A

KISHUN SINGH

v.

ABDUL RAHIMAN

[SUPREME COURT, 1965 (Mills-Owens C.J.), 12th, 26th March]

B

Appellate Jurisdiction

Crops—crop lien—signed during currency of earlier lien—validity and priority—Crop Liens Ordinance (Cap. 194) ss.3(3),6(1),8,10—Bills of Sale Ordinance (Cap. 193) s.14.

C A lienor successively executed three crop liens, which were duly registered, each purporting to create a lien over crops grown or to be grown on the same piece of land. The first lien was executed in favour of the respondent in June 1962, and was given up to the 24th June, 1964. The second lien was in favour of the appellant, was executed in February 1963, and was given up to February, 1965. The third lien was in favour of the respondent, and was executed in D June, 1964 for the ensuing two years. Certain crops grown before the 24th June, 1964, were harvested after that date and within the two year period of the second lien.

Held: 1. The first lien expired on the 24th June, 1964, and did not operate as a security over crops severed after that date.

E 2. Concurrent liens are permissible under the Crop Liens Ordinance and therefore the second lien was validly created notwithstanding the subsistence of the first lien, to which it was merely postponed.

3. The second lien took priority over the third lien by virtue of prior registration and the second lien operated as the prior valid security over the crops severed during its continuance subsequent to the expiry of the first lien.

F

Cases referred to: *Attorney-General for New South Wales v. Hill and Halls Ltd.* (1928) 32 C.L.R. 112: *Re Patrick. Bills v. Tatham* [1891] 1 Ch. 82; (1888) Sol. Jo. 798: *Tuck v. Southern Counties Deposit Bank* (1889) 42 Ch. D. 471; 61 L.T. 348: *Thomas v. Searles* [1891] 2 Q.B. 408; 65 L.T. 39.

G Appeal from a judgment of the Magistrate's Court.

K. C. Ramrakha for the appellant.

D. M. N. McFarlane for the respondent.

MILLS-OWENS C.J.: [26th March, 1965]—

H In this case three documents were successively executed and duly registered, each of them creating, or purporting to create, a lien of crops grown or to be grown on the same piece of land. All were in

the form prescribed by the Crop Liens Ordinance (Cap. 194) but with additional clauses to which I shall refer later. The prescribed form provides for the giving of —

> "a lien on my crop(s) of (name of the agricultural produce) growing or to be grown on land situate at .... in the Colony of Fiji and known as .... up to the .... day of .... 19...".

The first lien was executed in favour of the respondent in June, 1962 and was expressed as being given 'up to the 24th day of June, 1964'. The second lien was in favour of the appellant and was executed in February, 1963. It was expressed as being given up to February, 1965. The third lien was executed in favour of the respondent in June, 1964 and was in similar terms for the ensuing two years. The first and third liens were thus in favour of the respondent, whilst the second lien was in favour of the appellant. Obviously the first and the third liens were drawn so as to overlap in order that there should be no interval during which the respondent was not to be the registered owner of a crop lien, but the second lien was executed and registered before the third lien. The question which has arisen between the parties concerns crops which were grown during the two-year period of the first lien but not harvested until after that period expired, that is to say crops grown before the 24th June, 1964 but harvested after that date and within the two-year period of the second lien. The learned Magistrate held that under the terms of the Ordinance the security afforded by the first lien extended to such crops. The appellant contends that those crops, at the date of the harvesting thereof, no longer formed part of the security constituted by the first lien but formed part of his security under the second lien.

