

UGANDA / JUDGMENT

Tricumdass v Official Assignee and Another (C.A. 19/1934.) [1937] EACA 175 (1 January 1937) [1937] EACA 175

COURT

East African Court of Appeal

BEFORE

Abrahams CJ, Ag P (Uganda), Law, C.J (Zanzibar),
McDougall, Ag. C.J. (Tanganyika)

CASE / FILE NUMBER

C.A. 19/1934.

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COURT OF APPEAL FOR EASTERN AFRICA.

Before ABRAHAM, C. J., Ag. P. (Uganda), LAW, C. J. (Zanzibar), and McDougall, Ag.
C. J. (Tanganvika).

MORARJI TRICUMDASS (Appellant) (Original Applicant) $\mathbf{v}$ \$.

1. THE OFFICIAL ASSIGNEE, Assignee of the estate and Effects of Salam bin
Abdullah El-Rivami, and

2. THE WAKF COMMISSIONERS OF THE ZANZIBAR PROTECTORATE

(Respondents) (Original Respondents).

C. A. \$19/1934\$.

- Mortgage by an insolvent to a moneylender—Insolvency Decree (Zanzibar) Article 18, Schedule II—Moneylenders Decree. section 10—Necessity for note or memorandum in writing signed by borrower—English Moneylenders Act, section 6— Difference between English Act and Zanzibar Decree—Whether mortgage deed itself or a writing under the hand of the borrower a sufficient compliance with section 10—Whether proof that the writing was transmitted to the borrower—Estoppel—Rights and duties of a trustee in bankruptcy when examining a proof of debt.

- Held.-That, as no note or memorandum of the contract in writing signed by the borrower was made or sent to him within seven days of the contract as required by section 10 of the Moneylenders Decree of Zanzibar, H. B. M. High Court of Zanzibar was correct in dismissing an application for an order that properties mortgaged by an insolvent should be sold and the proceeds applied in payment of moneys secured by the mortgage deed.
Observations on difference between Zanzibar Decree and English Moneylenders Act.
Observations on duties and rights of trustees in bankruptcy in examining proofs of debt.
Following cases referred to, viz.: Lyle v. Chappell (1931) 1 K. B. 691, and In re Van Laun (1907), 1 K. B. 155.

Ghulam Ali for Appellant.

Wiggins for Respondent.

Ghulam Ali.—On 1st April, 1932, Rs. 329 only was owing. Insolvent's own cross-examination shows he is not such a fool as he makes out. Wakf deed, insolvent hardly the moving A certain book was not produced as an ordinary book of spirit. It is a memo within section 10 of Moneylenders account. Decree. If any memo was required apart from a copy of mortgage deed, which is a memo in itself; Ex. 6 p. 41 is a memo; Ex. 7 is a cash book. I agree that the memo must be apart from the security. The English law is that the memo must

precede the security: There was a new loan, not a substituted security for an existing loan. Lyle v. Chappell (1931), 1 K. B. 691. This is a new contract. Is there consideration for the new contract? Indian Contract Act, section 62; and section 59. Gaskell, Ltd. v. Askwith (1929), 45 T. L. R., p. 566. As to the shambas, they ought to be paid for.

Wiggins.—Not against the weight of evidence. $\mathbf{E} \cdot \mathbf{x}_{-6}$ Promissory Note on 1-4-32; Rs. 329. Sum was not advanced on this day. As to all the promissory notes, no copies were given. Therefore no copy of memorandum given as required by section 6. Chits said to be given. Not signed by borrower or Section 10, decree requires principal and interest. $\text{For } \text{quad}$ lender. these notes there was substituted a mortgage at a later date; nothing said about this in the memo of appeal. Substituted security, Cuthbert and Another v. Haley, 101 E. R. 1450 at p. 1451. The mortgage contains no particulars of the transaction. old loan declared to be paid off. Where is the interest stated? Lancashire Loans, Ltd. v. Black (1934), 1 K. B. at p. 406. The true nature of the contract is not set out. Even if Ex. 6 is a memorandum, the borrower received no copy. (1907), 1 K. B. 155 at p. 162, In re Van Laun, no estoppel against Official Assignee. The Wakf Commissioners have the right under the Moneylenders Decree to intervene.

Ghulam Ali replied.—Cuthbert v. Haley does not apply. The Moneylenders Decree only makes the contract, etc. unenforceable. The promissory notes were due and payable.

ABRAHAM, Ag. P.—This is an appeal from the judgment of the Acting Chief Justice of Zanzibar dismissing an application for an order that certain properties mortgaged by an insolvent should be sold and the proceeds be applied in payment of moneys secured by the mortgage deed.

