

A

**NANUKU-WAILEVU LAND-PURCHASE CO-OPERATIVE SOCIETY
LIMITED**

v.

B

BURNS PHILP (SOUTH SEA) CO. LTD.

[COURT OF APPEAL, 1968 (Hammett P., Gould J.A., Trainor J.A.,
29th April, 30th May)]

Civil Jurisdiction

C *Incorporated Societies—co-operative society—money owing by member to society for price of shares—agential authority by member to sugar miller for payment of cane proceeds to society—statutory charge in favour of co-operative society—charge limited to crops etc. raised purchased or produced from a loan by the society—Co-operative Societies Ordinance (Cap. 219—1955) s.14(1)—Co-operative Societies Ordinance (Cap. 219—1967) s.15—Co-operative Societies (Amendment) Ordinance 1967.*

Crop lien—second crop lien executed pursuant to covenant in first—crops harvested after expiry of first and before execution of second—proceeds not subject to lien.

D *Interpretation—Ordinance—statutory charge created by s.14(1) (a) of Co-operative Societies Ordinance (Cap. 219—1955)—construction of section—Co-operative Societies Ordinance (Cap. 219—1967) s.15.*

Interpleader—moneys in court—claim based on statutory charge unfounded—refusal by court to adjudicate upon effectiveness of agential authority not made basis of claim.

E

The South Pacific Sugar Mills Ltd. paid into court on interpleader proceedings the sum of £258-15-5. This sum represented the proceeds of sugar cane from the farm of one Mohan Lal harvested from the 27th to the 31st August, 1966, and from the 21st to the 24th September, 1966. The appellant society claimed these moneys under a statutory charge said to arise by virtue of section 14(1) of the Co-operative Societies Ordinance (Cap. 219 — 1955); the charge was claimed in respect of

F

moneys due to the society by Mohan Lal (a member) on account of the purchase price of his shares. He had given the society, on the 18th May, 1965, an agential authority authorising the South Pacific Sugar Mills Ltd. to pay to the society all moneys "payable to him now and in the future" in respect of the farm.

G

The respondent company claimed the moneys in court under two crop liens; the first was dated the 24th June, 1964, and expired on the 24th June, 1966; the second, given in pursuance of a covenant in the first, was executed on the 2nd September, 1966.

H

Held: 1. The words "shall be a charge on all crops" in section 14(1) (a) of the Co-operative Societies Ordinance were qualified by the later words "raised purchased or produced in whole or in part from any loan whether in money or in goods given him by the Society." The society had therefore no statutory charge on the moneys in question.

2. The first crop lien to the respondent company was effective only in respect of the proceeds of cane harvested up to the 24th June, 1966: the

second crop lien did not cover any of the proceeds of the cane harvested between the 27th and the 31st August, 1966, but did cover the proceeds of the crop harvested between the 21st and 24th September, 1966. The respondent company was entitled to the proceeds of the last mentioned crop and the case would be remitted to the Magistrate's Court to inquire into the value thereof. A

3. (*Per* Hammett P. and Gould J.A., Trainor J.A. dissenting.) The appellant society, not having based its claim upon the agential authority or pleaded it in the Statement of Claim the court was not in a position to adjudicate upon its effectiveness or validity and the balance of the money in court would be repaid to the South Pacific Sugar Mills Ltd. (*Per* Trainor J.A.) The respondent company's claim had substance and was opposed by the baseless claim of the appellant society; there should be judgment for the respondent company for the whole amount. B

Appeal from a judgment of the Supreme Court, sitting in appellate jurisdiction, on an interpleader issue. C

R. G. Q. *Kermode* for the appellant.

K. A. *Stuart* for the respondent.

The facts sufficiently appear from the judgments of *Hammett P.* and *Trainor J.A.* D

The following judgments were read :

HAMMETT P.: [30th May, 1968]—

At all material times one Mohan Lal, a sugar-cane farmer, was a tenant of the Colonial Sugar Refining Co. Ltd. on farm No. 852 Nanuku. This farm was situated on a larger parcel of land leased by the Colonial Sugar Refining Co. Ltd. from the estate of Charles Burness (decd.) held under Certificate of Title No. 10319. E