The case has been very fully argued and clearly involves considerations of some importance. Both Mr. Ramrakha for the appellant and Mr. McFarlane for the respondent have referred to a case decided in the High Court of Australia in 1923, namely *A.G. for New South Wales v. Hill and Halls Ltd.* (32 C.L.R. 112) where the nature of a similar statutory crop lien was the subject of consideration. The joint judgment of Isaacs and Rich JJ., if I may say so with respect, is particularly valuable. I quote from this judgment, at pp. 125 *et seq.* —

> "It is common ground that Part II enacts that a landholder can give, in the manner prescribed, what is called 'a preferable lien' over growing crops of agricultural or horticultural produce, as described. It is also uncontested that the effect of the Act was to alter the common law as it then stood unaffected by any statute except the repealed Act, and to make provisions so as (1) to enable the 'holder of land' to give, even before crops come into existence, a lien on those crops after they come into existence and are severed; (2) to make that lien 'preferable', that is, a preference lien (just as shares are preference shares), over every other claim, including bankruptcy, that might otherwise exist in respect of the crops, and (3) to leave the landholder in actual possession of the crops until the time comes for enforcing the lien. It is beyond question that the Act looks for its real effect to the time when the crop is to be severed. The

advance is on the 'crop'. The lien is declared to be, not on the 'land', but on the 'crop'. The agreement scheduled, and the promise it contains, is that it shall be 'gathered, carried away, and made marketable ... and be delivered to' the lender, who may sell it, &c. The basis of the Act, in short, is that the crop is treated as a *pure chattel* for the purposes of the Act, with certain necessary powers in case of default, namely, powers of severance and disposal. The nature of the statutory lien given is entirely new. At common law a lien (1) is a mere personal right of detention and therefore requires possession *(Donald v. Suckling* (1886) L.R. 1 Q.B. 585; *Great Eastern Railway Co. v. Lord's Trustee* (1909) A. C. 109; and *John D. Hope & Co. v. Glendinning* (1911) A.C. 419 at p. 422); (2) consequently cannot exist over property not yet in existence or, if in existence, that is not deliverable *(Thomas v. Kelly* (1888) 13 App. Cas., 506 at p. 515; and see *Brantom v. Griffits* (1876) 1 C.P.D. 349); and, further, (3) having regard to the bankruptcy law, an agreement that left the property in the possession of the owner would not avail against the order and disposition clause in the event of bankruptcy. A new legal interest with new rights and obligations and new consequences was therefore devised, primarily for the relief of the property owners, with appropriate protection to the lenders. The course prescribed by the Legislature for the relief of the property owner and the assured security of the lender is :— (1) Advance to be on condition of 'receiving as security' only for such advance a lien on the crop. That looks ahead to the time of the *severance of the crop from the land,* and is a present fictional separation of the two for the purposes of the Act. (2) An agreement in the statutory form. The agreement carries out the same idea. (3) Registration within thirty days; which, of course, means at any time within the thirty days ...."

The judgment goes on to point out that even at common law however crops *"fructus industriales"* were treated as personal property for some purposes before severance. The judgment proceeds —

> "The view thus presented of the effect of the Act in accordance with the common law is reinforced by the nature of the 'preferable lien'. The lienee, as he is called, is by sec. 4 'entitled to the whole of the 'crop and the whole produce thereof' (that is, the 'property' in the crop), 'and possession thereof by the lienor shall be to all intents and purposes *in the law* the possession of the lienee' (that is, the legal 'possession' of the crop). Then, says sec. 4: 'When' the 'advance is repaid with interest specified in' the 'agreement the possession and property of such crop shall *revert to and vest* in the lienor'. This shows how completely and effectually in the eye of the law the property and the possession have been transferred *to the lienee,* as his security."

Clearly, much of what is said in that judgment applies to liens created under the Ordinance, Chapter 194.

Mr. Ramrakha for the appellant, relies particularly upon the provisions of section 6(1) of the Ordinance, under which it is provided that a lien —

> "shall continue in force for the preiod specified in the agreement .... and may be created for any period not exceeding two years, ..."

He submitted that the question was whether that provision was to be given effect according to its terms or had to be read as subject to, or complementary to, subsection (3) of section 3 of the Ordinance. That subsection, so far as material, reads as follows —

> "(3) The lienee .... shall from the date of the registration of the agreement as aforesaid, have a preferable lien upon, and be entitled to, the whole of the crop or crops given as security, whether the same be then or be intended to be thereafter sown or grown, and the produce thereof or the proceeds thereof if and when sold and converted into money, and until the repayment of the advance or liquidation of the debt with interest (if any) the possession of the crop or crops and the produce or the proceeds thereof as aforesaid by the lienor or by any person or persons on his account or for his use or benefit shall, for all intents and purposes, be deemed to be the possession of the lienee."