The insolvent, a young Arab named Salim bin Abdulla, had borrowed money extensively from the applicant, an Indian moneylender, in a race against time to dissipate as much of his property as possible. In between the first and the twentyfifth of April, 1932, he had borrowed sums which the applicant's accounts showed to have amounted to Rs. 13,867. He had also purported to purchase from the applicant during that time four shambas valued by the applicant at Rs. 5,000. As a security for each sum lent and for the price of the shambas a promissory note was given—seven notes in all. On the 25th April these various transactions were particularly set out on a piece of paper to which the following statement was subjoined: "25-4-32: To Rs. 18,867 due as above on account of which you have mortgaged two stone houses and one shamba of yours, and four

shambas purchased by you from us, in all seven properties, on which you have executed a mortgage, Rs. 18,867". Underneath this was written in Swahili in the insolvent's writing: "I have received the account of Rs. 18,867, which is correct". This piece of paper was exhibited at the trial as Ex. 6

On the same day the parties executed a mortgage deed whereby the insolvent, described therein as the mortgagor, mortgaged to the applicant, described as the mortgagee, seven shambas in consideration of a sum of Rs. 18,867, paid by the mortgagee to the mortgagor. The mortgagor covenanted to pay the said sum on the 23rd of October, 1932, and there was a covenant to pay interest at 15 per cent per annum. Incidentally, the insolvent had made two of these shambas wakt twenty-four days earlier. The insolvent failed to pay the sum due and on his bankruptcy the moneylender applied to the High Court. Zanzibar, for an order as aforesaid. The application was subject to the provisions of Article 18 of the Second Schedule to the Insolvency Decree. The terms of that Article. I do not find it necessary to discuss.

The Official Assignee at the trial contended that the applicant was a moneylender and was not entitled to succeed as he had not made compliance with the terms of section 10 of the Moneylenders Decree, 1928. The learned Acting Chief Justice sustained that contention and we are now called upon to decide whether that contention is sound.

Section 10 of the Moneylenders Decree declares that no contract for the repayment by a borrower of money lent by a moneylender or for payment of interest on money so lent, and no security by the borrower in respect of such contract shall be enforceable unless there is made a note or memorandum of the contract in writing signed by the borrower a copy of which must be sent to him within seven days of the making of the contract. This note or memorandum must contain all the terms of the contract, and in particular must show the date of the loan, the amount of the principal, and the interest charged.

The foregoing enactment follows the terms of section 6 of the English Moneylenders Act with the important difference that the English Act contains a provision that requires the contract to be made and signed before the money is lent or the security given, albeit on the same day. It follows that two writings are required by English law. Mr. Wiggins, for the respondent, concedes that if the security itself (in this case the mortgage deed) contained all the terms of the contract as

required by section 10 that would be a sufficient compliance with the section. The learned Acting Chief Justice hints that he does not necessarily agree that the Zanzibar law does not require a written contract as distinct from a statement in the security itself. That question is not before us, so I give no opinion upon it, but cannot avoid indicating my inability to understand why the Zanzibar legislature did not think fit to follow the English statute in so important a respect.

Counsel for the appellant contends that section 10 of the Moneylenders Decree has been complied with either by virtue of the writing Ex. 6, or the mortgage deed or both read together. Now the mortgage deed was given by way of security for a new loan of Rs. 18,867, or by way of a substituted security for the promissory notes given to secure the several transactions above mentioned totalling the aforesaid amount. Counsel for the appellants gave me the impression that he was not sure which. Assuming the former alternative, section 10 has certainly not been observed for, to say the least of it, there is no indication that a fresh loan had been made, since there is no statement in either of the documents that the money advanced had been appropriated to paying the total sum made up of the individual amounts secured by the various promissory notes, all of which have been shown to be cancelled. In this connection *Lyle v. Chappell* (1931), 1 K. B. 691 is illuminating. Further, if the paper Ex. 6 is to be taken to represent the note or memorandum, either *per se* or in conjunction with the mortgage deed, there is no proof that any copy of it was transmitted to the borrower as required by section 10, nor do I regard the acknowledgment by the borrower on Ex. 6 as an indication that he was purporting to sign any such document.

Then, if it is submitted that the mortgage deed is a substituted security for the promissory notes the appellant is in no better case, since each individual loan secured by promissory note required a note or memorandum in accordance with the terms of section 10. This is shown never to have been done by separate document, and an examination of each security shows that in no instance can it be said it complies with the Whichever submission is adopted by the appellant conditions. he is defeated.

Counsel for the appellant has submitted, though without much energy, that the admission of the insolvent in his written statement in the High Court that he had received Rs. 18,867 from the appellant ought to have estopped the Official Assignee from calling in aid the Moneylenders Decree. I am of opinion that there is no substance in this submission. In *in re Van Laun* (1907), 1 K. B. 155 Bigham J. said at p. 162: "The trustee's

right and duty when examining a proof for the purpose of admitting or rejecting it is to require some satisfactory evidence that the debt on which the proof is founded is a real debt. No judgment recovered against the bankrupt, no covenant given by or account stated with him can deprive the trustee of this right. He is entitled to go behind such forms to get at the truth, and the estoppel to which the bankrupt may have subjected himself will not prevail against him". It results then that this appeal should be dismissed, and I would dismiss it with costs here and below.

LAW, C. J.-I agree.

McDougall, Ag. C. J.-I agree.

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