

## CHANDIRAM AND ANOTHER v. GHANA COMMERCIAL BANK

### JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

20<sup>TH</sup> JUNE, 1960

**CORAM: COR. LORD TUCKER, LORD JENKINS, LORD MORRIS OF BORTH-Y-GEST**

*Mortgage | Equitable mortgage in favour of Bank | Subsequent attachment under writ of fi.fa | Subsequent invalid legal mortgage in favour of second Bank | Effect | Sale of property under fi.fa | Sale subject to equitable mortgage.*

### CASE SUMMARY

On July 16, 1954 Holomah created an equitable mortgage in respect of property owned by him by deposit of the title deeds with Barclays Bank. On September 4, 1954 the title deeds were forwarded to the Ghana Commercial Bank to be held on behalf of Barclays Bank. On September 25, 1954 the property was attached by a judgment creditor of Holomah under a writ of fi.fa. On October 27, 1954 Holomah executed a legal mortgage of the attached property in favour of the Ghana Commercial Bank and on the same day that Bank repaid Barclays the amount owing to it on the security of the equitable mortgage of 16th July, 1954. Holomah let the attached property on November 4, 1954 to one Mensah and the tenant was in possession when the attached property was sold to Chandiram on April, 16, 1955. Chandiram brought an action against the tenant and the Commercial Bank of Ghana claiming declaration of title, recovery of possession, damages for trespass and mesne profit.

Held:

(1) the legal mortgage by Holomah to the Ghana Commercial Bank was null and void by virtue of Order 43, rule 7 of the Supreme Court (Civil Procedure) Rules, 1954.

(2) the attachment of September 25, 1954 took effect subject to the Barclays Bank interest as equitable mortgagees.

(3) being outside the ambit of the attachment, the benefit of Barclays Bank equitable mortgage continued after the 25th September, 1954 to be capable of assignment or devolution whether by express disposition or by operation of law or by the application of equitable principles, just as it would have been if the attachment had never taken place. Accordingly, by paying the amount due to Barclays Bank, the Ghana

Commercial Bank became entitled to the benefit of the equitable charge with the same priority for the amount thereby secured as had therefore been enjoyed by Barclays Bank.

(4) the purchaser, Chandiram as between himself and the Ghana Commercial Bank, was absolutely entitled to the property, subject to the charge thereon created by the equitable mortgage and entitled as against the Ghana Commercial Bank to the possession or receipt of the rents and profits of the premises unless and until otherwise ordered in proceedings later to enforce the equitable mortgage.

#### CASES REFERRED TO

(1) Dadzie v. Kojo and Another 6 W.A.C.A. 139.

(2) Wickham v. The New Brunswick and Canada Railway Co. (1865) L.R.1.P.C. 64.

(3) Butler v. Rice [1910] 2 Ch. 277.

(4) Chetwynd v. Allen [1899] 1 Ch. 353.

#### NATURE OF PROCEEDINGS

APPEAL from a decision of the Court of Appeal dismissing an appeal against the judgment of the High Court (save as to a variation as to mesne profits) in favour of the plaintiff. The judgment of the Court of Appeal is reported in 3 W.A.L.R. 518, sub nom. Chandiram v Mensah.

#### JUDGMENT OF LORD JENKINS

Lord Jenkins delivered the judgment of the Board: This case concerns competing interests in certain real property at Accra, the rival claimants being Ghana Commercial Bank, formerly the Bank of the Gold Coast, defendants in the action and now appellants (hereinafter called "the Ghana Bank"), who claim to be mortgagees of the property; and D. T. Chandiram, plaintiff in the action and now respondent (hereinafter called "the purchaser"), who claims to have bought the property at an execution sale free from the alleged mortgage. Also concerned in the litigation is one J. Mensah (hereinafter called "the tenant") who, in his capacity as Manager of St. John's Grammar School at Accra, was in possession of the property as tenant at the date of the execution sale, but who thenceforth, according to the purchaser, became a trespasser, by refusing to attorn tenant to the purchaser and insisting on paying his rent (£G75 per month) to the Ghana Bank, who demanded such payment on the strength of the alleged mortgage. The purchaser accordingly joined the tenant as a defendant along with the Ghana Bank, and he has been made a respondent in the present appeal but was not represented at the hearing before their Lordships.