In his submission section 3 (3) was intended to overcome the difficulties attendant upon the dealing with crops before severance to which attention was directed in the case cited. The Ordinance was concerned to provide means of creating and enforcing securities over such crops. Section 6 was to be given its plain meaning, namely that on the expiration of the two-year period the security lapsed or expired. This was consistent with the scheme of the Ordinance. Section 10 provided for the lien agreement being registered within 21 days of execution, and provided further that —

> "in case two or more agreements are made comprising in whole or in part the same crop or crops, they shall have priority in the order of their registration."

Mr. Ramrakha pointed out that if the judgment appealed against was correct it would be possible for the lienee to claim the proceeds, when harvested, of crops sown on the very last day of the two-year period. That, he submitted, would foil the whole system of registration and priorities; moreover, an intending purchaser of the land, for example, would be put on enquiry whether any crops had been sown during the period of any registered lien which might come to fruition after the purchase. Further, to interpret the lien as extending to crops harvested after the period of two years would be contrary to the grammatical construction of the operative part of the instrument in the statutory form. The words "up to the .... day of .... 19..." qualified the period of the lien, not the time at which the crops were sown or grown. One did not speak of crops growing or to be grown "up to" a specified date; one spoke of crops grown "on or before" a particular date.

Mr. McFarlane agreed that the Australian case was illustrative of the purposes of the Ordinance. The Ordinance dealt however not

merely with the registration of liens but with the substantive rights accruing thereunder. Under section 8 it was a serious offence to deprive a lienee of his rights or to impair his security; the second lien, if valid, offended against that section. Secondly, in his submission, it was very doubtful whether, under the terms of the Ordinance, there could be such a thing as a second lien, that is to say a lien intended to subsist during any period in respect of which a prior lien was subsisting. That was so because section 3(3) provided that the possession of the lienor was to be deemed to be the possession of the lienee. How was it possible for possession of the same property to vest in different persons at the same time? He relied upon the words of futurity appearing in this subsection. Thus the subsection referred to crops: "whether the same be then or be intended to be thereafter sown or grown, and the produce thereof etc.", and the subsection provided further that the lien was to continue: "until the repayment of the advance etc.". In the case cited, Higgins J. had expressed doubts whether two liens could subsist at the same time, although admittedly as an *obiter dictum*. If concurrent liens were permissible then section 10 dealt with the matter of priority, but, in principle, a subsequent lienee must take subject to all the rights of a prior lienee, which rights extended to crops subsequently severed. The subsequent lienee was to be deemed to have notice of any lien already on the register. Mr. McFarlane also relied upon clause 3 of the first lien —a clause which is common to all three documents although it does not appear in the prescribed form — under which the lienor agrees to give a further lien, or a renewal or extension of the then present lien, in certain events including the case where the indebtedness has not been fully discharged. On the facts of the present case, he submitted, there was a running or continuing security constituted by the first and third liens.

In reply Mr. Ramrakha submitted that a first lien could not be affected merely by the giving of a second lien; that could not be said to be an impairment within the meaning of section 8. Section 10 recognised that two or more liens might subsist at the same time. He would concede that the second lien was subject to the first lien but the question was: what was the duration of, and what were the rights incident to, the first lien. The Ordinance did not contemplate that a lien might be renewed or continued; clause 3 was contrary to the provisions of that section. The position under the Bills of Sale Ordinance (Cap. 193) might be usefully compared. Section 14 thereof provided expressly for renewals. There was no such provision in Chapter 194. The third lien was, therefore, rightly held by the learned Magistrate to be a new lien. Alternatively, clause 3 confirmed the view that the lien expired on the appointed date, otherwise why was it thought necessary to make such a provision. He would concede that one could not have possession subsisting in two persons, as lienees, at the same time. But there was nothing wrong in other liens being granted during the subsistence of a first lien. Subsequent lienees would, as it were, queue up according to the order of registration. The subsequent lienees' rights were merely postponed; the subsequent lienee's right to immediate possession sprang up or came into effect on the expiration of the right to possession of the prior lienee.

