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BALDEO

v.

NUR MOHAMMED

B [COURT OF APPEAL, 1961 (Marsack V.P., Trainor J.A., Knox-Mawer J.A.), 3rd, 8th May]

## Civil Jurisdiction

C *Bills of Sale—non-renewal of registration—Bill of Sale void from expiry of registration—personal covenant to pay principal and interest not severable—possible action for money had and received—from what point time runs for purpose of limitation—Bills of Sale Ordinance (Cap. 193) s.7—Bills of Sale Act 1878 (Imperial) (41 & 42 Vict., c.31) s.8—Bills of Sale Act (1878) Amendment Act 1882 (Imperial) (45 & 46 Vict., c.43) s.9.*

*Limitation of Actions—time running from accrual of cause of action—Bill of Sale void for non-renewal of registration—when cause of action for money had and received would accrue.*

D The appellant brought an action against the respondent in the Supreme Court for the principal and interest intended to be secured by a Bill of Sale dated the 7th January, 1955. At the hearing it was asserted by counsel for the respondent and admitted by the appellant that the registration of the Bill of Sale had not been renewed within the statutory period after its first registration: counsel for the respondent submitted that the Bill of Sale was void under section 7 of the Bills of Sale Ordinance. Counsel for the appellant submitted that the covenant for repayment, and clause 10 of the Bill of Sale (which purported to preserve the appellant's rights on the basis of simple contract) were severable from the remainder of the document and, on the 20th March, 1961, he applied to amend his pleadings accordingly. The application was refused by the trial judge, who considered that it would offend against the principle that an amendment of a Statement of Claim should not be permitted if it results in preventing the defendant from raising the Statute of Limitations as a defence. The trial judge expressed the view that the appellant's only remedy would be to sue for the recovery of money lent, with reasonable interest, as money had and received, but in view of the principle abovementioned, he did not permit an amendment to bring in this cause of action. Judgment was given for the respondent.

G On appeal,

Held: 1. The Bill of Sale was void, not *ab initio* but from the time the registration expired and was not renewed: the undertaking to repay principal and interest was an integral part of the Bill of Sale and not severable from it.

H 2. While the Bill of Sale was valid and operative no proceedings could have been instituted by the appellant save under the Bill of Sale.

3. No action by the appellant against the respondent for money had and received would lie until the Bill of Sale had become void for non-renewal of registration, and time, for the purpose of the Statute of Limitations, does not run until a cause of action has accrued.

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Per Marsack V.P. — A cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to enable the plaintiff to succeed.

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4. The judgment in the Supreme Court would be set aside and the case remitted for the trial judge to review, in the light of the decision of the Court of Appeal, the question of granting leave to amend the Statement of Claim.

Cases referred to: *National Provincial Bank, Ltd. v. Gaunt* [1942] 2 All E.R. 112; *Bradford Advance Co. Ltd v. Ayers* [1924] W.N. 152; 157 L.T. Jo. 344; *Manchester, Sheffield & Lincolnshire Railway Co. v. North Central Wagon Co.* (1888) 13 App. Cas. 554; 59 L.T. 730; *Charlesworth v. Mills* [1892] A.C. 231; 66 L.T. 290; *Davies v. Rees* (1886) 17 Q.B.D. 408.

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Appeal from judgment of the Supreme Court — (1961) 7 F.L.R. 105.

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K. C. Ramrakha for the appellant.

R. I. Kapadia for the respondent.

[Editorial note: This appeal was heard in 1961 but was not reported in the 1961 volume of the Fiji Law Reports. The Court of Appeal in *Sherani v. Latchman*, Civil Appeal No. 35 of 1967, which will be reported in a subsequent volume, did not follow *Baldeo v. Nur Mohammed* as to certain aspects of the effect of section 7 of the Bills of Sale Ordinance.]

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The following judgments were read:

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TRAINOR J. A. [8th May, 1961]—

The appellant in this case was the plaintiff in an action before the Supreme Court wherein he claimed, in a Special Endorsement of Claim as the administrator of one Ram Dei the sum of £717.5.0 being principal and interest due and owing by the defendant to the said Ram Dei under a Bill of Sale.

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Proceedings were commenced on the 18th August, 1960, and a statement of claim was delivered on the 14th October, 1960. By his defence the defendant denied that a sum of £70, alleged in the statement of claim to have been advanced on the security of the bill of sale was so advanced, and that he was indebted to the plaintiff as alleged or at all. He alleged in any case, that the said Bill of Sale was void within the provisions of the Bills of Sale Ordinance Cap. 193.

