'Alatini v. LDS Church & Muti. Bank of Tonga Intervening

Supreme Court, Nuku'alofa
Webster J.
Civil case No. 11 / 1987
16, 23 June 1989 and 22 January 1990

Contract – equitable mortgage – incorrect description of subject matter
Contract – equitable mortgage – subject to enforcement of court order
Contract – pledge – essential requirements
Judgment – enforcement by distress – priority over equitable mortgage
Property – joint ownership – proof

In June 1988 the plaintiff obtained judgment in the Supreme Court against the second defendant ("Muti") for $24,600 plus interest, and enforced the judgment by distraining upon the property of Muti, including a Toyota Hiace van L 1725. Muti applied to the court for the release of this van from distress on the grounds (i) that it was not his sole property but was jointly owned with his wife, and (ii) that it was the subject of a contract made with the Bank of Tonga in April 1989 whereby the van was pledged as security for a loan.

HELD:

(1) The presumption of ownership created by registration of the van in the name of Muti only was displaced by evidence that it was jointly owned by him and his wife;

(2) Property jointly owned can be seized under distress to enforce a court order, although the joint owner is entitled to half the proceeds of sale and may purchase it at the sale;

(3) The contract of security with the Bank referred to Toyota Hiace L 1003, whereas the van owned by Muti and his wife was Toyota Hiace L 1725; so that the contract was of no effect to create any rights as against third parties such as the plaintiff;

(4) The contract of security was not a pledge since there was no actual or constructive delivery of the thing pledged;

(5) The contract of security was an equitable mortgage, which only conferred rights against the mortgagee (Muti) and not against other parties such as the plaintiff;

(6) The application for release of the van was accordingly dismissed.

N.B. Leave to appeal was granted by the Court of Appeal on 12 September 1990. On 7th June 1991 the Court of Appeal dismissed the appeal (reported in (1991) Tonga L.R.).

Councel for the plaintiff	:	Mr L. M. Niu and Mr S. Etika
Counsel for second defendant	:	Mr N. P. Tonga
Counsel for the Bank	:	Mr F. Hogan
For the Police bailiff	:	Ch Insp T. Faletau

Judgment

This was an application by the Second Defendant Paula Muti for the release of goods seized under distress at the instance of the Plaintiff Mrs Diana 'Alatini as Administrator of the estate of her late husband Vakapuna for the amount of $24,600 plus interest awarded to him by Judgment of this Court on 29th June, 1988 and still unpaid. Mr Muti made the application on the grounds the property seized was not his, or alternatively was jointly owned by him and his wife Mrs Sisi Kafa Muti, and was also subject to a security in favour of the Bank of Tonga especially a Toyota van L77, a Toyota Hiace van 1725 and household goods etc at their home at Ha'ateiho.

The Court heard evidence from Mr Muti, Mrs Muti, Mrs Kalesita Kamesese the purchaser of the van L77 and Mr 'Isileli Langa'oi, Assistant Manager lending in charge of the Loan Division of the Bank of Tonga. The Court also heard submissions on behalf of the Second Defendant, the Plaintiff, the Bank of Tonga in respect of its interest, and the Police as the authority responsible for executing the distress. The application raised a number of issues of fact and of law.

Regarding the Toyota van L77, from the evidence of Mr and Mrs Muti and of Mrs Kamesese there was no doubt that it had been bought in good faith by her in 1986 and this was backed up by evidence of her loan from the Bank at that time. It was unfortunate that she had not taken the trouble to check that Mr and Mrs Muti had fulfilled their promise to have the registration transferred into her name: had she done so she might have been spared the distressing experience of having her ownership questioned in Court. The Traffic Act (Cap. 99) Part II is written on the basis that a vehicle is registered by the owner and that a change in ownership requires a change in registration. While Inspector Faletau on behalf of the Police submitted that, in terms of section 11, registration should be conclusive for all matters, in the absence of definite words in the Act the contents of the Register of Motor Vehicles only carry a strong presumption that they tell the true state of affairs. In the absence of evidence to the contrary the contents will be upheld, but can be displaced by such contrary evidence, as in this case. This was accepted by the Police and by Counsel for the Plaintiff. Because this van is no longer the property of Mr Muti I therefore release the van L77 from the seizure under distress and the Register should be brought up to date as soon as possible.