The foregoing represents the opposing arguments.

Clearly, in my view, the words "up to the .... day of .... 19..." which appear in the prescribed form, and in the instruments in question in this case, are to be construed as words which qualify the duration of the lien, not the period of growth of the crops. It is the lien which is to continue as a security up to the specified date. On general principles, proceedings cannot be founded on a security after its lapse or expiry unless express provision is made reserving a right to the creditor to enforce any antecedent liability. This view is consistent with the provisions of section 6(1) which expressly contemplates the continuance in force of the lien for a specified period, not exceeding two years. It is consistent also with the scheme of registration which provides a means whereby intending lienees and others may be made readily aware of the existence of any lien under the Ordinance and of its period of continuance. To regard a lien as extending to crops maturing after the specified date, and the proceeds thereof, would be to introduce uncertainties which the registration system under the Ordinance is not designed to overcome. The provisions of subsection (3) of section 3 in so far as they refer to crops intended to be thereafter sown or grown, as it appears to me, were aimed at eliminating the difficulties which would otherwise arise under the ordinary law with regard to the creation of a security over future property in the sense of crops not yet severed and moneys not yet due, and with regard to the rule that it is a necessary incident of a common law lien that the lienee should have possession of the thing over which he claims a lien. I do not regard the words: "until the repayment of the advance etc." as apt to extend the period of continuance of the lien beyond the specified date. These words are intended to state the scope or incidence of the security during its continuance and to delineate its character as a security. The period of the continuance in force of the security is provided for elsewhere, namely in section 6(1). The judgment of Isaacs and Rich JJ. supports this conclusion, in my view, notwithstanding that there are differences as between the legislation there under consideration and Chapter 194. In particular, I derive therefrom and apply the following expression of opinion: the Ordinance looks for its real effect to the time when the crop is to be severed. At that time, in the present case, the first lien had expired; the third lien was then in existence, but it was registered after the second lien and therefore ranked subsequent thereto.

This, however, is subject to the question whether a second lien may validly be created during the subsistence of a prior lien. Subsection (3) of section 3 expresses the statutory lien to be a "preferable" lien. The expression admits the possibility of the subsistence of more than one lien, although primarily, no doubt, the expression is used to describe the nature of the statutory lien. However that may be, section 10 expressly deals with the case where the same crops, wholly or in part, are comprised in two or more liens. It does not declare the prior lien to be valid to the exclusion of any subsequent lien, but says that they are to have priority "in the order of" their registration. These words, very clearly in my view, contemplate the subsistence, as valid liens, of more than one lien at the same time. Subsection (3) of section 3 operates to provide that whilst

physical possession of the crops will be in the lienor as occupier of the land, legal or constructive possession will be in the lienee. 'Possession' is one of the most difficult spheres of the law, but I think it must be clear that the possession which vests in a statutory lienee under the Ordinance cannot be vested in two or more such lienees at the same time, jointly or otherwise. The Ordinance, however, as I have endeavoured to indicate, does contemplate concurrent liens, and effect can be given to the rights of the subsequent lienee by adopting the view that, whilst during the continuance of the first lien the legal or constructive possession is in the first lienee, the second lienee has an equity entitling him to succeed therto so that upon the expiry of the first lien the lienor will hold possession on account of or in trust for the second lienee. In other words, the second lienee's right to possession is merely postponed. The doubts expressed by Higgins J. were in the following terms (at pp. 132-3) —

> "I feel it incumbent on me to say that I am by no means satisfied that sec. 4 of the Act of 1898 allows a holder of land who has signed a lien on his crops for one year's growth to give another lien for the same year — at all events if the first lien be registered within thirty days. Two distinct parties cannot have the legal title which the section confers; and it may well be that the power to give such a lien is exhausted if the power be once exercised. In the Victorian Act (Liens on Crops Act 1878, sec. 4) there was an express recognition of subsequent charges; there is none in the New South Wales Act."

