

# NAND SINGH v. JAIMAL & THIRD PARTY.

[Civil Jurisdiction (Corrie, C.J.) February 14, 1941.]

*Building erected by lessee on land held under a "native" lease—clause in lease providing that building erected on the land shall be the property of and removable by the lessee—bill of sale executed by lessee—over buildings and other chattels—subsequent mortgage of lease executed by lessee—attornment clause in mortgage whereby lessee attorned tenant to the mortgagee at a rent equal to mortgage interest—rights of grantee of bill of sale as against mortgagee considered.*

The facts of this case were the subject of a special case as follows :—

- " This action was commenced on the 15th day of May 1940 by a writ of summons whereby the plaintiff claimed an injunction to restrain the defendant from entering on or remaining upon the land known as "Lau No. 1A" comprising 1 acre 1 rood in the district of Nakelo described and contained in Native Lease No. 5214 and from occupying or removing the buildings which are upon the said land namely a dwelling house, and kitchen. On the 17th day of September 1940 Security Investments Limited was joined as a third party to this action.
- " 1. Sankar Das was the lessee of 19 acres 1 rood of land "Lau No. 1" by Native Lease No. 2381 dated the 15th day of May 1931, copy of which lease is annexed.
- " 2. Sankar Das erected on that land a dwelling house built on plates resting on and nailed to piles fixed into the ground, and having walls partitions and ceiling of wood with roof of iron and also a kitchen built on piles fixed into the ground.
- " 3. Sankar Das died on the 8th day of July 1931 and probate of his will was granted to Gurucharan on the 25th day of August 1931, copy of which will and probate is annexed. The said Lease No. 2381 was transmitted on the 22nd day of September 1931 to the said Gurucharan as executor and was mortgaged by Gurucharan to Jaimal by mortgage registered on 28th October 1933 numbered 8560, copy of which mortgage is annexed, and which mortgage was discharged on the 24th day of August 1935.
- " 4. On the 1st day of August 1935 Gurucharan assigned the said dwelling house and kitchen to Jaimal of Suva by deed, which was registered as a bill of sale book 35 folio 394 and copy of which is annexed.
- " 5. On the 1st day of August, 1935 no notice of intention to remove the dwelling house had been given by the lessee of Native Lease No. 2381 to the lessor.
- " 6. In December 1935 Gurucharan as executor transferred seventy-two undivided seventy-sevenths share of the Native Lease 2381 to Haricharan and Dharambir.
- " 7. Haricharan and Dharambir in December 1935 transferred seventy-two undivided seventy-sevenths share to Nand Singh.
- " 8. By transfer registered on the 16th day of September 1938 Gurucharan as executor transferred five undivided seventy-sevenths share in the Lease No. 2381 to Nand Singh.
- " 9. Nand Singh was the sole proprietor of the Lease No. 2381 on the 15th day of September 1938.
- " 10. On the 15th day of September 1938 Nand Singh surrendered 1 acre 1 rood of the land contained in the said lease.
- " 11. On the 15th day of September 1938 Native Lease No. 5214 of 1 acre 1 rood of the land "Lau No. 1A" was given on behalf of the native owners to Gurucharan being the land which had been surrendered by Nand Singh and on which the said dwelling house and kitchen were originally erected and now are. A copy of this lease is annexed.
- " 12. On the 13th day of December 1939 Gurucharan mortgaged the Lease No. 5214 to Security Investment Limited by mortgage Registered No. 19438 under the Land (Transfer and Registration) Ordinance 1933, copy of which mortgage is annexed.
- " 13. On the 19th day of December 1939 the dwelling house was insured for £400 (four hundred pounds) with the Pacific Insurance Co. Ltd., in the names of Gurucharan (owner) and Security Investments Limited (mortgagee) on a proposal signed by Gurucharan.
- " 14. A receiving order in bankruptcy was made against Gurucharan on the 6th day of September, 1939.
- " 15. Security Investments Limited gave notice on the 6th day of September, 1939 to Gurucharan requiring payment under the mortgage, which payment was not made and has not since been made. Copy of which notice is annexed.
- " 16. On the 23rd day of November, 1939 Security Investments Limited as mortgagee leased the 1 acre 1 rood of land contained in Native Lease No. 5214 to Nand Singh by an agreement, copy of which is annexed and Nand Singh entered on and remained in possession of the said land and the dwelling house and kitchen thereon.
- " 17. On the 3rd day of May 1940 one Roy de Gans entered upon the said land and occupied the said dwelling house against the will of Nand Singh who was then in possession thereof.
- " 18. The said Roy de Gans purported to enter on the land under the authority of documents which he landed to Nand Singh being—
  - " (i) A notice addressed to Gurucharan requiring payment of £100 principal and £71 5s. 2d. interest due to Jaimal under bill of sale book 35 folio 394.
  - " (ii) A notice addressed to Gurucharan and signed by the said Roy de Gans that unless this amount was paid forthwith it was his intention to restrain the goods and chattels in and upon the premises occupied by you.
  - " (iii) An authority from Jaimal to Roy de Gans to distrain the goods and chattels in and upon the premises of Gurucharan. Copies of which documents are annexed.