Coming next to the Toyota Hiace van L1025, Mr Muti claimed that, although registered in his name since it had been bought in 1985, the van had all along been the property of his wife, even although he had signed a Bank of Tonga Loan Agreement pledging what he said was the van (there described as "Toyota Hiace

L1003") in security for a loan of $22,195 as recently as 19th April, 1989 - and apparently without advising the Bank of the unpaid judgment debt of $24,600 + in this case. Since the seizure of the van under this distress Mr Muti had also attempted to transfer the van into his wife's name and claimed that the documents for this had been lodged with the Registrar around the second half of 1988 in connection with an insurance claim. However no independent evidence about this was produced and it appeared all somewhat fanciful and I did not accept the evidence of Mr and Mrs Muti on this, which naturally casts doubt on other parts of their evidence. However I did accept the evidence that the van was used jointly by Mr and Mrs Muti and that the down-payment and some contributions to the original loan repayments had been made by Mrs Muti, particularly during the 4 months when Mr Muti was detained in Hawaii for giving false information for immigration purposes. Mrs Muti was able to do this because she has a good independent income from her work as a teacher at Liahona. But it was equally clear that Mr Muti himself had also made payments towards the price of the van and the evidence of him and his wife confirmed this. Martin CJ considered the law of Tonga on joint property in a marriage recently in *Estate of Vakapuna 'Alatini (Application 111 89)* and made it clear -

> *"[it]* depends on the facts of each case, and may be established by proving a common intention that property was to be held jointly, or that the circumstances were such that it would be inequitable to permit the legal owner to retain the entire benefit of property for himself."

Here I think that both criteria apply as there was such a common intention and it would also be inequitable for Mr Muti to retain the entire benefit for himself therefore find that the van L1025 was jointly owned by Mr and Mrs Muti, which is in accordance with the submissions of Mr Tonga on behalf of the Second Defendant, and Mr Niu on behalf of the Plaintiff. Again I find that this evidence displaces the presumption arising from the entry in Mr Muti's name alone in the Register.

As to the effect of this when the property is seized in distress, no authority was cited to me and I have been unable to find any. I therefore see no reason why this could stop a sale of the complete article under distress, otherwise, as Mr Niu pointed out, a debtor could defeat a court judgment simply by holding all his property jointly with his wife. Clearly on a sale half of the sale proceeds must be given by the seller to the joint owner, in this case Mrs Muti, or any other person having right to it, and indeed if the joint owner wishes to retain the particular article it is open to her or him to buy it at the sale.

The position on the household furniture, fittings, appliances and electrical goods at Ha'ateiho seized under distress is the same. I find them to be the joint property of Mr and Mrs Muti and so they can be sold under reservation of Mrs Muti or other person entitled being paid her half-share.

Next the Court has to look at the effect on these findings of the Loan Agreement with the Bank of Tonga by Mr Muti alone dated 19th April, 1989. Before doing so I must record that I have a similar agreement myself with the Bank: I advised Counsel of this at the hearing and Mr Hogan for the Bank and other Counsel said that they were happy for me to continue with the hearing. I observe that despite Mr Muti's evidence to this Court the purport of the Agreement is that the dwelling

house and contents and van are owned solely by Mr Muti, which appears not to be the case. But more importantly the Agreement purports to pledge in security "Toyota Hiace L 1003". While there was evidence that the Muti's Hiace van L 1725 originally was wrongly registered as a heavy commercial vehicle H 1003, that was changed 3 years ago in 1986 and it has never been registered or known as L 1003. If the Bank intended to take a valid security over L 1725 they should have said so accurately in the Loan Agreement: the Bank has plenty of resources to enable it to make checks of this kind and they cannot expect the Court or third parties to be mind readers going behind the actual words of the Agreement. Lest it be thought that this approach is legalistic and over-technical, I point out that, assuming that as required under the Contract (Cap. 113) the Loan Agreement is registered at the Magistrates' Court, a third party examining it to see the status of Mr Muti would assume that L 1725 was not pledged to the Bank in security and would be entitled to assume that was a valid conclusion. So certainly against third parties such as the Plaintiff, the Loan Agreement does not create any security at all over L 1725.

If I am wrong in this view, and in any event because the house contents are clearly covered by the Loan Agreement, it is necessary to consider the effect of the Loan Agreement itself, the relevant part of which states -

> "The Borrower pledges the following articles as security for the performance of this Agreement: Dwelling house at Ha'ateiho and contents and Toyota Hiace L1003 and the Borrower agrees to preserve carefully the said articles hereby pledged as security. And the borrower further agrees that he will not give away, sell or otherwise dispose of the said articles until he has received from the Bank a signed memorandum stating that the terms of this Agreement have been performed.
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> In the event of the failure by the Borrower to fulfil his obligations under this Agreement then .... the Bank is entitled to take possession of the said articles pledged as security without further process of law and the Borrower undertakes to give up control of the said articles on demand by the Bank."