On 24th June, 1964, Mohan Lal executed a Crop Lien in favour of Messrs. Burns Philp (S.S.) Co. Ltd. the original 1st Claimant over the sugar-cane cultivated on farm No. 852 to secure the repayment of £1,000. This Crop Lien was duly registered and presented to the South Pacific Sugar Mills Ltd. for noting. F

The Nanuku-Wailevu Land-Purchase Co-operative Society Ltd. the original 2nd Claimant was formed in 1964 by the tenant farmer occupiers of the Burness Estate. This Society purchased, with money provided by a bank, the whole of the land held under C.T. 10319. Each farmer was allocated and agreed to purchase a number of shares in the Society by instalments over a period of years. The apparent intention was that once all the shares have been purchased and paid for, the Society will be wound up and the members become the owners of their respective individual farms in lieu of their shares in the Society. G

On 30th October, 1964, Mohan Lal became a member of the Society and was allocated 1,856 shares which he agreed to purchase for £1,856 to be paid in instalments over a period of years. H

On 18th May, 1965, Mohan Lal executed a form of Agential Authority authorising and requesting the South Pacific Sugar Mills Ltd. to pay to

A the bank account of the Society all "monies payable to him now and in the future" in respect of farm No. 852. No moneys have yet been paid or received by virtue of this authority.

B On 2nd September, 1966, Mohan Lal executed a further Crop Lien in favour of Messrs. Burns Philp (S.S.) Co. Ltd. over the sugar-cane cultivated on farm No. 852 to secure the sum of £475. This Crop Lien was given in pursuance of the covenant in that behalf contained in the earlier Crop Lien given in 1964 which had expired. This Crop was duly registered and presented to the South Pacific Sugar Mills Ltd. for noting.

The nett proceeds of the sugar-cane harvested from farm No. 852, in the period 27th to 31st August, 1966, and 21st to 24th September, 1966, amounted to £258.15.5d. To this money in the hands of the South Pacific Sugar Mills Ltd. the two parties to this appeal laid claim.

C Messrs. Burns Philp (S.S.) Co. Ltd. claimed the money was due to them under the Crop Lien dated 2nd September, 1966. The Co-operative Society claimed the money was due to it, by virtue of the provisions of section 15 of the Co-operative Societies Ordinance.

D The South Pacific Sugar Mills Ltd. issued Interpleader process in the Magistrate's Court at Ba and paid into Court the disputed sum of £258.15.5d. less the costs awarded them.

E After hearing both sides and considering the statement of agreed facts that had been filed, the learned trial Magistrate gave judgment on 26th July, 1967. He held that the Co-operative Society held a statutory charge over the proceeds of sale of the sugar-cane harvested on the farm in question which took priority over the Crop Lien of Messrs. Burns Philp (S.S.) Co. Ltd. He did, therefore, order that the money in Court be paid out to the Co-operative Society.

Against this decision Messrs. Burns Philp (S.S.) Co. Ltd. appealed to the Supreme Court.

On 30th November, 1967, the Supreme Court gave judgment reversing the decision of the Magistrate's Court dated 26th July, 1967.

F Against this decision the Co-operative Society has now appealed to the Court of Appeal on the following grounds :

G "1. That the learned Judge in interpreting Section 14(1) of the Co-operative Societies Ordinance was wrong in law in holding that the words in the said Section appearing immediately after the word "production" therein qualified in preceding words in the said subsection and in not holding that the said words qualified only the words "and generally all produce of labour and things used in connection with production."

H 2. That the learned Judge erred in not holding that the said Section 14(1) gave the Appellant/Respondent a first charge and that the Appellant/Respondent was entitled to the moneys paid into Court.

3. That if the learned Judge was correct in his interpretation of the said Section 14(1) he erred in not holding that the Appellant/Respondent was entitled to the moneys paid into Court.