The joint judgment of Isaacs and Rich JJ. contains a similar passage —

> "(3) no priority according to date of registration is expressly declared by the Liens Act, and no such priority is known to the law unless created expressly or implied by statute; (4) such an implication under the Liens Act, sec. 4, is opposed to the specified transfer of possession and property to a lienee, inasmuch as such statutory legal transfer cannot in the nature of things be made to more than one lienee at the same time;".

But the Ordinance Chapter 194, as I have said, contains an express recognition of concurrent liens and regulates their priority. I have dealt above with the question of possession. Similar considerations, as it appears to me, apply to the legal title to the crops which is to vest in the lienee by virtue of section 3(3). Legal ownership vests in the lienee merely as a security. Whilst the legal title remains indivisible, the lienor retains an equity of redemption in the crops and the proceeds thereof; how otherwise are his legal rights to be preserved on the lien expiring or the debt being discharged? No provision is made in the Ordinance as to re-assignment either on discharge of the debt or expiry of the lien. On either of such events occurring no re-assignment to the lienor becomes necessary. His legal rights to ownership and possession of the crops revive or re-vest (see *In re Patrick. Bills v. Tatham* [1891] 1 Ch. 82 at 86, per Lindley L.J.). Although therefore in the present case the lienor parted with the legal title upon executing the first lien, he did so conditionally only, namely as a security. He could create a title in the second lienee

(see per Fry L.J. in *Tuck v. Southern Counties* (1889) 42 Ch.D. 471 at 483). I would refer also to the judgment of Lindley L.J. in *Thomas v. Searles* [1891] 2 Q.B. 408 at 412, where he said —

> "But what is the position of a man who gives a bill of sale, not by way of absolute assignment, as in *Tuck v. Southern Counties Deposit Bank* 42 Ch.D. 471, but by way of mortgage to secure an advance? He still has the equity of redemption in the goods. What is there to shew that he is not the true owner to the extent of that interest for the purpose of giving a fresh bill of sale as security for a further advance of money?"

Both these authorities deal with Bills of Sale but the same principles apply.

There is the practical aspect also that if it were not possible to create a second lien during the continuance of a prior lien much inconvenience would result. An intending second lienee would have to wait until the expiry of the first lien before being able to obtain a security.

No doubt there is good purpose in the Ordinance restricting liens to a maximum period of two years' continuance. If no such limit were placed a farmer would be entitled to mortgage his whole future in one transaction, with possibly evil consequences. Clause 3 of each of the documents is clearly inconsistent with the provisions of the Ordinance in this respect, that is to say if the clause is intended to operate in itself as an extension of the lien beyond the specified period. But the clause may be viewed otherwise, namely merely as an agreement to execute a further lien; in other words it is binding contractually only and does not in itself constitute a security. But that does not assist the respondent in the present case; the clause did not amount to a lien as it was not in the statutory form duly registered. The second lien gained priority under section 10 by its registration before the third lien. As to the argument based on section 8 I am unable to view the granting of a second lien as in itself an impairment of a first lien, the effect and priority of which it cannot possibly prejudice.

For these reasons I hold that (1) the first lien expired on the due date, the 24th June, 1964; (2) it did not operate as a security over crops severed after that date; (3) concurrent liens are permissible under the Ordinance and therefore the second lien was validly created notwithstanding the subsistence of the first lien; (4) the second lien was merely postponed thereto; (5) the second lien took priority over the third lien by virtue of prior registration; and (6) the second lien operated as the prior valid security over the crops severed during the period of continuance thereof subsequent to the expiry of the first lien on the 24th June, 1964. Accordingly the appeal is allowed, with costs.

Appeal allowed.