- " 19. The said Roy de Gans was withdrawn from the said house and kitchen in pursuance of  
 " and subject to the terms and conditions of two letters copy of which are annexed  
 " hereto—  
 " 6th May, Cromptons to Grahame & Co.  
 " 7th May, Grahame & Co. to Cromptons.  
 " The questions for the opinion of the Court are—
- " 1. Whether the dwelling house and kitchen erected by Sankar Dass on the land originally  
 " comprised in Native Lease 2381 but now comprised in Native Lease 5214 were included,  
 " as part of the land, in the charge over Native Lease 2381 created by the Mortgage No.  
 " 8560 given by Gurucharan to Jaimal on the 28th day of October 1933 over Native  
 " Lease 2381?
- " 2. Whether the said dwelling house and kitchen passed to Jaimal by the bill of sale book  
 " 35 folio 394 dated the first day of August 1935 (a) when the Bill of Sale was made on  
 " the 1st day of August 1935 : or (b) when the Mortgage No. 8560 was discharged on  
 " the 24th August 1935 or (c) not at all : and, if the said dwelling house and kitchen  
 " passed to Jaimal, to what extent?
- " 3. Whether the rights (if any) acquired by Jaimal under the bill of sale book 35 folio 394  
 " were defeated, abolished, lessened or impaired by any of the following transactions—  
 " (a) The transfer to and vesting in Nand Singh as sole proprietor of Native Lease No.  
 " 2381 on the 15th September 1938 : and whether the said dwelling house and  
 " kitchen then passed to Nand Singh, and if so to what extent?  
 " (b) The surrender by Nand Singh to the lessor on the 15th September 1938 of the  
 " 1 acre 1 rood of Native Lease 2381 upon which the dwelling house and kitchen  
 " were then standing : and who became the owner thereof and to what extent?  
 " (c) The granting of the Lease No. 5214 of 1 acre 1 rood on which the dwelling  
 " house and kitchen were standing by the lessor to Gurucharan on the 15th day  
 " of September 1938?  
 " (d) The Mortgage No. 19438 given on the 13th December, 1938 by Gurucharan  
 " to Security Investments Limited over his Lease No. 5214?  
 " (e) The failure of Gurucharan to perform the terms and conditions of the Mortgage  
 " No. 19438 and the consequent entry of Security Investments Limited into  
 " possession of the said land and the granting by it of a tenancy thereof to Nand  
 " Singh?  
 " (f) The facts that the dwelling house and kitchen had not been removed by the  
 " lessee or by Jaimal on the determination of Lease No. 2381 in respect of the  
 " 1 acre 1 rood on the 15th September 1938, and that the said dwelling house  
 " and kitchen have not yet been removed but are still standing upon the said  
 " 1 acre 1 rood?  
 " (g) Any other event set out in this agreed case?
- " 4. Whether, if the said dwelling house and kitchen are the property of Jaimal.  
 " (a) They are subject to distress for rent owing by Gurucharan to Security Investments  
 " Limited.  
 " (b) Jaimal must pay such rent before taking possession of or removing the said  
 " dwelling house and kitchen.
- " 5. Whether the entry of Jaimal's bailiff was lawful?  
 " If not, the Court is requested to award a proper sum to Nand Singh as damages for  
 " trespass.
- " 6. Whether Jaimal now has a right of entry which he can exercise? Whether this right  
 " is to enter only for the purpose of immediately demolishing and removing the said  
 " dwelling house and kitchen ; or whether he has a right to enter and occupy the said  
 " dwelling house and kitchen for his own convenience?  
 " If Jaimal has no right of entry, the Court is requested to issue an injunction  
 " restraining him.
- " 7. Whether Jaimal now has a right to the disposal of, to the possession of the said dwelling  
 " house and kitchen, or to the value thereof?  
 " If he has, the Court is requested to make an Order against Nand Singh to deliver up  
 " the dwelling house and kitchen, or in the alternative (as the case may be) to pay to  
 " Jaimal the value of the dwelling house and kitchen as severed, and for the costs of  
 " these proceedings : and to make an Order (to which Security Investments Limited  
 " hereby agree) that Security Investments Limited do allow Jaimal to remove and/or  
 " sell the same.  
 " If Jaimal has no right to the said disposal possession or value of the dwelling house  
 " or kitchen, the Court is requested to issue an injunction against him as aforesaid and  
 " to award the costs of this action to Nand Singh."