4. That the learned Judge erred in law in holding that the Respondent/Appellant's two Crop Liens extended to cover proceeds of cane harvested after expiry of one of the liens and before the creation of the other lien." A

I would point out that Section 14(1) of the Co-operative Societies Ordinance (Cap. 219 in the 1955 Edition of the Laws of Fiji) is now Section 15 of the Co-operative Societies Ordinance (Cap. 219 in the 1967 Edition) as since amended by the Co-operative Societies (Amendment) Ordinance 1967 (No. 34 of 1967). B

In the course of his argument in support of the appeal, counsel for the Co-operative Society conceded that only two points in effect arose on the appeal:

Firstly: What is the proper construction of Section 15 of the Co-operative Societies Ordinance, and

Secondly: If the interpretation sought to be placed on Section 15 by the Appellant Society is not accepted, how should the moneys in Court be properly apportioned between the two claimants. C

The provisions of Section 15 of the Co-operative Societies Ordinance (Cap. 219 of the 1967 Edition of the Laws as amended by Ordinance No. 34 of 1967) read as follows: D

"15. Subject to any prior claim of the Crown on the property of the debtor and to the lien or claim of a landlord in respect of rent or any money recoverable as rent and in the case of immovable property to any prior registered charge thereon —

(a) any debt or outstanding demand payable to a registered society by any member or past member shall be a first charge on all crops or other agricultural produce, felled timber or other forest produce, marine produce, fish, livestock, fodder, agricultural, industrial, and fishing implements, plant, machinery, boats, tackle and nets, raw materials, stock in trade and generally all produce of labour and things used in connection with production raised purchased or produced in whole or in part from any loan whether in money or in goods given him by the society: E F

Provided that nothing herein contained shall affect the claim of any bona fide purchaser or transferee without notice:

(b) any outstanding demands or dues payable to a registered housing society by any member or past member in respect of rent, shares, loans or purchase money or any other rights or amounts payable to such society shall be a first charge upon his interest in the immovable property of the society." G

In the Court below it was held that the words "raised purchased or produced in whole or in part from any loan whether in money or in goods given him by the society" qualified all the preceding words from "all crops or other agricultural produce" down to the words "things used in connexion with production." H

For the Appellant Society it is submitted that this is not correct. It is contended that the words "raised purchased or produced" down to

A the words "society" only qualify the words which immediately precede it, namely "and generally all produce of labour and things used in connexion with production."

If the construction sought to be put upon the section by the Appellant Society is correct subsection (a) could be rewritten as follows:

B "any debt or outstanding demand payable to a registered society of any member or past member shall be a first charge on generally all produce of labour and things used in connexion with production raised purchased or produced in whole or in part from any loan whether in money or in goods given him by the society and on all crops or other agricultural produce, felled timber or other forest produce, marine produce, fish, livestock, fodder, agricultural, industrial and fishing implements, plant, machinery, boats, tackle and nets, raw materials and stock in trade."

C By such a construction a co-operative society would be given statutory priority to any other charge, whether by way of crop lien, bill of sale or otherwise over —

D "all crops or other agricultural produce, felled timber or other forest produce, marine produce, fish, livestock, fodder, agricultural, industrial and fishing implements, plant, machinery, boats, tackle, nets, raw materials and stock in trade."

This would be so even though the assets in question had not been purchased or produced in whole or in part from any loan in money or goods given by the society.

E The society would, on this basis, be given statutory priority to the secured creditors of its members without notice to them and even though the security had been given before the member became either indebted to or even a member of the co-operative society.

F Such a construction would be extremely wide in its scope. It would result in the defeat of the rights and interests of *bona fide* third parties who had given value and who had not been and could not, in some cases, be given notice of the rights of the society. It would work such manifest injustice in so many cases that any court would be hesitant so to construe it unless —

(1) the intention of the legislature that it should be so construed was made manifestly clear, and certain, and

G (2) the statute was not reasonably and properly open to any other construction of a less onerous or apparently unjust and arbitrary nature.

H There appears to me to be no need to construe the statute in the manner submitted by the Appellant Society. If it had been the intention of the legislature to enact legislation, so discriminatory and so much in favour of a co-operative society containing provisions which were so over-riding and so regardless of the rights and interests of all other persons and bodies in the community, I am confident that the legislature could and would have made its intention abundantly plain. I do not

believe it would have left it to be one of two constructions to which it is contended that this section is open.