The action was brought by the purchaser as plaintiff in the Land Court at Accra claiming against both defendants jointly and severally:-

"(a) A declaration of his title of ownership to the said premises;

(b) £G500 general damages for trespass;

(c) £G2,025 as mesne profits at the rate of £G75 a month as from the 16th April, 1955" (the date of the execution sale) "to the 15th September, 1956" (the end of the last whole month prior to the issue of the writ on the 26th September, 1956) "and any further sums of money by way of mesne profits that will have accrued up to the date of judgment.

(d) Recovery of possession."

The case was tried in the Land Court before Ollennu, J., who by a judgment and decree dated 3rd September 1957, granted the purchaser the relief claimed (save that he reduced the claim for damages for trespass to £G100) with costs. He assessed the mesne profits at £G75 per month from the 16th April, 1955 to 15th September, 1957 and found them to amount to £G2,925; and he directed that the recovery of possession should take effect from the 15th September 1957.

From that judgment and decree both defendants appealed to the Court of Appeal of Ghana (Korsah, C.J., van Lare and Granville Sharp, JJ.A.) who by a judgment and decree dated the 2nd December, 1958 dismissed the appeal, save that the learned judge's calculation of the mesne profits was corrected from £G2,925 to £G2,175. From the last-mentioned judgment and decree the Ghana Bank now appeals to this Board.

The facts can be shortly stated.

On the 16th July, 1954 one Ebenezer Ofue Holomah (hereinafter called "the debtor"), who was then the owner of the property in dispute, created an equitable mortgage upon it in favour of his bankers Barclays (D.C. & O.) Ltd. (hereinafter called "Barclays") by the usual method of depositing with Barclays the title deeds to the property, together with a Memorandum of Deposit signed by him and stating (to put it shortly) that the deeds had been so deposited with the intent to create an equitable mortgage on all the hereditaments and property comprised therein for assuring the payment and discharge on demand of all moneys and liabilities then or thereafter due from or incurred by the debtor to Barclays. The memorandum contained a usual form of undertaking on the part of the debtor to execute on demand a legal mortgage of the property to Barclays in such form and with such provisions and powers of sale leasing and appointing a receiver as Barclays might require. The deeds were not in fact retained in the physical possession of Barclays, but were held on their behalf by their solicitor, Mr. H. V. A. Franklin. It is not suggested that this circumstance has any material bearing on the case.

On the 4th September, 1954, Mr. Franklin sent the deeds to the Ghana Bank with a letter in which he stated that the debtor had requested him to hand them to the Ghana Bank, and that he had obtained Barclays' permission to do so against the Ghana Bank's undertaking to hold them on their behalf. According to the evidence of Kwasi Amoako Atta, the credit manager of the Ghana Bank, the deeds were received

by him on the 9th September. There was no evidence as to the reason for this change in the custody of the deeds, but it did not materially alter Barclays' position. It was simply a substitution of the Ghana Bank for Mr. Franklin as the agents by whom the deeds were to be held on Barclays's behalf.

On the 24th September, 1954 a writ of fi. fa. for the attachment of the property was issued under the hand of the Chief Justice at the instance of one M. D. Bassil who had obtained a judgment dated the 27th July, 1954 against the debtor in the Divisional Court, Sekondi. The attachment was made by an attachment notice issued by the deputy sheriff and dated the 25th September, 1954. No question is raised as to its validity. It prohibited the debtor from "alienating the property by sale, gift, or in any other way and" all persons were thereby prohibited "from receiving the said property by purchase, gift or otherwise". On the same date auction notices were issued by the deputy sheriff advertising the property for sale on the 18th October, 1954.

The attachment was effected under Order 43 of the Supreme Court (Civil Procedure) Rules, 1954. Order 43 includes the following provisions:-

"4. If the judgment be for money, and the amount thereof is to be levied from the property of the person against whom the same have been pronounced, the Court shall cause the property to be attached in the manner following.

7. Where the property shall consist of lands, houses, or other immovable property, or any interest therein, either at law or in equity, the attachment shall be made by a written order of the Sheriff prohibiting the judgment debtor from alienating the property by sale, gift, or in any other way, and all persons from receiving the same by purchase, gift, or otherwise, and the Sheriff may also, by direction of the Court, take and retain actual possession thereof.