This part of the Agreement purports to be a pledge, but it is clear that it cannot be so because a pledge is incomplete without actual or constructive delivery of the thing pledged *(Halsbury's Laws (4th Ed) Vol. 32 para 412 and Vol. 36 para 103)*. There has been no actual delivery and no symbolic delivery such as handing over a key *(Vol. 36 para 114)*. Even though the Bank may have possession of the certificate of registration of the van, delivery of a document of title (even if the certificate of registration is such, which I doubt) does not at common law amount to delivery of the article except in the case of bills of lading *(Vol. 36 para 114)*. Mr Hogan for the Bank did not allege that a pledge had been achieved in this case.

However Mr Hogan did submit that the Loan Agreement did amount to an equitable mortgage of the articles. In equity a mortgage is created by a contract evidenced in writing for valuable consideration that property is to stand security for a certain sum *(Halsbury's Laws (4th Ed) Vol. 32 para 437)*. Any written instrument showing the intention of the parties that a security should be created is sufficient *(Encyclopedia of Forms and Precedents (4th Ed Vol 14 p 28 para 49)*, even if accepted orally by the creditor *(Halsbury Vol. 32 para 436)*. It may also be created by a deposit of title deeds *(Vol. 32 para 419)*. There is clearly enough

in this case by the Agreement coupled with the deposit of the certificate of registration with the Bank to establish an equitable mortgage and I accept Mr Hogan's submission on this. Mr Hogan then contended that the result was that this equitable mortgage of the Bank had priority and even if the Court ordered a sale the Bank could contend that they were entitled to the net proceeds of sale up to the point when their security was discharged.

An equitable mortgage is a contract which creates a charge on property but does not convey any legal estate or interest to the creditor, ie it is an equitable interest. Its operation is that of an executory assurance which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance and is enforceable under the court's equitable jurisdiction *(Vol. 32 para 405)*. The mortgagee takes no estate in the property but he has an equitable interest enforceable by sale and sometimes by foreclosure *(Vol. 32 para 638)* or by having a receiver appointed by the Court: these are his sole remedies. Therefore the Bank only has rights under this equitable mortgage against a third party such as the Plaintiff who has effectively had the goods seized under a court order so that they are in custody under law (as in *Abingdon RDC v O'Gorman (1968) 3 All E.R. 79 (CA), 82)*: the position is not the same as if the Bank had had a legal mortgage. The Bank have made no specific application to the Court to exercise its equitable jurisdiction and it is not clear whether they would wish to have the articles sold at present. Even if they did, it would not follow automatically that the Court would grant such an application if Mr Muti as borrower was still fulfilling his obligations under the Loan Agreement.

Mr Hogan submitted that the commercial practice in Tonga was relevant. As there was no other instrument of security available, he said, the practice had evolved and had been accepted as clothing the Bank in a form of security. He submitted that for the Court to rule otherwise would strike at the heart of commercial practice in Tonga. But no evidence was presented that this would be the case, beyond the fact that the Loan Agreement was obviously a standard form agreement used regularly by the Bank. Nor has this Court any power to change the common law just to follow commercial practice: the remedy is either for Parliament after due consideration to change the law to give legal backing to commercial practice; or for those in commerce to adapt their practices to follow existing legal principles. The problem of creating a valid security over personal property is not a new one but cannot be resolved by expecting the law to bend: if special conditions are to be imposed this has to be done within the existing framework of the law. For example one way is by hire-purchase, which in England began by using the ordinary law of hiring, although there is now much statutory backing.

However I do not think that a decision against the Bank in this case need be seen as rendering their Loan Agreements completely invalid against all their borrowers. This is an exceptional case because it concerns the rights of a third party and moreover a third party supported by a court order. The equitable mortgage created by the Agreement should still remain valid against the borrower himself, who also remains under the obligation created in the Agreement not to give away, sell or otherwise dispose of the articles in security. Indeed Mr Muti will not be doing any of these things in this case if articles are sold under a court order.

For all these reasons I shall not exercise the equitable jurisdiction of the Court in favour of the Bank in this case.

Mr Niu for the Plaintiff tried to make something of the fact that the Bank knew of this judgment debt of $24,600 before the Loan Agreement was signed on 19th April. I find it difficult to believe that in Tonga the relevant officers of the Bank did not know about this judgment, especially one concerning a known figure such as Mr Muti (and as efficient bankers they ought to have known or made a point of finding out such information). I do not consider that it has any real bearing on this application as seizure under distress was not made until May i.e. after 19th April. Even if the Bank had known, while it might have been foolish for them to give Mr Muti this new loan, there was no obligation on them to wait indefinitely to take security while the Plaintiff took time to commence distress action.

I therefore dismiss the application for the release of the seized goods except the van L 77 and order the sale to proceed on a date to be fixed by the Court on application of the Police, subject to one half of the net sale price of articles owned jointly by Mrs Sisi Kafa Muti being paid over to her or any other person entitled.