In my view the construction placed on this section by the learned trial Judge was the logical and correct construction. In this respect the appeal against his decision must, therefore, fail. A

The next point raised in the appeal concerns the actual amount covered by the Respondent Company's Crop Lien. I am of the view that there is substance in the complaint of the Appellant Society that the money in the hands of the South Pacific Sugar Mills Ltd. should have been, apportioned by the Court below. It is clear that the first Crop Lien expired on 24th June, 1966. It was only, therefore, effective in respect of the proceeds of sale of sugar-cane harvested on the land up to 24th June, 1966. Since none of the cane, in respect of which this £258.15.5d. came into the hands of the South Pacific Sugar Mills, was harvested until after 24th June, 1966, none of it fell within the terms of that Crop Lien. B

The second Crop Lien was not registered until 16th September, 1966, and it did not, therefore, cover any of the sugar-cane proceeds of the crop which had already been harvested between 27th and 31st August, 1966. It did, however, cover the cane harvested between 21st and 24th September, 1966. There is no evidence of how much of this £258.15.5d. is in respect of the cane harvested between 21st and 24th September. C

I would, therefore, set aside the judgment of the Supreme Court except in so far as it relates to costs and in lieu thereof order the case be remitted to the original court of trial, namely the Magistrate's Court of the 1st Class sitting at Ba, with the direction that there be further enquiry into the value of the sugar cane which was harvested between 21st and 24th September, 1966. I would further order that judgment should then be entered by that court in favour of the Respondent Company in respect of the nett proceeds of sale of that sugar cane. That sum should then be paid out to the Respondent Company from the money in Court. D

The next point for consideration is what order should be made in respect of the balance of the money in Court. E

In the Statement of Agreed Facts which was filed in the Magistrate's Court reference was made to an Agential Authority, given by Mohan Lal to the South Pacific Sugar Mills Ltd. authorising the payment to the Appellant Society of all moneys payable to him by that Company. F

It is open to argument whether the Court should give effect to that Agential Authority by directing that the balance of moneys in Court be paid to the Appellant Society. G

Whilst I appreciate the convenience of such a method of disposing of the matter, it is undoubtedly true that the original claim of the Appellant Society was not based on this Agential Authority. It was not in fact pleaded in the Society's statement of Claim. It was only later referred to in support of the Society's unsuccessful claim to a statutory lien. H

In these circumstances this Court is not in a position to adjudicate upon the effectiveness or validity of this Agential Authority. I consider it appropriate to order that the balance in Court be paid out to the South Pacific Sugar Mills Ltd. It will be for that Company to decide upon its own course of action in relation to this authority. I

A On the question of costs I observe that when the Appellant Society was granted an extension of time within which to appeal, it undertook not to seek to disturb any order for costs already made. I would not, therefore, disturb the order for costs made by the Supreme Court.

The Appellant Society has not succeeded on the appeal. I would, therefore, order that the Appellant Society pay the Respondent Company's taxed costs of the appeal.

B GOULD J.A.

I have had the advantage of reading the judgment of the learned President and agree with his reasoning and conclusions and with the orders proposed.

TRAINOR J.A.:

C The details of this case have been outlined in the judgment of the learned President which I have had the opportunity of reading and I do not propose to repeat them. I respectfully agree with his views on the interpretation of Section 14(1) of the Co-operative Societies Ordinance, Cap. 219 (now Section 15 of Cap. 219 of the 1967 Revised Laws of Fiji) and his conclusion that the claim of the Appellant must be dismissed. I do, however, with the greatest respect, differ on one detail which I consider to be of such importance that it forces me to a final conclusion different to that reached by the learned President.

D In the Interpleader proceedings the Appellant Society sets out the basis of its claim in its Notice of Claim. In this, after reciting certain facts, it says —

E “9. That the Claimant, Nanuku-Wailevu Land-Purchase Co-operative Society Limited claims that by virtue of Section 14(1) (a) of the Co-operative Societies Ordinance Cap. 219 it is entitled to a first charge on all crops produced by the said Mohan Lal on the said farm 852 Nanuku and accordingly claims the said sum of £258.15.5 the subject matter of these proceedings.”

F In the Magistrate's Court Mr. Sweetman, learned Counsel for the Appellant, confined himself solely to two points :-

1. There existed an over-riding statutory charge in favour of the Appellant; and
2. Notice of the existence of that charge had been given to the South Pacific Sugar Mills Ltd. by an “Agential Authority.”