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When the case came before the Court below, Counsel for the defendant made a legal submission to the effect that the registration of the Bill of Sale had not been renewed within the statutory period after its first registration and consequently was void; Counsel for the plaintiff conceded that it had not been so re-registered. He, Counsel for Plaintiff, submitted that section 7 of Cap. 193 only dealt with first registration and that it was only failure to register initially that rendered a bill of sale fraudulent and void. He referred to a clause in the Bill of Sale, Clause 10, and submitted that the right of the mortgagee as a simple contract creditor was not affected. He further submitted that his claim in the pleadings was on a simple contract. The Court adjourned at this stage to consider the points raised.

On resumption, Counsel for the plaintiff was further heard to argue that the clauses in the Bill of Sale are severable and that the plaintiff was entitled to sue for the money advanced under the Bill. He asked that if the Court held against him on his submissions he might be at liberty to amend his pleadings by adding the words "under Clauses 4 and 10 of the Bill of Sale" after the figure £717.5.0 in paragraph 6 of the statement of claim.

The date of the Bill of Sale was the 7th January, 1955, and the amendment was sought on the 20th March, 1961, at which date, if the claim was based on a simple contract and the plaintiff's right to sue existed from the date of the contract, the plaintiff's claim would have been statute barred. For this reason Counsel for the defendant objected to this amendment, the effect of which would have been to deprive him of the benefit of the Statute of Limitations.

In his judgment the learned trial Judge upheld the submission of Counsel for the defendant that the failure to renew the registration of the Bill resulted in its being deemed fraudulent and void and added that it would appear that the plaintiff's only remedy would be to sue for the recovery of money lent with reasonable interest as money had and received on the authority of *Bradford Advance Co. Ltd. v. Ayers* [1924] W.N. 152.

He then considered the plaintiff's application to amend the statement of claim but held that to do so would offend against the principle laid down in *National Provincial Bank Ltd. v. Gaunt* [1942] 2 All E.R. 112, where it was held that an amendment of a statement of claim should not be permitted if it results in preventing the defendant raising the Statute of Limitations as a defence.

The plaintiff has appealed against this decision on the grounds that :—

- (1) the learned trial Judge erred in law and in fact in holding on the facts before him that the claim of the appellant was barred under the Statute of Limitations;
- (2) the learned trial Judge erred in law and in fact in holding that the appellant was proceeding under the Bill of Sale and further erred in law and in fact in not holding that on the facts before him the claim could be one for money had and received;

(3) in the alternative the learned trial Judge erred in law and in fact in not holding that the claim of the appellant was under clause 10 of the Bill of Sale; and asked that the judgment be set aside and/or altered or varied and that judgment be entered for the plaintiff on the preliminary issue and that the matter be remitted for hearing of the further issues.

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At the hearing application was made for leave to add an additional ground of appeal, namely:

(4) that while the learned trial Judge came to the correct conclusion that the Bill of Sale was void, he erred in law and in fact in not holding that the Bill of Sale was void as against third parties only and not between the parties to the Bill of Sale itself.

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Counsel for the respondent did not object and the amendment was allowed.

Counsel for the appellant dealt with the last ground of appeal first and submitted that section 7 of Cap. 193 is modelled on section 8 of the Bills of Sale Act 1878, the only difference being that section 8 makes it quite clear that avoidance of a bill of sale is only effective in so far as it concerns third parties. In support of this he cited *Manchester, Sheffield and Lincolnshire Railway Company v. the North Central Wagon Company* (1888) 13 App. Cas. 554. He quoted from the judgment of Lord Herschell at p. 560:

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" The bills of sale are therefore made void only as against creditors or their representatives. As between the parties to them they were perfectly valid. "

He further cited the case of *Charlesworth v. Mills* [1892] A.C. 231, and quoted Lord Halsbury at pp. 234 and 235. With regard to the quotation from the *Manchester, Sheffield and Lincolnshire Railway Company v. The North Central Wagon Company* (supra) it must be remembered that Lord Herschell was there distinguishing between Bills of sale made under the Bills of Sale Act, 1978, and those made under the Act of 1882. Any advantage to the plaintiff to be derived from the cited case depends on this Court holding that section 7 of Cap. 193 is modelled on, and should be interpreted in the same way as section 8 of the Bills of Sale Act 1878.

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*Charlesworth v. Mills* decided that in the circumstances of that case there was no bill of sale.

Without considering the general similarity between section 7 of Cap. 193 and section 8 of the Bills of Sale Act 1878, I must comment on the obvious distinction between the effect created by the two sections on a bill of sale. Section 8 provides that on failure to comply with the provisions thereof, the Bill "... shall be deemed fraudulent and void as regards the property in or right to the possession of any chattels ..." whereas a similar failure with regard to section 7 of the Cap. 193 results in the Bill of Sale being "... deemed fraudulent and void."