**HELD.**—(1) Buildings erected by a lessee on land held under a lease containing a covenant that such building shall be the property of and remain the property of the lessee, are from the time of their erection the property of the lessee and may be the subject of a valid assignment by way of bill of sale from the lessee.

(2) A lessee who has assigned buildings erected on the lease by bill of sale cannot subsequently confer on a mortgagee rights against the grantee of the bill of sale ; if the bill of sale is registered, the mortgagee is deemed to have notice of it.

(3) A lessee who has assigned buildings on the leasehold by bill of sale and subsequently purported to confer rights in respect of the same buildings on a mortgagee cannot avail himself of an attornment clause in the mortgage to oppose the lawful exercise of his rights by the grantee of the bill of sale.

*Obiter.*—(1) The mortgagor of a lease (under the Land (Transfer and Registration) Ordinance 1933<sup>1</sup> and persons claiming under him are estopped from denying the mortgagee's title as lessee, although as against third parties the mortgagee has no rights as lessee.

(2) A lessee who has executed a mortgage of a leasehold property on which are erected buildings which in terms of the lease are the property of and removable by the lessee cannot subsequently execute a bill of sale giving the grantee rights over the buildings as against the mortgagee.

[**EDITORIAL NOTE.**—This judgment seems to lead to the result that in the case of buildings erected on a leasehold a security may be either a bill of sale or a mortgage—and whichever is first registered will be effective.]

Cases referred to :—

(1) *Crossley Brothers, Ltd. v. Lee* [1908] 24 T.L.R. 35 ; 1 K.B. 86 ; 77 L.J.K.B. 199 ; 97 L.T. 850 ; 31 Dig. 193.

(2) *Gough v. Wood & Co.* [1894] 1 Q.B. 713 ; 63 L.J.Q.B. 564 ; 70 L.T. 297 ; 10 T.L.R. 318 ; 35 Dig. 309.

(3) *Bain v. Brand* [1876] 1 App. Cas. 762 ; 31 Dig. 182.

(4) *re Thomas G. P. Willoughby d'Eresby (Baroness)* [1881] 44 L.T. 781 ; 31 Dig. 205.

(5) *Leschalles v. Woolf* [1908] 1 Ch. 641 ; 77 L.J.Ch. 345 ; 98 L.T. 558 ; 31 Dig. 211.

(6) *Lancaster v. Eve* [1859] 28 L.J.C.P. 235 ; 141 E.R. 288 ; 31 Dig. 187.

(7) *Miller v. Strohmeyer* [1887] 4 T.L.R. 133 ; 3 Dig. 98.

(8) *London & Westminster Loan & Discount Co. v. Drake* [1859] 28 L.J.C.P. 297 ; 141 E.R. 664 ; 31 Dig. 203.

(9) *Saint v. Pilley* [1875] L.R. 10 Ex. 137 ; 44 L.J. Ex. 33 ; 33 L.T. 93 ; 31 Dig. 204.

(10) *Todman v. Henman* [1893] 2 Q.B. 168 ; 57 J.P. 664 ; 9 T.L.R. 509 ; 30 Dig. 361.

(11) *Amas v. G. Meyer* [1931-2] 5 Aus.L.J. 213.

(12) *Filimone v. Jaimal & ors* [1936] 3 Fiji L.R.

(13) *Smith v. City Petroleum Co.* [1940] 1 A.E.R. 260.

