

SURUJ KUMARI

v.

REWA DEVELOPMENT LIMITED

[HIGH COURT, 1989 (Jesuratnam J) 10 February]

Civil Jurisdiction

Land- Crown (State) land- mortgage- whether an agreement to mortgage crown land requires consent- whether a mortgage is created upon agreement or upon registration- Crown (State) Lands Act (Cap 132) Section 13- Land Transfer Act (Cap 131) Sections 5, 37.

The Plaintiff mortgagor sought to restrain the mortgagee from exercising its powers of sale. The Plaintiff's case was that the mortgage had been executed prior to obtaining the consent of the Director of Lands and was accordingly void. The High Court dismissed the Plaintiffs application and HELD: that a mortgage is not created until it is registered and that since the registration did not take place until after the consent of the Director had been obtained it was not void for want of consent.

Cases cited:

Chalmers v. Pardoe [1963] 3 All ER 552

Phalad v. Sukh Raj (FCA Repts 78/471)

A. Khan for the Plaintiff

V. Maharaj for the Defendant

Interlocutory application in the High Court.

Jesuratnam J:

In this matter the plaintiff seeks an extension (and the defendant the dissolution) of an interim injunction I issued restraining the defendant from proceeding with the mortgage sale.

The plaintiff, Suruj Kumari, as the sole trustee and executrix of the estate of Ganga Dei, is suing the defendant, Rewa Development Ltd, for a declaration that the mortgage no. 196120 of 23.11.1982 entered into by the late Ganga Dei with the defendant is null and void because it, inter alia, contravenes section 13 of the Crown Lands Act according to which the consent of the Director of Lands must be "first had and obtained" before the execution of a mortgage relating to land governed by that section. The land in question, which is the subject of the present mortgage, admittedly comes within the purview of section 13 of the Crown Lands Act.

It is the case of the plaintiff that this mortgage was executed on 23.11.82 whereas

the consent of the Director of Lands was obtained only on the subsequent day i.e. on 24.11.82 and that therefore the mortgage is in breach of section 13 and is thus unlawful and unenforceable.

A

Mr. Maharaj for the defendant argues that a mortgage becomes effective only when the consent of the Director of Lands has been obtained and the instrument is registered. He states that this mortgage was executed on 23.11.82, the consent of the Director of Lands was obtained on 24.11.82 and it was registered on 25.11.82. His point is that at the time of registration the consent of the Director had been given and therefore section 13 has been complied with.

B

Mr. Maharaj further argued that the breach, if any, is only a technical one and the fact that the Director endorsed his consent on the document on 24.11.82 nullified any prior breach. I do not agree with this argument. If there had been a breach of section 13 it seems to me that the breach is incurable. Section 13 is in imperative terms and is analogous in many respects to section 12 of the Native Land Trust Act. Any breach of section 13 will vitiate the mortgage.

C

What is prohibited under section 13 of the Crown Lands Act is a "mortgage" in terms whereas under section 12 of the Native Lands Trust Act one has to look for the meaning of the word "dealing" before classifying whether the prohibited act falls within the term unless of course the prohibited act is "sale", "transfer" or "sublease" which are specifically mentioned.

D

The crucial question in this case therefore is when does a "mortgage" become a mortgage. Is it at the time the mortgage document is executed? Or is it at the time when it is registered by the Registrar.

E

The Land Transfer Act (Cap. 131) defines "mortgage" as meaning "any charge on land or any estate or interest therein, created under the provisions of this Act for securing (a) the repayment of a loan".

Section 37 of the Land Transfer Act states:-

F

"No instrument until registered in accordance with the provisions of this Act shall be effectual to create, vary, extinguish or pass any estate or interest or encumbrance in, on or over any land subject to the provisions of this Act, but upon registration the estate or interest or encumbrance shall be created, varied, extinguished or passed in the manner and subject to the covenants and conditions expressed or implied in the instrument."

G

Section 5 of the Land Transfer Act brings in this land along with other types of lands within the purview of the Land Transfer Act.

It is therefore clear and beyond doubt that a mortgage of land becomes effective only on registration. All steps taken and arrangements made prior to registration are really on the threshold. The mere execution of a document of mortgage does

not seem to be more than a piece of paper.

It seems to be really an agreement to mortgage. It becomes effective and legal as a mortgage only on registration. Any earlier steps taken are without legal consequences. Nor can such steps be illegal or unlawful.

A

A mere agreement to mortgage which the instant "mortgage" was on 23.11.82 is not illegal or unlawful. There are a number of authorities which considered the analogous provision of section 12 of the Native Land Trust Act according to which prior agreements to lease or sublease before the necessary consent of the NLTB is obtained are not unlawful or void.

B

The Privy Council said in the classic case of Chalmers v. Pardoe [1963] 3 All ER 552 at p. 557:-

"It is true that in [Harnam Singh and Backshish v. Bawa Singh (1958-59) F.L.R. 31] the Court of Appeal said that it would be an absurdity to say that a mere agreement to deal with land would contravene section 12, for there must necessarily be some prior agreement in all such cases. Otherwise there would be nothing for which to seek the Board's consent"

C

The Fiji Court of Appeal said in Phalad and Sukh Raj (FCA Reps. 78/471):-

D

"The cases already cited show that the courts have held that the mere making of a contract is not necessarily prohibited by section 12".

In those cases it was laid down that what were prohibited were the acts done in pursuance of the agreements prior to consent. It should also be remembered that section 12 of the Native Land Trust Act refers to "dealing" in land which can occur in a multitude of situations. There can be "dealing" in land in a thousand and one ways. Agreement coupled with some acts can cover the situation.

E

But in section 13 of the Crown Lands Act the word "mortgage" is in terms specifically used as one of the prohibited acts whereas in section 12 of the Native Land Trust Act the word "dealing" covers all the prohibited acts. And the word "mortgage" has a specific technical and legal meaning as defined in the Land Transfer Act. The meaning of mortgage is restricted to its definition.

F

In the case of a mortgage the "mortgage" or the agreement to mortgage becomes a mortgage only on registration. There are no prior stages of a mortgage which can be said to be prohibited by themselves and fall into the prohibited class of acts.

G

I am therefore of the view that in the instant case the effective date on which the mortgage came into legal existence was the date of its registration which was 25th November, 1982. The consent of the Director had been obtained on the 24th

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November, 1982. The mortgage does not therefore contravene section 13 of the Crown Lands Act. It is lawful and is in order.

A Mr. Khan for the plaintiff also raised 2 other objections against the mortgage. On the second objection he argued that the mortgage is null and void as the defendant is an unlicensed moneylender and the lending transaction is therefore unlawful and unenforceable.

B There is no evidence in this case that the defendant was engaged in the "business" of money-lending. Admittedly the instant case is one of mortgage of land to secure a loan. I do not see any merit in this argument.

Mr. Khan abandoned his third objection that in entering into the mortgage transaction the defendant acted ultra vires its articles and memorandum of Association of the defendant company.

C I therefore dissolve the interim injunction with costs.

(Application granted; injunction dissolved.)

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