MORTGAGE*

We act for both the Mortgagor Shaukat Ali Ali father’s name Ahmed Ali and the Mortgagee Abdul Razak father’s name Kamrudin and enclose application for consent to Mortgage over LD reference 4/13/638 for principal sum of \$18,600.00

Your records would reveal that there is a existing Mortgage number 1890 over LD reference 4/13/638 between the same parties for a principal sum of \$12,300.00 (Twelve Thousand Three Hundred Dollars). However both parties agree that Mortgage number 1890 has been wrongly worded in that it states that the sum of \$12,300.00 was lent and advanced on the day of execution of the said Mortgage. In fact the money was not advanced on that particular day but the said sum, was due and owing by the Mortgagor and the Mortgagee.

In order to correct the above error and in light of a further advance of \$700.00 already made to the Mortgagor and the [sum] of \$5,600.00 which the Mortgagee intends to give to the Mortgagor upon grant of consent to this application, we forward fresh application for consent to mortgage for a principal sum of \$18,600.00 (Eighteen Thousand Six Hundred Dollars). The parties will discharge the existing Mortgage number 1890 upon grant of consent to this application. The sum of \$5,600.00 is required for some improvements in farm.

We enclose herein our cheque of \$548.72 being arrears of rent and \$13.00 being application for consent to mortgage fee.”

Mr Mishra submits that the admission in the letter that mortgage 1890 was wrongly worded in the respect stated is fatal to the mortgage. Further the stated intention to replace mortgage number 1890 with a new mortgage securing \$18,600.00 was never completed.

We are unable to accept this submission also. That the mortgage contained an error indicating that the principal sum was lent and advanced on the day of the execution of the mortgage, when in fact it was the sum due and owing that had accrued over a period of time does not affect the validity of the mortgage. It is certainly no evidence of fraud. Further the letter confirms the view of the parties at that time that the principal sum had been advanced to Shaukat Ali not to Ahmed.

Interest

Next Mr Mishra submits that there was no agreement to pay interest of 13.5% per annum as stated in clause 2 of the mortgage. In support he relies on the same letter of 1 November from the solicitors acting for the mortgagor and mortgagee. That letter makes no reference to interest. The amount to be secured by the proposed mortgage was intended to be \$18,600.00, which did not include any arrears of interest. The increased amount was attributable to the further advance already made and an intended further advance.

In considering this submission it is important to note the purpose of the letter. It was to ask the Divisional Surveyor whether consent would be given to the proposed new mortgage. It was not otherwise concerned with the detail of the transaction between Shaukat Ali and Razak. That interest was payable under the mortgage 1890 was not relevant to the application for consent to the proposed new mortgage. The omission of any reference to interest is therefore of little moment. It certainly does not have the effect of varying the expressed provision in the mortgage itself that the mortgagor will pay interest at 13.5%, nor is it evidence of fraud.

On or about 26 August 1987 the solicitors then acting for Razak prepared a detailed statement showing the advances that had been made. This statement shows that the balance owing by Shaukat Ali to Razak on 21 August 1985 (the date of the mortgage) to be \$12,300.00. Further advances and repayments were made with the result that at 26 August 1987 the balance then owing was \$12,482.51. The statement notes that interest is payable at 13.5% and it is included in the statement. Mr Mishra submits that this account is further evidence against Razak and the authenticity of mortgage number 1890. On the contrary, the statement is entirely consistent with the mortgage, the principal sum it secures, and Shaukat Ali's liability to pay interest at 13.5%.

The Moneylender defence

In amended pleadings Shaukat Ali pleaded that mortgage 1890 was void and unenforceable due to non compliance with the Moneylenders Act cap 234 on the grounds, first that Razak was a moneylender and therefore the Act applied, and secondly that the terms of the transaction were harsh and unconscionable in a number of respects.

The Judge held, apparently in reliance on s.3 of the Act, that the onus was on Razak to satisfy the Court that he was not engaged in the business of money lending. That section provides that, save for certain exceptions which do not apply, any person "who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary be proved to be a moneylender."

The Judge apparently took the view that Razak lent the principal sum to Shaukat Ali expecting a larger sum to be repaid because of the liability to pay interest. In holding that

s.3 applied, the Judge was not correct. This issue was decided by this Court in *Permal Naicker v Pachamuttu* (1959) 6 FLR 144. The Court held that the section only applies to those transactions in which there is a promise to repay a larger capital sum in respect of the loan of the lessor capital sum. Interest does not enter into that question.

However, even with the onus of proof resting on Razak, the Judge was satisfied that Razak was not in the business of lending money. He helped Shaukat Ali financially as a family member and not in a capacity of the business of money lending. For that reason he concluded that the Act did not apply. This was a purely factual issue. The Judge having heard the evidence is well able to assess the nature of the transaction. We find no reason to differ from the conclusion he reached.

Conclusion on this ground

We have considered all the grounds advanced by Mr Mishra in support of his submission that the mortgage was invalid. We conclude that the Judge was correct in holding that Shaukat Ali had failed to make out his challenge to the validity of mortgage 1890. This ground of appeal does not succeed.