G Both learned Counsel who appeared for the Respondent attacked the first point and argued that no over-riding or any charge existed in favour of the Appellant. Mr. Stuart, in addition, maintained that the first Crop Lien, in conjunction with the second, established the Respondent's claim.

H The claim of the Respondent was never at any time challenged. Mr. Sweetman for the Appellant confined his reply to a re-assertion that a statutory charge subsisted over-riding the Respondent's Crop Liens, and that the Sugar Mills had notice of it then.

It might here be pertinent to quote two clauses of the Crop Lien so far as they are relevant to this judgment :—

“6. Nothing herein contained or implied is to extinguish the rights of the Lienee against the Lienor as a simple contract creditor and these presents are to be a running and continuing security until a final written discharge thereof shall have been given by the Lienee to the Lienor;” and

“10. If all the said indebtedness is not paid in terms of paragraph three hereof the Lienor at the Lienor’s expense shall if required by the Lienee give to the Lienee such further Lien, mortgage or other security for the purpose of securing the payment of the said indebtedness.”

The learned Magistrate held there was an overriding charge but an appeal against this decision was upheld in the Supreme Court and the learned Judge ordered the funds in Court to be paid out to the Respondent.

The learned President in his judgment on the appeal to this Court has found that there was no statutory charge and with this I respectfully agree. He then proceeded to consider the destination of the money in Court. In doing so he obviously had in mind that it was conceded by the Appellant that in the event of the Court holding against the statutory charge, the proceeds of the 1966 crop cut after the second Crop Lien came into operation should go to the Respondent. He said it was open to argument whether the Court should give effect to the Agential Authority by directing that the balance of moneys in Court be paid to the Appellant. I respectfully disagree. Here is a document put in as evidence for the sole purpose of showing that the Sugar Mills had notice of a statutory charge. It is an authority to pay money on foot of a charge that never existed. As the sole purpose for the existence of the document before this Court has disappeared I consider that, in this case, it has no evidential value whatever. Might I add that it was only on appeal that a claim was formulated on it. I would not take it into consideration in this case for any purpose other than that for which it was produced by the Appellant and dealt with by learned Counsel for the Respondent. I consider the document devoid of any value whatever. I am fortified in this conclusion by the words of the document itself.

This Agential Authority is an authority by Mohan Lal to the Sugar Mills to pay all moneys payable to me “now or in the future, in respect of Farm No. 852 Nanuku Sector.” What were the moneys payable “now” in respect of Farm No. 852. There may have been moneys due to him from the Sugar Mills in respect of the farm but it certainly could not be the proceeds of sugar growing at the date of this document (or for the next two years) as it was caught by the first Crop Lien. It could not have been due in respect of any other cane proceeds as Mohan Lal had agreed that the Crop Lien was to be a running and continuing security until a final written discharge of his indebtedness was given to him by the Respondent. Moreover he further covenanted to give, if required, such further Crop Lien, Mortgage or other security to secure this indebtedness. To have given an Agential Authority to pay any of the proceeds of the 1966 sugar cane crop, cut or uncut, would have been in frustration of his covenant to give another Crop Lien if required. On the presumption

A that no man intends to act in breach of his covenant I cannot accept that Mohan Lal intended to deprive the Respondent of the proceeds of any of the 1966 crop of sugar cane.

B On the other hand at the time of the Interpleader proceedings there was money in the hands of the South Pacific Sugar Mills Ltd. representing the 1966 crop. The Respondent claimed it on the basis of two Crop Liens which it pleaded and argued. The Sugar Mills were aware of their claim. They were opposed by a baseless claim whereas the basis of the Respondent's claim has substance and was unchallenged until the case came before this Court. I am unaware of any other claimant to the funds in Court; Mohan Lal is certainly not claiming it. I would treat this case as I would any undefended claim. I would give judgment for the Respondent.

C Even if I had a doubt as to where this money should go I would still award it to the Respondent as I consider that to do otherwise could involve Mohan Lal in unnecessary and, I am sure, unwanted legal proceedings and consequent costs.

I would dismiss this appeal with costs.

Order of Supreme Court varied.