(14) *Meux v. Jacobs* [1875] 32 L.T. 171 ; 39 J.P. 324 ; L.R. 7 H.L. 481 ; 31 Dig. 206.

(15) *Reynolds v. Ashby & Son* [1904] A.C. 466.

(16) *Minshall v. Lloyd* [1837] 6 L.J. Ex. 115 ; 150 E.R. 834 ; 31 Dig. 201.

<sup>1</sup> Cap. 120.

*D. M. N. MacFarlane*, for the plaintiff and third party : Jaimal's rights in respect of the buildings arise from the Bill of Sale granted to him by Gurucharan. At the most those rights can be no more than Gurucharan had and must be restricted to a right of removal in terms of the lease. The method of exercising the right of removal is provided by clause 15 of the lease and the right has never been exercised by Jaimal. Jaimal's position is however even weaker than I have suggested—it is our submission that at the present date he has not even the right of removal of the house. The land on which the house stands was the one acre and one rood in respect of which Nand Singh surrendered his lease on September 15, 1938. The right of removal can be exercised only during the currency of the lease or within a reasonable time of its expiration ; it was not exercised prior to September 15, 1938 or at any time since. It is true that a fresh lease was granted to Gurucharan and the property, both the land and the house, were thereby demised to him. But this gave Gurucharan no right of removal as to buildings already erected—the right is a right to remove buildings erected by himself (*re Thomas ; Wilson & ors v. Neville ; Leschalles v. Woolf Minshall v. Lloyd*). The right of removal being gone the Bill of Sale ceased to be effective.

The mortgage to Security Investments Limited was executed after the issue of the new lease and the land and buildings became subject to the mortgage.

It is submitted however that the case for the plaintiff and the third party must prevail quite irrespective of the argument I have so far advanced when the fundamental natures of the respective securities is considered. The house is either a chattel or a fixture forming part of the land ; if it is the former then only a Bill of Sale can be effective, if the latter only a mortgage can be effective. The issue as to whether the house is a chattel or a fixture is not to be determined according to whether the Bill of Sale or the Mortgage was given first. The nature and character of the house cannot alter with the class of security purported to be given over it. It is our submission here that the house is a fixture, though admittedly severable on compliance with certain conditions. If it were so severed it would become a chattel but only then. The lease says that the " house shall be the property of the lessee " but that cannot affect its classification as a fixture or otherwise. The lessor says only that, as far as he is concerned, the lessee may on certain conditions take up and remove that which in the ordinary course, being a fixture, is not removable. The provision of the lease does not give the character of removability to the house except for a certain right solely between the lessor and the lessee.

Accordingly it is submitted that the questions propounded in the special case must be answered as follows :—

*Question 1 :—*

A substantial building comprising a dwelling house and kitchen, was erected on the land for the purpose of permanent enjoyment of the land and has been there for nine years.



Whatever is affixed to the soil becomes in the contemplation of law a part of it and is subject to the same rights of property as the soil itself.

The existence in the lease of a covenant or condition by which the lessee is entitled to remove certain fixtures does not alter the character of the fixture which is acquired through affixation to the soil. A fixture is not by such a right in the lease converted from realty into personalty. In *Crossley Bros. v. Lee Phillimore J.* observed that from his point of view "there are two classes of fixtures putting aside such special things as gas fittings which are provided for by a particular Act of Parliament." There were those fixtures which once implanted on the soil became part of the freehold and irremovable except with the consent of the parties, and there were those fixtures which a tenant could sever during his tenancy but which until he severed them remained a part of the freehold and if he did not sever them "remained so for all time." The case of *Reynolds v. Ashby and Son* shows clearly that when a mortgage is given over land, whether it is freehold or leasehold, whatever is fixed to the soil so becoming part of it, becomes charged by the mortgage, so that the dwelling house and kitchen on the leasehold land were charged by mortgage No. 8560 given by Gurucharan to Jaimal on the 28th October 1933. A lessee is in the same position as owner of the fee simple in this regard (*Bain & or v. Brand & or*). The mortgagee has not been a party to any other arrangement as was the case in *Gough v. Wood & Co.*

*Question 2 (a) —*

The dwelling house and kitchen did not pass to Jaimal by the Bill of Sale dated the 1st August 1935 because Gurucharan did not have good right and absolute authority to grant and assign the said chattels to Jaimal, free from all encumbrances. On the 1st August 1935 when the Bill of Sale was given Gurucharan was not the absolute owner of the dwelling house. The dwelling house was part of the land and charged by the mortgage and Gurucharan was not the owner of the chattels described in the Bill of Sale. The house was not a chattel at that date and therefore the Bill of Sale was of no effect and was void and Jaimal acquired nothing under it.