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In my opinion the effect produced by section 7 of Cap. 193 of the Laws of Fiji is the same as that produced by section 9 of the Bills of Sale Act 1882.

Section 9 reads :

A " A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed."

From his argument on ground (4) of the grounds of appeal, learned Counsel for the appellant urged the Court, in arguing ground (3), that two relationships were created by a bill of sale between the parties :

B (a) that of a secured creditor with an equity of redemption in the borrower: and

(b) a simple contract between the parties.

The result of this, it was submitted, is that if a bill of sale becomes void it is only (a) that is affected and that all the rights subsisting by virtue of (b) remain.

C In support of this he cited *Davies v. Rees* (1886) 17 Q.B.D., 408, and quoted Bowen L.J. at pp. 411 and 412. In particular he referred this Court to the Honourable Lord Justice where he said:

D " When an Act makes one thing void we must see that we do not destroy independent obligations merely because they are contained on the same piece of paper or because apparently they hang together, that is the general principle. "

The continuation of that quotation is of considerable interest :

E " But here the question is whether according to its true construction the Act of 1882 avoids only the Bill of Sale proper or whether with it all the rest of the instrument is to go by the board. It may be said that the covenant to repay the principal money with interest is entirely independent of the assignment of the chattels and that if it had been contained in a separate piece of paper it would have been enforced, although the Bill of Sale was void, and that the fact that it is contained in the same piece of paper can make no difference, but, looking at the Act and reading section 9 by the light of section 8, it appears that when F by section 8 the legislature intended to avoid a Bill of Sale only in respect of the personal chattels comprised in it they said so. In the very next section, section 9, which directs that the form of the Bill of Sale given in the Schedule is to be followed those words which limit the extent of the avoidance are absent and it seems to follow that it was intended to make void the whole Bill of Sale which is not made in accordance with the form in the Schedule. I have come therefore to the conclusion that this G Bill of Sale is void *in toto* ...."

H Counsel for the appellant submitted that whereas under section 9 of the Act of 1882, a form is prescribed which provides for the repayment of a loan and interest, no such form is prescribed in Cap. 193 and therefore the condition to repay with interest is not an integral part of the Bill of Sale and constitutes a separate contract.

As I have said before, the effect of failure to comply with section 7 of Cap. 193 is the same as that of failure to comply with section 9



of the Act of 1882, that is the Bill is rendered void and I respectfully agree with the learned Lord Justice that it is void *in toto*. I do not accept that the undertaking to repay principal and interest is not an integral portion of the Bill of Sale in the instant case so as to create an independent obligation as contemplated by the learned Lord Justice. The Bill of Sale is a security for money lent and to be lent. It stipulates the property which is to be available as security but which is to remain in the possession of the borrower. It is impossible to conceive that the condition to repay the advance is not an integral portion of the transaction. There has been no suggestion that the agreement between the parties was other than that recorded in the Bill of Sale.

I am of the opinion that by reason of the failure of the appellant to re-register the Bill of Sale it became void and *in toto*. A contract that is void must be distinguished from a contract that is illegal. In the latter case all remedies that might be available to a party to a contract are unavailable but where money is paid on foot of a contract that is void an action does lie for money had and received and that is the position here. In my opinion there is no doubt but that the plaintiff would be entitled to claim for money had and received and with reasonable interest thereon. However, in the instant case it must be decided when that right of action arose. It has not been contended, nor do I think it could have been that there was anything inherently defective in the Bill of Sale *ab initio*. Any defect there was arose on failure to re-register. While the Bill of Sale was valid and operative no proceedings might have been instituted save within the terms of the Bill of Sale. It made provision for the repayment of the money advanced and to be advanced by instalments. Therefore time began to run against the appellant as each instalment fell due and he had the remedies available to him under the Bill of Sale. He had no claim, however, for money had and received based on the void Bill of Sale until such time as it became void and that was on the 6th January, 1960. There is nothing in the judgment of the learned trial Judge to indicate if he considered that paragraph 10 of the Bill of Sale created an obligation independently of the Bill of Sale as contemplated in *Davies v. Rees* or not but having regard to my decision in this case it will be open to him on another occasion so to do.

In the circumstances, I am of the opinion that, had the learned trial Judge wished so to do, he was entitled to allow the amendment without involving any conflict with the principle reiterated in *National Provincial Bank Ltd. v. Gaunt*. Being of this opinion I consider the judgment herein should be set aside and the case be remitted to the Supreme Court, that the learned trial Judge may consider, in the light of this decision, whether or not to allow the amendment of the statement of claim and, if so, to decide on the issues raised in the pleadings. I would allow the appellant the costs of this appeal; any other costs being costs in the matter.

MARSACK: V. P.

