A

ISHWARI PRASAD CHAUDHARY

v.

B

TAVUA CLUB (TRUSTEES)

[SUPREME COURT, 1969 (Moti Tikaram Ag. P.J.), 1st February, 16th, 18th October 1968, 2nd April 1969]

Civil Jurisdiction

C *Bill of Sale—defeasance—nature of defeasance—bill of sale repayable by instalments—collateral promissory note payable on demand—collateral assignment of debts to be credited on receipt—neither collateral security mentioned in bill of sale—whether defeasances—Bills of Sale Ordinance (Cap. 202) s.11.*

By a deed the plaintiff acknowledged his indebtedness to the defendants in the sum of £623-14-0 and, pursuant to its terms, the plaintiff contemporaneously executed, to secure the same indebtedness (a) a Bill of Sale repayable in four instalments of £155-18-6 each at half-yearly inter-
D vals (b) an assignment of moneys to be collected by his solicitor and to be credited on receipt (c) a transfer of a promissory note for £122 and interest payable on demand. The Bill of Sale contained no reference to the deed abovementioned, nor to the assignment or promissory note.

After the first three instalments under the Bill of Sale had been paid the defendants caused the chattels covered thereby to be seized on the
E plaintiff's default in payment of the last instalment. In an action by the plaintiff for (*inter alia*) a declaration that the Bill of Sale was illegal and void as failing to comply with section 11 of the Bills of Sale Ordinance —

Held: 1. The mere failure to refer in a Bill of Sale to a contemporaneous collateral security to secure the same moneys or part thereof,
F does not of itself offend against the provisions of the Bills of Sale Ordinance.

2. Such a collateral security operates as a defeasance only if it be shown that it contains provisions or stipulations which alter the arrangement between the parties to the Bill of Sale in a way which avoids either the right of the grantor to redeem the goods or of the grantee to seize them.

G 3. (a) The nature of the promissory note and the stipulation as to payment on demand constituted it a defeasance.

(b) The assignment, which was expressed to be a running and continuing security until a final discharge was given, also constituted a defeasance.

(c) The Bill of Sale was consequently illegal and void as offending
H against section 11 of the Bills of Sale Ordinance.

Cases referred to:

Stott v. Shaw & Lee Ltd. [1928] 2 K.B. 26; 139 L.T. 302: *Southam, Re, Ex parte Southam* (1874) L.R. 17 Eq. 578; 30 L.T. 132: *Counsell v.*

London & Westminster Loan & Discount Co. Ltd. (1887) 19 Q.B.D. 512; 56 L.J.Q.B. 622.

Action in the Supreme Court for a declaration that a Bill of Sale was void.

M. S. Sahu Khan for the plaintiff.

S. M. Koya for the defendants.

The facts sufficiently appear from the judgment.

MOTI TIKARAM Ag. P.J.: [2nd April 1969]—

By a Deed (Exhibit D.1) dated the 2nd day of March, 1964 the plaintiff acknowledged his indebtedness to the defendants (Trustees of the Tavua Club) in the sum of £623.14.0. Pursuant to the terms of the Deed and in consideration, *inter alia*, of time given by the defendants the plaintiff executed contemporaneously with said Deed and in respect of the same indebtedness the following documents:—

(a) a Bill of Sale (Exhibit D.3) over all the debtor's goods and chattels and also upon the debtor's stock and chattels in his shop at Tavua;

(b) an Assignment (Exhibit D.2) of all his moneys held or thereafter to be collected and received by Mr. M. T. Khan, solicitor, Ba from the various debtors of the plaintiff;

(c) a transfer of all his rights and interest in a Promissory Note (Exhibit D.4) but such transfer was, as stipulated in the Deed, subject to the understanding that it was . . . . . "not to entail immediate credit . . . . . and the amount to be credited progressively upon receipt of the payment by the creditors under the said promissory note".