*Question 2 (b) —*

On the 24th August 1935 mortgage No. 8560 was discharged by Jaimal so that the lease No. 2381 was no longer charged by the mortgage. What effect did that discharge have on the dwelling house and kitchen? Did it renew the assignment made by the Bill of Sale dated that 1st day of August 1935 and give validity to the Bill of Sale? The answer is no. That which is void *ab initio* cannot be resurrected or given new life.

*Question 3 (a) —*

On the 15th of September, 1938 Nand Singh became the lessee of the land and what was attached to the land was part of the land, and therefore became the property of Nand Singh. Gurucharan's rights as lessee had ceased to exist. As lessee any rights under the conditions contained in the lease to remove the buildings would pass to Nand Singh.

*Question 3 (b)—*

On the surrender by Nand Singh of Native Lease 2381 the land and what was attached to it reverted to the Native owners.

*Question 3 (c)—*

The new lease of one acre one rood was given by Native Lease No. 4214 to Gurucharan on the 15th September 1938, on which the dwelling house was then standing. The lease gave the right of removal to the lessee of any buildings erected by him subject to certain conditions. Those buildings had been erected by Sanker Dass and not by Gurucharan and so not being buildings erected by the lessee, that is Gurucharan, he Gurucharan, had no right to remove them. The Bill of Sale given by Gurucharan on the 1st August 1935 could not now affect the buildings on the land covered by Lease 52144 because the Bill of Sale originally was void, and secondly Gurucharan had no right of removal of the buildings and therefore could not give any valid assignment of them.

*Question 3 (d)—*

On the 15th September, 1938 Gurucharan was registered proprietor of the land comprised in Native Lease 5214 and gave a mortgage over the land and the buildings affixed thereon, therefore being realty, were charged by that mortgage given to Security Investments Limited. (*Reynolds v. Ashby & Son*).

*Question 3 (e)—*

Under the powers contained in this mortgage, Security Investments, upon the default of Gurucharan the mortgagee, granted a tenancy of the mortgaged land to Nand Singh and that tenancy of course included the buildings which formed part of the soil. The tenancy thereby created gave the land and the buildings on it to Nand Singh who thereby acquired lawful possession of the land.

*Question 3 (f)—*

The property in the building and the right to remove it in the terms of clause 15 of the lease is conditional and only arises in the lessee when the provisos (a) to (f) have been satisfied. The lessee has no right to remove the buildings and therefore can not pass on or assign any right to remove the buildings, and if he did so or purported to do so, the assignment would be ineffectual. When Gurucharan gave the assignment, that is the Bill of Sale on the 1st August 1935, he had no right to remove the buildings because he had not complied with the conditions (a) to (f) in clause 15 of Lease No. 2381. When the lease 2381 determined on the 15th September 1938 as to one acre one rood Gurucharan's rights in respect of the dwelling house provided he complied with the terms of the lease were to remove the dwelling house within a reasonable time after the termination of the lease, that is after the 15th September, 1938. But the dwelling house in fact was not removed after the 15th September, 1938 and is still standing on the land, and any right that Gurucharan had to remove it has ceased.

(*Smith v. City Petroleum Co.*).

*Question 4—*

If it is held that the dwelling house and kitchen are the property of Jaimal, are they subject to distress for rent owing by Gurucharan to Security Investments Ltd.? By the 14th covenant in the mortgage given by Gurucharan to Security Investments Limited the mortgagor attorned tenant to Security Investments Ltd. and thereby constituted the relationship of landlord and tenant between Security Investments Ltd. and himself. On non-payment of rent Security Investments Limited as landlord has the right to levy distress for rent and that extends to chattels on the land in respect of which rent is owing, and those chattels are seizable by the landlord, whether they are the property of the tenant or a third person and despite the fact that they are subject to a Bill of Sale.

The Bill of Sale holder can remove the chattels with the grantor's consent and they are then free from seizure for distress for rent, but until such chattels which are subject to a Bill of Sale are removed from the land in respect of which rent is owing, they are lawfully seizable by the landlord in distraint for rent. If it is held that the dwelling house is a chattel, then it is on land in respect of which rent is owing by Gurucharan to Security Investments Limited.