I have had the advantage of reading the judgment of my brother Trainor J. in this matter and agree as to the order proposed by him

on this appeal. I desire, however, to make some short observations with regard to the law applicable to the facts of this case in so far as we are able to ascertain them.

- A In my opinion, insufficient stress was laid during the argument on the fact that the Bill of Sale in issue in this case was a good and valid document, binding on both parties to it, until the 7th January, 1960. Until that date the remedies of the appellant against the respondent in respect of the transaction between them were those, and only those, set out in the Bill of Sale. Although clause 10 of that document preserves any rights arising on the basis of simple contract between the parties, yet while the Bill of Sale remains in full force and effect I think any action taken by the appellant against the respondent by reason of non-payment of moneys due, or other defaults, would have to be brought under the Bill of Sale. If this view is correct then no right of action arising out of the contract would have accrued to the appellant before that date otherwise than in accordance with the terms of the Bill of Sale and on the authority of that document.

- C Under the Bills of Sale Ordinance, Cap. 193, section 7, failure to re-register by the 7th January, 1960 rendered the Bill of Sale "fraudulent and void". No part of the argument of counsel was directed to the significance of the word "fraudulent" under section 7. It is hard to believe that the Legislature intended that failure to register a perfectly valid document—particularly one that had been in full force and effect for five years—should invest the whole transaction with the attributes of dishonesty and moral wrong ordinarily understood by the use of the word "fraud". If the idea of dishonesty and moral wrong is eliminated from the meaning of "fraudulent" in this section — and I cannot see any justification for the supposition that the omission of a mere formality should be regarded as making the transaction dishonest or morally reprehensible—then the word "fraudulent" in section 7 entails no further legal consequences than those attaching to the word "void". If this view is correct then the words "fraudulent and" in the section are mere surplusage.

- E I think there is force in the argument of counsel for the appellant that section 10 is severable from the remainder of the document and that it is in fact not an integral part of the Bill of Sale. I do not agree that the covenant to repay contained in the document is also severable. The document is in the form of a security over certain property given to secure repayment of the moneys owing plus interest in the manner specified in the document. The covenant to repay must therefore be regarded as an integral part of the Bill of Sale which becomes void upon failure to re-register. Clause 10, which preserves rights arising independently of the Bill of Sale, is in a different position.

- F Whether, however, Clause 10 is severable or not, the appellant is not left without his remedy. Equity will not suffer a wrong to be without a remedy, and this equitable right to repayment in the case of money had and received to the use of the debtor is well recognised. For the purpose of this appeal the important question is as to when the remedy thus available to the appellant arose. In the course of

the argument in the court below and in the judgment of the learned trial Judge it would seem to be assumed that any rights independently of the document itself arose at the time of the original transaction, namely the 7th January, 1955; and the Statute of Limitations would start to run from that date.

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In my view, however, as I have stated, any right of action vested in the appellant prior to the 7th January, 1960, arose by virtue of the Bill of Sale and he could not have taken action except under the Bill of Sale. The effect of section 7 was to render the Bill of Sale void, not *ab initio*, but from the time when its original registration expired and was not renewed. Time under the Statute of Limitations begins to run when the cause of action accrues. The cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to enable the plaintiff to succeed. The cause of action, independently of the covenant to repay contained in the Bill of Sale did not accrue in my opinion until the document became void under section 7 upon failure to re-register; that is to say the 7th January, 1960.

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If that view is correct, the learned trial Judge in considering the application for leave to amend need not have felt himself bound by the judgment in *National Provincial Bank Limited v. Gaunt* [1942] 2 All E.R. 112. The precise point referred to in this judgment as to the time from which the Statute began to run was not argued before us, and apart from that this Court has not necessarily been put in possession of all relevant facts. But in the absence of compelling authority to the contrary, I am of opinion that the law is as I have stated it, and the learned trial Judge should not have considered his discretion fettered by the judgment quoted.

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I agree that the judgment dismissing the plaintiff's claim should be set aside, and the case should be remitted to the court below for the trial Judge to review the question of granting leave to amend in the light of this judgment, and if leave is then granted should impose such terms as he thinks fit.

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I agree that the appellant should have his costs of this appeal, but that costs in the court below should be costs in the cause.

KNOX-MAWER J. A.

I have had the opportunity of reading the judgments of Marsack, Acting President, and Trainor, J.A., and I am in accordance with them.

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Upon the facts placed before this court, I agree that the decision in *National Provincial Bank Ltd. v. Gaunt* [1942] 2 All E.R. 112, did not, *per se*, oblige the learned trial judge to refuse the appellant's application to amend his statement of claim.

I concur in the order set out by my learned brothers in their judgments.

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*Judgment of Supreme Court set aside; remitted for further hearing.*