The transfer endorsed on the Promissory Note (Exhibit D.4) made reference to the Deed and likewise the Deed was also referred to in the Assignment (Exhibit D.2) but the Bill of Sale executed by the plaintiff made no reference whatsoever to the Deed pursuant to which it was made, nor was there any mention in this Bill of Sale of the Promissory Note or the Assignment. The sum for which the Bill of Sale was made was £623.14.6 and by clause 4 of this instrument the plaintiff covenanted to repay his indebtedness as follows:—

(i) £155.18.6 on the 30th day of April, 1964;

(ii) £155.18.6 on the 30th day of September, 1964;

(iii) £155.18.6 on the 30th day of April, 1965;

(iv) £155.18.6 on the 30th day of September, 1965.

Clause 4 also provided that in the event of default, the whole amount or the balance due became payable on demand. The plaintiff paid three instalments amounting to £467.15.6 leaving a balance of £155.18.6. He says that he refrained from paying the last instalment because he believed that the defendants must have recovered the amount owing under the Promissory Note and that they would account for the overpayment in due course. It is agreed in this case that no payment was received by the defendants under the Promissory Note although a written demand was made on the giver of the Promissory Note, who is now a bankrupt.

On the 25th of May, 1966 defendants caused the chattels of the plaintiff to be seized in purported exercise of their powers under the Bill of Sale on account of the plaintiff's default in paying this last instalment of £155.18.6. However, upon the payment of a sum of £170 as security 8 of his Amended Statement of Claim. The plaintiff's claims against the May, 1965, and suspended the seizure.

The figures on which the plaintiff bases his claim that he has overpaid the defendants to the extent of £39.5.6 are set out in paragraphs 7 and 8 of his Amended Statement of Claim. The plaintiff's claims against the defendants are as follows:—

" (a) A declaration that is in respect of the amount due and owing under the said Bill of Sale the defendants having been fully paid and satisfied prior to the 25th day of May, 1966 and that the defendants are estopped from claiming any further sum from the plaintiff.

(b) A declaration that the said Bill of Sale is illegal and void in that it does not comply with the Bills of Sale Ordinance Cap. 202.

(c) That the purported seizure was illegal and void.

(d) That the sum of £74.13.0 comprised as follows:—

(a) *SPECIAL DAMAGES*			
(i)	Loss of earnings for 6 days		£30. 0. 0
(ii)	Return of over payment	£662. 19. 6	
	LESS	623. 14. 0	39. 5. 6
(iii)	Travelling expenses and costs of raising loan		5. 7. 6
			£74. 13. 0
(b) *GENERAL DAMAGES*			£500. 0. 0
(c) Such other and further relief as in Justice may seem meet.			"

The question of satisfaction of debt prior to the 25th day of May, 1966 and the claim for the alleged over-payment of £39. 5. 6 can only arise if it is held that the plaintiff was entitled to be given credit for the amount owing under the Promissory Note, which amount was stated in the Deed to be £182 (presumably inclusive of interest) as at 6th day of March, 1964, whereafter interest accrued at the rate of ten per centum per annum on balance principal as long as the Promissory Note remained valid and enforceable. In view of the plaintiff's specific undertaking in the Deed, namely that no credit was to be given until any payment was received under the Promissory Note and as no payment in fact was received, no question of complete satisfaction of debt prior to the 25th of May, 1965 or of any over-payment arises. The plaintiff's claim is not based on the ground that the defendants were under a duty to recover the amount owing under the Promissory Note and to give him credit for same and that the defendants negligently failed to carry out this obligation. I therefore hold that as at 25th May, 1965 the plaintiff was indebted to the defendants in the sum of £155. 18. 6 and that he defaulted in paying that sum in terms of the Bill of Sale. I am satisfied that this sum still remains unpaid.

The next question is whether the said Bill of Sale is void on the ground that its registration is void for non-compliance with Section 11 of the Bills of Sale Ordinance. If the answer is in the affirmative, then the seizure must be held to be unlawful.