The Bill of Sale holder has not removed the chattel from the land. Rent is due and owing and the landlord, Security Investments Limited, is entitled to levy distress for rent due and owing and to seize the chattels that is the house on the land.

*Question 5—*

The answer to this question depends upon the view which the court takes of the question of fixture set up for Question 3 (e). We contend that the mortgagee of the land with the dwelling house as a fixture thereon was entitled to give a lease of it to Nand Singh and that Nand Singh then acquired lawful possession of the land.

If the court decides that the dwelling house does not become a fixture and therefore part of the land its character in law is a chattel and the property in it was validly conveyed to Jaimal by the assignment (Bill of Sale) of the 1st August 1935. The fact remains that the chattel was never delivered and that the right conveyed to Jaimal by that assignment was the right to physically remove the chattel. Jaimal has never exercised that right which he could have done only while the chattel was in the physical possession of Gurucharan.

Gurucharan's possession ceased and Nand Singh acquired lawful possession of the land and of the chattel i.e. the dwelling house, affixed to the land and there is no right in Jaimal to interfere with Nand Singh's possession. (*Miller v. Strohmeyer*).

*Question 6—*

If it is held that Jaimal's right of property in the chattel implies the right to interfere with the possession title of the third person to land on which the chattels are, despite the delay on the part of the owner of the chattel to take it from the owner in whose pos-

session it was when conveyed to Jaimal, then surely the right to interfere with the title and possession of the third party only goes to the extent of taking physical possession of the chattel itself and removing it from the constructive physical possession of the third party on whose land it is.

It is submitted that at best Jaimal's only right is to enter on the land and demolish (as he will have to do board by board) the building and remove the separate demolished constituents of the chattel "so called".

*Townsend*, for the defendant : The house must be either a landlord's fixture and part of the realty or a tenant's fixture or a chattel. In terms of the lease it must be a tenant's fixture (*Lancaster v. Eve*). If the tenant wrongfully removes the chattels without notice it may be that they vest in the landlord (*Woodfall on "Landlord & Tenant"* 21st edition page 796). This is not an Act of Parliament aimed against landlords ; it is a grant by a landlord which must, therefore be construed against him. When Gurucharan transferred the seventy two seventy-sevenths he had only an equitable title to the building to transfer. The equity of redemption is a chose in action and must therefore be transferred separately. Surrender of the lease does not affect a right given by a tenant to a third party (*London Westminster Loan & Discount Co. v. Drake ; Saint v. Pilley*). When Nand Singh surrendered his lease to the landlord he could not transfer any interest on the buildings because he had none to transfer. A mortgagee under the Torrens systems takes no estate in the land ; hence a tenancy by attornment operates by estoppel only and does not bind third parties (*Hogg's "Australian Torrens System"* p. 948 ; *Tadman v. Henman*). An attornment clause does not give a right to distrain ; a clause which purports to give a right to distrain is illegal as an unregistered bill of sale (23 *Halsbury* p. 325).

In Fiji a mortgagee gets a charge but does not get the land ; the tenancy by attornment is not good against a third party. Jaimal is not concerned with a contract between Security Investments and Nand Singh nor with the alleged tenancy between Security Investments and Gurucharan ; Jaimal claims under the bill of sale given by Gurucharan as legal owner—not in his later and different capacity as a tenant of Security Investments. Security Investments could levy distress against Gurucharan if they had chosen not to put him out and instal another tenant. The so called rent is a sham ; it is in fact interest on a loan. Security Investments cannot have any case against Jaimal. (*Amas v. G. Meyer*).

*D. M. N. MacFarlane*, in reply : In *Lancaster v. Eve* it was decided that plaintiff had an easement. A mortgagee can distrain on any goods on the mortgaged premises belonging to the mortgagor or persons claiming under him. The authority cited as to attornment clause was upon the wording of the English Bills of Sale Act. The Torrens system recognises attornment clauses in mortgages ; there is nothing in Fiji corresponding to s. 16 of the English Bills of Sale Act.



CORRIE, C.J.—The facts which give rise to this action are fully set out in the Special Case which has been filed.