"11. After any attachment shall have been made by actual seizure, or by written order as aforesaid, and in case of an attachment by written order, after it shall have been duly intimated and made known in manner aforesaid, any alienation without leave of the Court of the property attached, whether by sale, gift, or otherwise, and any payment of the debt or debts, or dividends, or shares to the judgment debtor during the continuance of the attachment, shall be null and void, and the person making such alienation or payment shall be deemed to have committed a contempt of Court."

The debtor applied for and obtained a stay of execution pending an appeal, which was unsuccessful. Ultimately fresh notices of attachment and auction were issued on the 13th January, 1955, and the property was ultimately sold to the purchaser on the 16th April, 1955. It was held in both courts below that notwithstanding the stay of execution the attachment effected on the 25th September, 1954 remained in full force, and the contrary was not argued before their Lordships.

On the 27th October, 1954 the debtor executed a legal mortgage of the property in favour of the Ghana Bank. By this document (to put it shortly) the debtor covenanted with the Ghana Bank to pay on demand all such sums as then were or should from time to time become owing by him to the Ghana Bank (inter alia) on balance of current account and/or loan account and/or any other account sanctioned by the

Ghana Bank, with interest at the rate of 7 per cent. on the balance from time to time owing, and conveyed the property to the Ghana Bank its successors and assigns for ever, subject to the proviso for redemption therein contained. Their Lordships do not find it necessary to refer further to the terms of this legal mortgage except to mention that it ended with a provision to the effect that the legal mortgage was not to prejudice or affect the security created by any deposit which might already have been made with the Ghana Bank of the deeds relating to the property or any other securities the Ghana Bank might then or at any time thereafter hold for the moneys thereby secured or any part thereof.

On the same day (27th October, 1954) the Ghana Bank paid to Barclays the sum owing to Barclays on the security of the equitable mortgage of 16th July, 1954, retaining in their custody the deeds which had been passed to them by Mr. Franklin to hold on Barclays' behalf. There is no evidence as to the amount owing to Barclays Bank on the 27th October, 1954, but counsel for the purchaser in his opening speech appears to have put the amount in respect of which the legal mortgage was given by the debtor at £G4,000.

On the 4th November, 1954 the debtor let the property to the tenant on a monthly tenancy at a rent of £G75 per month, and the tenant was in occupation of it at the date of the sale to the purchaser.

As already mentioned that sale took place on the 16th April, 1955. Prior to the sale the Ghana Bank had requested the Deputy Sheriff to institute interpleader proceedings, but, for whatever reason nothing came of this.

In view of an argument addressed to their Lordships by Mr. Quass Q.C. (for the Ghana Bank) as to the scope and effect of the attachment, it is right to notice that the judge's certificate of sale dated the 29th June, 1955 described the subject matter of the sale as consisting of "the right title and interest" of the debtor in the property.

On the 25th July, 1955 the Ghana Bank's solicitor wrote to the tenant a letter stating that the legal estate in the property was vested in the Ghana Bank under and by virtue of the legal mortgage of the 27th October, 1954, and requiring the tenant to pay all rent which was then or should thereafter become payable in respect of the property to the Ghana Bank or its duly authorised agent.

On the 28th July, 1955 the purchaser's attorney wrote to the tenant informing him of the sale of the property to the purchaser on the 16th April, 1955 and requiring the tenant as from that date to pay the rent of £G75 per month in respect of the property to the writer as such attorney.

On the 13th August, 1955 the tenant wrote to the purchaser's attorney to the effect that the tenant was paying to the Ghana Bank according to their instructions all rents accruing in respect of the property, which course was thereafter persisted in by the tenant in accordance with the Ghana Bank's demand.

In these circumstances the present proceedings were on the 26th September, 1956 brought by the purchaser against the tenant and the Ghana Bank claiming (so far with success) the relief above described.

The learned trial judge at any early stage in his judgment said:- "It is agreed by counsel for the parties that the main question to be determined in the suit is, in whom was the legal estate in the property vested on the date of attachment?" and this statement is fully justified by reference to the notes of counsel's arguments in the record.