The subsequent transactions

Mr Mishra submitted that the evidence established that the subsequent transactions, that is the transfer of mortgage 1890 from Razak to Hashim, the mortgagee sale of the land from Hashim Alito Buksh, and the mortgage for the full amount of the purchase price by Buksh to Bano, were a fraud and a sham. The purpose of it was to enable Razak to achieve

what he could not achieve directly. As mortgagee, he was unable, in exercise of his powers as mortgagee, to sell directly to himself. So this elaborate and fraudulent scheme was devised to achieve the same result. The evidence established that Bano is Razak's wife and that Razak has control of her assets. He therefore had control of the mortgage and by that means of the land. The Judge concluded that this allegation was not supported by the evidence to the standard of proof required. This is a finding of fact in respect of which this Court would require convincing evidence before it would be justified in reaching a different conclusion.

We briefly examine each of the transactions to ascertain whether there is such evidence.

The sale and transfer of mortgage 1890 from Razak to Hashim Ali is evidenced by a transfer dated 2 March 1990 which shows the consideration to the transfer of the tractor, trailer, car and plough, expressed to be by way of exchange and equality in value. As we have already mentioned, there is evidence from Razak that he sold the car and plough shortly after the transfer. He used the tractor and trailer for some years, then they also were sold. This was evidence that the transaction was genuine that was open for the Judge to accept.

The transfer in exercise of the power of sale by Hashim Ali to Buksh is dated 14 November 1991. It shows the purchase price to be \$35,500.00. There was no evidence to show that this price was other than appropriate.

The whole of this purchase price was borrowed from Bano. Mr Mishra submitted that this was clearly not so because the evidence showed that Bano herself did not provide any part of the money. However, Razak said that after Buksh had tendered to purchase the land, his,

Buksh's, application to the bank for a loan was declined. Buksh then approached Asrad Buksh who is married to Bano's daughter, Rakshan. Asrad agreed to lend Buksh the \$35,500.00. As Asrad was then in Australia, it was decided that the loan should be from his mother-in-law Bano to Buksh to obviate the need to obtain consent. Asrad transferred the money to Hashim Ali who by then was in Canada. This too was an explanation that it was open for the Judge to accept.

In the light of this evidence, we do not find any basis for disturbing the Judge's conclusion that there was no sufficient evidence to establish that these transaction were a fraudulent sham.

The notice of demand

The principal sum of \$12,300 secured by mortgage 1890 was repayable upon demand. On 2 March 1988 the solicitors then acting for Razak made demand for payment of the principal sum, plus interest. Mr Mishra submits that this demand was "compromised or negated" by the letter of 1 November 1989 from the solicitors then acting for Shaukat Ali and Razak, which we have set out in full above.

The Judge made no finding in respect of this submission. He said that no evidence or argument was advanced as to whether or not a proper demand was made on Shaukat Ali prior to the mortgagee sale. He assumed the allegation was abandoned. He was in error. There were submissions made in the High Court by Mr Mishra on behalf of Shaukat Ali challenging the validity of the demand.

Mr Mishra submits that because no reference was made to payment of interest at

13.5% in the letter of 2 March 1998, and because of the indication in that letter that mortgage 1890 was to be discharged and a new mortgage entered into, is, in some way that is not clear to us, fatal to the demand.

Had the intention stated in the letter to enter into the new mortgage for a larger sum been carried out, the demand would no longer be an effective demand. There would need to be a further demand for payment of the amount due under the new mortgage. But this intention was not carried out. Mortgage 1890 remained in force. The demand remained a valid demand.

Mr Mishra raised a number of other issues under this heading, none of which we consider would justify a finding that the demand did not remain an effective demand.

Section 86 of the Property Law Act

A further ground for challenging the validity of the later transactions was that no application was made to the Court for consent pursuant to s.86 (1) of the Property Law Act, cap 130.

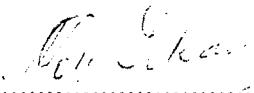
The Judge dismissed this ground because it had not been pleaded. He was correct to do so. The rules of court require that if a party wishes to raise a cause of action or an affirmative defence, that cause of action or defence must be pleaded, so that the other parties and the court will know upon what grounds the party pleading will rely. If the court were to allow causes of action or affirmative defences that had not been pleaded to be raised and relied on, it would not be possible for cases to be determined by the court fairly and effectively.

However, as did the Judge, we will comment briefly on this ground. Section 85 of the Property Law Act provides that ss 68 to 83, conferring on mortgagees various powers, including the powers of sale, apply where the mortgage is made by deed. Section 86, requiring an application to the Court for consent, applies where the earlier provisions are inapplicable.

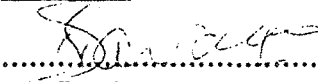
This mortgage was a deed. As required by s.4 (1) of the Property Law Act, it was signed by the party to be bound, and was attested by one witness not being a party to the deed. That subsection provides that no particular form of words are requisite for the attestation. The section also makes it clear that sealing of a deed is not necessary except where executed by a corporation, nor are formal delivery and indenting. It follows that compliance with s.86 of the Property Law Act was not required.

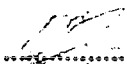
The Result

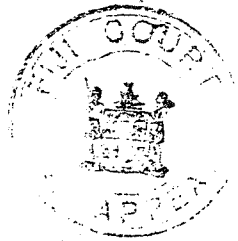
None of the grounds advanced by Mr Mishra had been made out. The appeal is dismissed. The respondents are entitled to costs which we fix at \$1,200 inclusive of disbursement.


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Sir Moti Tikaram

President


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Mr Justice Savage
Justice of Appeal


.....
Justice Sir David Tompkins
Justice of Appeal



Solicitors:

Messrs. Mishra, Prakash and Associates Ba, for the Appellant
Messrs. Sahu Khan and Sahu Khan, Ba for the Respondents