The dwelling-house and kitchen, which are the subject of the action, were erected by one Sankar Dass upon land of which he was the lessee under a lease granted on the 15th May, 1931, by the Commissioner of Lands on behalf of the native owners.

Clause 15 of the lease contained the following provisions :—

- " (15) Any building (other than a hut made of grass and unsawn timber) erected by the lessee upon the land hereby leased which is not erected in pursuance of some obligation in that behalf shall be the property of and be removable by the lessee before or within reasonable time after the determination of this lease; Provided that—
- " (a) Before the removal of any building the lessee shall pay all rent owing by him, and shall perform or satisfy all his other obligations to the lessor in respect of the land hereby leased;
- " (b) In the removal of any building the lessee shall not do any avoidable damage to any other building or other part of the land hereby leased;
- " (c) Immediately after the removal of any building the lessee shall make good all damage occasioned to any other building or other part of the land hereby leased by the removal;
- " (d) The lessee shall not remove any building without giving one month's previous notice in writing to the lessor of his intention to remove it;
- " (e) At any time before the expiration of the notice of removal, the lessor, by notice in writing given by him to the lessee, may elect to purchase any building comprised in the notice of removal, and any building thus elected to be purchased shall be left by the lessee and shall become the property of the lessor who shall pay to the lessee the fair value thereof to an incoming lessee of the land; and any difference as to the value shall be settled by the Governor in Council, whose decision shall be final and binding upon all parties;
- " (f) If the lessee applies for a renewal of the lease the provisions of this clause shall be deemed to cease to apply as from the date of the application of the lessee for a renewal of the lease, and thereafter the whole matter shall be dealt with under the provisions of the Native Lands (Leases) Ordinance 1905."

It has been argued on behalf of the plaintiff that a building erected under the provisions of this clause and affixed to the land, vests in the lessor, and does not become the property of the lessee until he has fulfilled the requirements of paragraphs (a) to (e) of the clause. In support of this contention the plaintiff relies upon the judgment in *Crossley v. Lee*, 24 T.L.R., p. 35. No reason, however, has been put forward by the plaintiff for distinguishing this case from *Filimone v. Jaimal and others*, in which it was held that buildings erected by a lessee under a lease containing a clause identical with clause 15 of the lease in the present case remained the property of the lessee and were liable to be sold in satisfaction of the lessee's judgment debts.

Apart from authority, moreover, paragraphs (a) to (e) of the clause deal only with the removal of buildings, and make no reference to the vesting of any such buildings in the lessee. Again, paragraph (e) provides that any building which the lessor elects to purchase "shall be left by the lessee and shall become the property of the lessor"; an expression which would be inappropriate if the buildings were already the lessor's property.

I hold, therefore, that paragraphs (a) to (e) do not qualify the provision that the buildings shall be the property of the lessee; and hence that buildings erected under the clause are, from the time of their erection, the property of the lessee, and are subject only to the lessor's right to purchase.

On the 26th October, 1933, after the death of the lessee, his executor, Gurucharan, executed a mortgage of the land comprised in the lease in favour of the defendant Jaimal. This instrument is headed "Form of Mortgage. Real Property Ordinance 1876"; but at the time when it was executed, the land (Transfer and Registration) Ordinance 1933 had been enacted and the Real Property Ordinance 1876 thereby repealed.

The mortgage which was registered in the Land Registry on the 28th October, 1933, accords in form with the form of mortgage prescribed by Schedule G to the Land (Transfer and Registration) Ordinance 1933 ;<sup>1</sup> and thus took effect as a mortgage under that Ordinance.

Section 60 of the Ordinance provides that :—

“ A mortgage or 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 ”.

The fixtures were not mentioned in the mortgage ; but would be subject thereto although the mortgage did not vest any estate in the land in the mortgagee (See *Meux v. Jacobs*, [1875] 32 L.T.R., p. 171).

The mortgage was discharged on the 24th August, 1935.

In the meanwhile, on the 1st August, 1935, Gurucharan assigned the dwelling-house and kitchen, together with a safe and other chattels, by registered Bill of Sale to the defendant Jaimal, as security for a sum of £100 and interest.

The effect of the Bill of Sale was to vest the buildings included therein in the defendant Jaimal, subject to the proviso for redemption contained therein, and subject also to the charge created by the mortgage of the 26th October, 1933 (which was subsequently discharged); and to the lessor's right of purchase under clause 15 of the lease.