Then, after a full statement of the facts, the learned judge went on to hold that the attachment of the property made on the 25th September, 1954 was never lifted (this being a reference to the stay of execution on which some reliance had apparently been placed on the part of the Ghana Bank); that Barclays never at any time transferred their equitable mortgage on the property to the Ghana Bank, but merely created them their agents for the custody of the title deeds; that consequently the Ghana Bank never acquired any proprietary interest which was subsisting or could subsist on the 25th September, 1954, but were on that date holding the title deeds merely as agents or bailees of Barclays. So far the learned judge was clearly right, if his intention was merely to describe the position as matters stood on the 25th September, 1954, but his statements to the effect that Barclays "never at any time" transferred their equitable mortgage to the Ghana Bank, and that the Ghana Bank "never acquired any proprietary interest legal or equitable in the property," required further examination if and so far as they are intended to apply to the period between the date of the attachment and the date of the execution sale. The learned judge went on to say that "the legal estate and beneficial interest was on the 25th September, 1954 vested in 'the debtor' and in no other person."

In saying this the learned judge appears to have overlooked the important circumstance that on the 25th September, 1954, the debtor's interest in the property was subject to Barclays' equitable mortgage. As to the legal mortgage given by the debtor to the Ghana Bank on the 27th October, 1954, the learned judge held that the execution of this mortgage by the debtor while the attachment was subsisting without the leave of the court, and the acceptance of it by the Ghana Bank, were in contravention of the provisions of Order 43, Rule 7, and that accordingly by virtue of the provisions of Order 43, Rule 11 this mortgage was null and void. It will be observed that the learned judge said nothing as to the effect on Barclays' equitable mortgage of the payment by the Ghana Bank to Barclays on the 27th October, 1954 of the balance then owing from the debtor to Barclays on that security. It is clear from the learned judge's note of the argument addressed to him by the defendants' counsel that the point was taken that even if the legal mortgage was null and void the Ghana Bank still had the benefit of Barclays' equitable mortgage, having "stepped into the shoes" of Barclays on paying them the amount due under it.

In fairness to the learned judge it is right to say that before him the defence based on the continuance of the equitable mortgage for the benefit of the Ghana Bank (as distinct from the argument based on the contention that the Ghana Bank had acquired the legal estate by virtue of the legal mortgage of the 27th October, 1954) seems not to have been accorded the major importance attached to it at the hearing

of the present appeal. Moreover, before the learned judge the claim to the benefit of the equitable mortgage seems to have been based primarily on the erroneous ground that there had been a transfer of the equitable mortgage on the 9th September, 1954, when the Ghana Bank received the title deeds from Mr. Franklin; and this may have led the learned judge to overlook the alternative claim to the effect that the Ghana Bank acquired the benefit of the equitable mortgage by paying off Barclays on the 27th October, 1954.

Be that as it may, the learned judge concluded that the purchaser acquired the whole of the right title and interest which the debtor had in the property on the 25th September, 1954, comprising the legal estate and beneficial interest, and the consequential right to immediate possession.

He went on to hold that the tenant became a trespasser the moment he refused to acknowledge the title of the purchaser; and that the Ghana Bank were also trespassers in that they claimed to be entitled to possession and had authorised the tenant to continue to occupy the premises upon payment of the monthly rent to the Bank. On this basis he made the order detailed above against the tenant and the Ghana Bank jointly and severally for damages, mesne profits and recovery of possession of the premises by the purchaser.

In the Ghana Court of Appeal van Lare, J.A. delivered a judgment with which the other two members of the court agreed. That judgment contains the following statement of the law relating to the position of a purchaser under the execution of a *fi. fa.*, which appears to their Lordships to be wholly correct:—

"The law is clear that a purchaser of a property under the execution of a *fi. fa.* steps into the shoes of the judgment debtor, and purchases no more than the estate of the judgment debtor in the property. In other words, what is sold and what is bought at a sale in execution is the right, title and interest of the judgment debtor (*Dadzie v. Kojo and Another*, 6 W.A.C.A. 139). It therefore follows that, if certain property which is attached under execution by way of *fi. fa.* turns out to be in any way encumbered, the purchaser buys subject to that charge or incumbrance." (3 W.A.L.R. at p. 520).

The learned Justice of Appeal went to say that the case would have taken a different turn had Barclays still remained at the date of sale the party interested in the encumbrance, thereby, as it seems to their Lordships, indicating the view that, in accordance with his statement of the law as quoted above, Barclays, had they retained the equitable mortgage, could have enforced it against the property in the hands of the purchaser.

