

GANGA AND ANOTHER *v.* H. E. SNELL AND OTHERS

[FIJI COURT OF APPEAL AT SUVA (Sir George Finlay, Acting President,
C. F. C. Macaskie and C. J. Hammett, JJ/A), May 21, 1960]

CIVIL APPEAL No. 16 OF 1959

(Appeal from H.M. Supreme Court of Fiji—Lowe C.J.)

Land (Transfer and Registration) Ordinance (Cap. 136)—notice to mortgagor under s. 61—requirements of s. 63 (1).

The appellants operated a sawmill on land of which they were the registered proprietors. They borrowed £5,000 from Sir Henry Scott upon the security of a mortgage over this property. It was stipulated in the mortgage agreement that the loan would be fully repaid on 19th March, 1957. The appellants had fallen into arrears with the payments of interest and on the 8th March, 1957, the respondents, as executors and trustees of Sir Henry Scotts' estate, served a notice upon the appellants. The notice was to the effect that if the principal and interest amounting to £5,149 15s. 10d. was not paid within eight days the property would be sold. The appellants paid nothing. Accordingly, on 25th June, 1957, the respondents sold the property to a buyer for £5,560. The appellants instituted an action against the respondents in the Supreme Court claiming damage for trespass, the return of certain chattles which they alleged did not form part of the security, damages for loss of business profits, a declaration that they were entitled to redeem the mortgage, and a statement of account. Judgment was entered for the respondents. Against this judgment the appellants appealed. They argued two grounds of appeal. The one ground of appeal turned entirely upon the facts as found by the Supreme Court, and with this finding the Court of Appeal concurred. The other ground of appeal was that the notice of 8th March, 1957, was invalid. The appellants relied upon sections 61 and 63 (1) of the Land (Transfer and Registration) (Cap. 136), which read:—

“61. A mortgage or an encumbrance shall, when registered as herein provided, have effect as a security but shall not operate as a transfer of the land thereby mortgaged or encumbered, and, in case default is made in payment of the principal sum, interest, annuity or rent-charge secured or any part thereof respectively or in the performance or observance of any covenant expressed in any mortgage or encumbrance or in this Ordinance declared to be implied in any mortgage, and such default is continued for one month or for such other period of time as is therein for that purpose expressly fixed, the mortgagee or encumbrancee may serve on the mortgagor or encumbrancer notice in writing to pay the money due or owing under such mortgage or encumbrance or to perform and observe the covenants therein expressed or implied as the case may be, by giving such notice to him or them or by leaving the same on the mortgaged or encumbered land or by sending the same through the post office by a registered letter directed to the proprietor of the land at his address appearing in the register.

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63. (1) If default in payment or in performance or observance of any covenant continues for one month after the service of such notice, the mortgagee or encumbrancee may sell or concur with any other person in selling the mortgaged or encumbered land or any part thereof either subject to prior leases, mortgages and encumbrances or otherwise, and either together or in lots by public auction or by private contract, and either at one or several times, subject to such terms and conditions as the mortgagee or encumbrancee thinks fit, with power to vary any contract for sale and to buy in at any auction or to vary or rescind any contract for sale and to resell without being answerable for any loss occasioned thereby, with power to make such roads, streets and passages and grant such easements of right of way or drainage over the same as the circumstances of the case require and the mortgagee or encumbrancee thinks fit, and may make and sign such transfers and do such acts and things as are necessary for effectuating any such sale."

It was contended on behalf of the appellants that in so far as the period of one month stipulated by section 63 (1) is mandatory, the notice giving eight days only, which purported to be served thereunder, was wholly ineffectual.

Held.—(1) The notice was valid for the purposes of section 61.

(2) Section 63 (1) does not of itself require the service of any notice and in so far as the notice purported to be a notice under section 63 it was mere surplusage.

(3) The default in payment having continued beyond the period of one month after the service of a valid notice under section 61, the respondent was entitled to sell in accordance with the provisions of section 63 (1).

Appeal dismissed.

K. C. Ramrakha for the appellants.

D. M. N. McFarlane and *T. Rice* for the respondents.

The appellants have appealed from a judgment of the Supreme Court delivered on the 28th August, 1959, in an action in which they claimed damages for trespass, return of certain plants and machinery, damages for loss of business profits and a declaration that they were entitled to redeem a mortgage, and a statement of account.

The appellants were the registered proprietors of certain land on which they had erected a sawmill and on which they were at all material times carrying on the business of sawmilling. The respondents are the executors and trustees of the will of the late Sir Henry Scott. The appellants had borrowed £5,000 from the latter on the security of a mortgage over the land. This mortgage was by its terms to be fully repaid on the 19th March, 1957. Interest payments had fallen into arrears and on the 8th March, 1957, a notice, the terms of which are hereafter referred to, was served by the respondents on the appellants. The notice was to the effect that if the principal and interest amounting to £5,149 15s. 10d. were not paid before the expiration of eight days then the properties would be sold. This term of eight days did not offend against the provisions of section 61 but did in fact purport to reduce to eight days the period of one month prescribed by section 63, of the Land (Transfer and Registration) Ordinance (Cap. 136). No part of the money due under the mortgage was paid and on the 25th June, 1957, the respondents accepted the tender of D. B. Sharma for the land

together with all buildings, plant and machinery thereon for £5,560. In their letter of acceptance to Sharma's solicitor the respondents expressly excluded the engine which had been placed on the land by an arrangement between the appellants and the United Lumber Company. At the trial, judgment was entered for the respondents.