By two transfers registered in December, 1935, certain shares in the land subject to the lease were transferred to the plaintiff Nand Singh ; and by a third transfer, registered on the 15th September, 1938, the remaining shares in the land were vested in Nand Singh, who thus became the proprietor of the whole of the land comprised in the lease.

On the same day, Nand Singh surrendered to the lessor one acre one rood of the land, and the lessor granted to Gurucharan a fresh lease of one acre one rood, being the land upon which the buildings were erected. The defendant Jaimal was not a party to any of these dispositions and the buildings remained vested in him, subject to the proviso for redemption contained in the Bill of Sale and the lessor's right to purchase.

On the 13th December, 1938, Gurucharan mortgaged his one acre one rood of land to Security Investments Ltd. (the third part to the present action) who, on the 6th September, 1939, gave notice to Gurucharan requiring payment of the moneys due under the mortgage.

Gurucharan having failed to comply with the notice, Security Investments Ltd. as mortgagee in possession, on the 23rd November, 1939, granted a tenancy for 12 months of the one acre one rood to the plaintiff Nand Singh, who entered into possession.

On 3rd May, 1940, a bailiff acting under an authority from the defendant Jaimal authorizing him “ to distrain the goods and chattels in and upon the premises of Gurucharan ” for the sum due under the Bill of Sale, entered upon the land and occupied the dwelling-house. He was subsequently withdrawn upon the terms of letters exchanged between the parties' solicitors and this action was then commenced.

<sup>1</sup> Cap. 120.

The mortgage to Security Investments Ltd. contained an attornment clause whereby Gurucharan attorned tenant to the mortgagee at a rent equal to the interest payable under the mortgage: and on behalf of Security Investments Ltd. it is argued that as a Bill of Sale is no protection against a distress for rent, the buildings, though not subject to distress so long as they remain affixed to the land, will become so subject if detached with a view to removal.

Now, as has already been stated, a mortgage registered under the Land (Transfer and Registration) Ordinance, 1933,<sup>1</sup> vests no estate in the land in the mortgagee.<sup>2</sup> It follows that, while the mortgagor and persons claiming under him are estopped from denying the mortgagee's title as lessor, as against third parties, no rights as lessor are vested in the mortgagee.

Had the Bill of Sale been executed after the mortgage the grantee would have been a person claiming under the mortgagor and would thus have been estopped from denying the mortgagee's title as lessor.

Such, however, is not the position in the present case. When Gurucharan granted the Bill of Sale he was absolute owner of the buildings, subject only to the right of purchase reserved to the Commissioner of Lands by clause 15 of the lease of the 15th May, 1931.

Gurucharan could not, by a subsequent mortgage containing an attornment clause, confer upon the mortgagee rights against the grantee of the Bill of Sale, as to do so would be a derogation from his own grant. That a Bill of Sale existed which gave the grantee rights superior to those which the mortgagee would enjoy under his mortgage was a fact which the mortgagee could have ascertained by searching the Register of Bills of Sale.

Whether he searched or not, the mortgagee must be deemed to have had notice of the Bill of Sale, and his rights under the mortgage with respect to the buildings are subject to those of the grantee of the Bill of Sale.

As against the third party, Security Investments Ltd., therefore, the defendant Jaimal is entitled to succeed.

There remains the question of the plaintiff's claim to damages for wrongful dispossession by the defendant's bailiff.

The plaintiff's rights over the dwelling-house derive from the mortgagee and, even if it be assumed that the tenancy agreement under which he claims was valid, he cannot oppose a lawful exercise by Jaimal of his rights under the Bill of Sale.

Clearly Jaimal has no right to occupy the buildings for his own convenience, but it does not appear from the special case that he has made any attempt to do so.

Under clause 8 of the Bill of Sale, Jaimal was entitled, upon default being made in payment of the moneys due under the Bill, to enter upon the premises in which the buildings were and to "sell on such premises or remove and sell elsewhere" the said buildings. He was therefore entitled to instruct a bailiff to take and retain possession of the buildings pending sale or removal, and his action does not give rise to any right to damages on the plaintiff's part.

There will be an order against Nand Singh and against Security Investments Ltd. in terms of paragraph 7 of the special case.

<sup>1</sup> Cap. 120.

<sup>2</sup> Cf. *Ganda Singh v. Kartar Singh & or* [1939] 3 Fiji L.R.