Section 11 of the Bills of Sale Ordinance, Cap. 202 reads as follows :—

> "If a bill of sale is made or given subject to any defeasance, or condition, or declaration of trust, not contained in the body thereof, such defeasance, condition or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before registration; otherwise the registration shall be void:
>
> Provided that in the case of a document securing the payment of the moneys or any part thereof payable by virtue of a bill of sale it shall not be necessary for the purposes of this section to write such document on the same paper or parchment so long as the date, names of the parties thereto and the nature of the security are set forth in the bill of sale or in some schedule thereto."

The object of this requirement is to restrict, within certain limits, the nature of bargain which can be made by bill of sale and a defeasance is an instrument or agreement which defeats the operation of a bill of sale (*Halsbury's Laws of England* (3rd ed.) Volume 3, page 296).

It is the contention of the learned counsel for the plaintiff that the Promissory Note (or strictly the transfer of it) as well as the Assignment jointly and severally constitute a defeasance and therefore the failure to refer to them in the Bill of Sale in terms required by Section 11 of the Bills of Sale Ordinance avoids the instrument completely. On the other hand, the learned counsel for the defendants has argued that to make the Promissory Note and/or the Assignment come within the definition of a defeasance of condition, it must first be shown that the "bill of sale is made or given subject to . . . . . " to both or either of these documents. He contends that the Promissory Note and the Assignment were made pursuant to the Deed and that the Bill of Sale is not made or given subject to the Promissory Note or the Assignment. In my view the mere failure to refer in the Bill of Sale to a contemporaneous collateral security given as part of the same transaction to secure the moneys or part of the moneys as are payable by virtue of the Bill of Sale does not itself offend against the provisions of Section 11 of the Bills of Sale Ordinance. To hold that the collateral security operates as a defeasance or condition it must also be shown that it contains provisions or stipulations which alter the arrangement between the parties to the Bill of Sale in a way that avoids either the right of the grantor to redeem the goods or of the grantee to seize them. See *Stott and Anor. v. Shaw & Lee Ltd.*, [1928] 2 K.B. 26. The principle underlying the provisions contained in Section 11 of the Bills of Sale Ordinance is that if for the same debt there are varying provisions or a number of provisions, then they must be contained on the same paper or parchment as the bill of sale or alternatively the other document containing the varying provisions must be referred to in the bill of sale in the manner required by the proviso to Section 11 so that the whole world may know what are the conditions on which the security is given. (See *Ex parte Southam, re Southam* 30 L.T. 132).

In the case before me I find that the plaintiff had one contract with the defendants but that contract was comprised in four documents namely the Deed, the Bill of Sale (registered as Book 64 Folio 607), the Assignment and the conditional transfer of the Promissory Note. The position is therefore somewhat analogous to that as appears in *Counsell v. London and Westminster Loan and Discount Company, Limited,* (1887) 19 Q.B.D. 512 wherein it was said that if there was one contract in two documents and there is anything in either which sins against the Bills of Sale Act the contract in the two documents cannot stand and the bill of sale would be set aside. Lord Esher in the case referred to in fact held that the contract in question did sin against the Bills of Sale Act because when the one contract in two documents is read there is a condition in the contract which does not appear in the bill of sale. He was referring to a stipulation in a promissory note which did not appear in the bill of sale, the stipulation being that in case of default of any payment of any instalment the whole sum shall become due and payable. The Court of Appeal in affirming the decision of the Queen's Bench Division held that by reason of this stipulation the promissory note was a defeasance of the Bills of Sale Act because if at any time the whole sum payable on the Note were paid, the rights of the grantors under the bill of sale would cease and therefore the bill of sale was void.