Notice of appeal was given on various grounds but only two were argued before us. The first had relation to the alleged invalidity of the notice: the second that in any event judgment should have been given for the appellants for damages for conversion of certain moveable chattles on the land, which chattels did not form part of the security.

Argument on the first ground was necessarily directed to sections 61 and 63 of the Land (Transfer and Registration) Ordinance (Cap. 136). Counsel for the appellants contends that under section 63 the period of one month is mandatory and that inasmuch as the notice purported to reduce this term to eight days the notice was wholly ineffectual and invalid. The material sections read as follows:—

" 61. A mortgage or an encumbrance shall, when registered as herein provided, have effect as a security but shall not operate as a transfer of the land thereby mortgaged or encumbered, and, in case default is made in payment of the principal sum, interest, annuity or rent-charge secured or any part thereof respectively or in the performance or observance of any covenant expressed in any mortgage or encumbrance or in this Ordinance declared to be implied in any mortgage, and such default is continued for one month or for such other period of time as is therein for that purpose expressly fixed, the mortgagee or encumbrancee may serve on the mortgagor or encumbrancer notice in writing to pay the money due or owing under such mortgage or encumbrance or to perform and observe the covenants therein expressed or implied as the case may be, by giving such notice to him or them or by leaving the same on the mortgaged or encumbered land or by sending the same through the post office by a registered letter directed to the proprietor of the land at his address appearing in the register.

" 63.—(1) If default in payment or in performance or observance of any covenant continues for one month after the service of such notice, the mortgagee or encumbrancee may sell or concur with any other person in selling the mortgaged or encumbered land or any part thereof either subject to prior leases, mortgages and encumbrances or otherwise, and either together or in lots by public auction or by private contract, and either at one or several times, subject to such terms and conditions as the mortgagee or encumbrancee thinks fit, with power to vary any contract for sale and to buy in at any auction or to vary or rescind any contract for sale and to resell without being answerable for any loss occasioned thereby, with power to make such roads, streets and passages and grant such easements of right of way or drainage over the same as the circumstances of the case require and the mortgagee or encumbrancee thinks fit, and may make and sign such transfers and do such acts and things as are necessary for effectuating any such sale."

We are unable to accept that view for several reasons. Section 63 does not of itself require the service of any notice. The notice to which it relates is the notice required to be given under section 61. Insofar therefor as the notice purported to be a notice under section 63 it was unnecessary and a mere surplusage.

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Insofar as it purported to shorten the term of one month prescribed by section 63, it was ineffectual and void for section 63 is mandatory as to the term it fixes. But the fact that the notice was in relation to section 63 ineffectual and void does not affect the validity of the notice in respect of that separate and independent aspect which was designed to and did give effect to section 61.

As to that aspect the notice was valid and effectual. The proceedings of the respondents did not in consequence offend against section 61. Nor did they offend against section 63 for they allowed more than a month to elapse between the giving of the notice and the sale.

There is no substance therefore in the first ground of appeal relied upon.

On the second ground Counsel for the appellants argued that when the trustees put Sharma into possession they intended that Sharma could take everything on the land. He quoted from the evidence of Tazim Raja who said:—

“When I went there the workmen were not running the mill. In taking possession with D. B. Sharma I was acting for Scott and to give possession. I was sent from the office. I was the agent for the mortgagee to give possession. I know Sharma was going to lock the mill. That was our purpose on going out. He was to take dominion over the land and mill. In my presence he padlocked everything. Parbhu's watchman was left inside. I did see some logs there but there was no timber except outside the boundary.”

Counsel for the respondents agreed that the period of one month in section 63 was mandatory but contended that all the mortgagee is bound to do is to tell the mortgagor that he intends to sell the property and this was done by the notice of the 8th March, 1957. He agreed that if a mortgagee does sell before the expiration of one month, he may be liable to an action for damages if the mortgagor is damnified thereby. In this case the sale did not take place until the 25th June, i.e. three and a half months later. The appellants meanwhile took no legal proceedings to restrict the trustees from selling except to lodge a caveat on the grounds that there was a clog on the equity of redemption. This caveat was later removed after proceedings had been taken in Court. Counsel contended that the appellants had notice of the sale to Sharma and had ample time to remove any chattels not covered by the security.

We are satisfied that the notice of the 8th March, 1957, was a sufficient notice within the terms of section 61 of the Land (Transfer and Registration) Ordinance. After the expiration of one month of the service of the notice, as default in payment had continued the respondent was justified in selling the land as provided for by section 63. No further notice is required by the Ordinance.

On the second point we see no reason to differ from the conclusions of the learned Chief Justice at the trial when he said in his judgement:—

“Plaintiff claimed that he removed none of his articles from the mill before it was seized by Mr. Sharma as he was not told of the sale. That also I disbelieve because Sharma's evidence is completely acceptable and shows to the contrary. I am satisfied also that Sharma himself told this witness some days before Sharma locked the premises that he must clear out his own belongings as the mill had been purchased by Sharma.

I am satisfied also that Reddy Construction Company, no doubt on instructions from the plaintiffs, removed 4 or 5 lorry loads of timber from the property within the last few days before Sharma locked it up. I am equally satisfied that there were comparatively few logs on the mill site when Sharma took over and that these were purchased by Sharma from the real owner."

It was not contended by Counsel for the appellants that the appellants were prevented from removing any chattles before Sharma was put into possession. If they had been prevented since, then it would appear that any claim for damages for conversion of the chattels should have been taken against Sharma and not against the respondents.

For these reasons the appeal is dismissed.

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