The first question which therefore arises in this case is the effect of the non-registered securities namely the Assignment and the Promissory Note on the registered namely the Bill of Sale. In order therefore to decide whether the Promissory Note and/or the Assignment constituted a defeasance it is essential to examine their contents. Let us therefore first examine the contents of the Promissory Note. This Note was originally given by one Ram Rattan to the plaintiff on the 6th day of October, 1956 for the sum of £122 and was made payable on demand with interest accruing at the rate of ten per centum per annum. Endorsement of transfer on the Promissory Note by the plaintiff on the 2nd March, 1964 contained the declaration that the whole of the principal and interest was still owing. Indeed the total sum owing as as the date of the conditional transfer was shown in the Deed to be £182. Although on the face of the endorsement what the plaintiff purported to do was to transfer the whole of his interest and rights in the Promissory Note to the defendants, in fact by reason of the stipulation contained in the Deed this transfer constituted nothing more than a collateral security. An outright transfer would have entitled the plaintiff to receive forthwith credit for the appropriate sum and the defendants could not as between themselves and the plaintiff look to the Promissory Note as a form of security. They would have had to treat it as a form of payment. The Bill of Sale in question was not made payable on demand and it did not provide for any interest. Although the Promissory Note purported to secure only a portion of the total debt, nevertheless had the giver of the Promissory Note chosen to pay to the assignees his debt under the Note with interest at any time after the first three instalments under the Bill of Sale were paid but before the fourth was due, the whole of the plaintiff's indebtedness would have been extinguished and he would have indeed overpaid his debt. Wherefore the Bill of Sale would in fact have become void by reason of satisfaction of debt. Under the Promissory Note the defendants were entitled to demand payment at any time in contradistinction to the provision in the Bill of Sale. In

my view the very nature of the Promissory Note and the stipulation as to payment on demand contained therein constituted a defeasance of the Bill of Sale and there was therefore non-compliance with section 11 of the Bills of Sale Ordinance rendering the Bill of Sale void. Although no payment under the Promissory Note was received, it is significant to note that a demand for immediate payment was made on the maker of the Promissory Note on the 2nd March 1964 when no payment under the Bill of Sale was due (See Notice of transfer and demand, Exhibit D.1).

I am also of the opinion that the Assignment also constitutes a defeasance which nullifies the Bill of Sale. I refer in particular to the following portion of the Assignment :—

> "AND this assignment shall be a running and continuing security notwithstanding any resettlement of account or other matter or thing whatsoever until a final discharge hereof shall have been given by the assignee.
>
> It is hereby agreed and declared that the moneys hereby secured are the same moneys as are secured by a Bill of Sale given by the assignor to the creditors, but nothing herein contained shall take away, prejudice or affect the rights remedies claims and demands at law or in equity of the creditors under the said Bill of Sale."

On the basis of my foregoing conclusions the plaintiff though not entitled to a declaration that he had satisfied his indebtedness to the defendants prior to 25th of May, 1966 or that he over-paid to the extent of £74. 13. 0, is nevertheless entitled to a declaration, which I hereby make, that the Bill of Sale (Book 64, Folio 687) is illegal and void in that it offends against the provisions of section 11 of the Bills of Sale Ordinance. This being so the seizure was wrongful and illegal as it was based on a void Bill of Sale. The plaintiff is therefore entitled to recover general and special damages on the evidence before this court. I am satisfied that he has suffered, as a result of the illegal seizure, some loss of income and has also incurred some expenses though not to the extent claimed. I award the plaintiff £120 (i.e. $240) by way of general damages and £20.17.6 (i.e. $41.75c) by way of special damages.

The defendants are entitled to succeed on their counterclaim by virtue of the subsisting deed. In the result therefore I enter judgment for the plaintiff, for the sum of £140.17.6 (i.e. $281.75c) and judgment for the defendants for the sum of £155. 18. 6 (i.e. $311. 85c) on their counterclaim. In order to avoid multiplicity of future proceedings I order that from the sum of £170 deposited by the Plaintiff in the trust account of Messrs. Govind & Company, Solicitors, Ba, the sum of £15. 1. 0 (i.e. $30. 10c) be paid to the defendants and the balance be refunded to the plaintiff. This will then satisfy the indebtedness of each party on the basis of judgment in this court. As regards costs I am of the opinion that this is proper case in which each party should bear its own costs.

I therefore make no order as to costs.

Judgment for the plaintiff on claim.

Judgment for the defendants on counterclaim.