Nevertheless, the learned Justice of Appeal went on to conclude that the appeal should be dismissed, it would seem on the grounds that Barclays ceased to have any interest in the property on being paid off by the Ghana Bank on the 27th October, 1954; that there was no formal assignment of Barclays interest to the Ghana Bank; that the legal mortgage given by the debtor to the Ghana Bank on the 27th October, 1954 was null and void by virtue of the provisions of Order 43 above referred to; and

accordingly that the Ghana Bank had no interest, legal or equitable, in the property at the date of the execution sale.

Their Lordships agree that the legal mortgage of the 27th October, 1954 must be taken to have been null and void, and are unable to accept the submission made by Mr. Quass Q.C. to the effect that the legal mortgage should be related back to the date of the equitable mortgage on the ground that it was merely an implementation of the debtor's undertaking contained in the latter document to execute a legal mortgage when required to do so by Barclays. It appears to their Lordships that the legal mortgage was on the face of it intended to constitute a new and distinct security. But this by no means compels the conclusion that the Ghana Bank did not become entitled to the benefit of Barclays' equitable mortgage on paying to Barclays on the 27th October, 1954 the balance owing on that security.

In their Lordships' opinion it follows from their acceptance of van Lare, J.A.'s statement of the law as quoted above (to which may be added a reference to the observations of Lord Chelmsford in *Wickham v. The New Brunswick & Canada Railway Co.* L.R.1 P.C. 64 at pp. 75, 76) that the attachment of the 25th September, 1954 took effect subject to Barclays' interest as equitable mortgagees.

It furthermore appears to their Lordships that, being outside the ambit of the attachment, the benefit of Barclays' equitable mortgage continued after the 25th September, 1954 to be capable of assignment or devolution, whether by express disposition or by operation of law or by the application of equitable principles, just as it would have been if the attachment had never taken place.

The case thus turns upon the question whether the payment by the Ghana Bank to Barclays on the 27th October, 1954 of the amount then owing on the security of Barclays' equitable mortgage had the effect of entitling the Ghana Bank to the benefit of the equitable mortgage with the like priority over the purchaser's interest as it had possessed in the hands of Barclays at the date of such payment off.

It is not open to doubt that where a third party pays off a mortgage he is presumed unless the contrary appears, to intend that the mortgage shall be kept alive for his own benefit, see *Butler v. Rice* ([1910] 2 Ch. 277 at pp. 282, 283).

In the present case it has been contended that the execution of the abortive legal mortgage sufficed to negative any such intention.

Their Lordships cannot agree. While not disputing that the Ghana Bank's intention was to substitute the legal mortgage for the equitable charge, they find it impossible to accept the view that the Ghana Bank intended the equitable charge to be extinguished in the event of the legal mortgage proving for any reason to be invalid or ineffective. In other words their Lordships take the intention of the Ghana Bank to have been to replace the equitable charge by a valid and effective legal mortgage, but to keep it alive for their own benefit save in so far as it was so replaced. See *Butler v. Rice* (supra) and *Chetwynd v. Allen* ([1899] 1 Ch. 353). Their Lordships would add that if it is legitimate to look at the abortive legal mortgage for this purpose, the view they have formed as to the Ghana Bank's intention finds some

support from the terms of the ultimate paragraph of that document, to which reference has already been made.

Their Lordships accordingly hold that by paying the amount due to Barclays the Ghana Bank became entitled to the benefit of the equitable charge with the same priority for the amount thereby secured as had theretofore been enjoyed by Barclays.

But this conclusion gives rise to consequential questions which were not fully argued before their Lordships, and cannot be adequately dealt with in the present appeal, in view of the form of the proceedings and the absence of evidence as to the amount which can properly be claimed to be due to the Ghana Bank on the security of the equitable charge in priority to the purchaser's interest. For example it seems to their Lordships open to question whether the equitable charge could rank as security in the hands of the Ghana Bank for any greater sum than the amount owing upon it to Barclays at the date of the attachment or at the date of the payment off of Barclays by the Ghana Bank, whichever was the less. It also seems to their Lordships that the possible bearing on the question of priority of any payments made into or out of the debtors account between acquisition of the benefit of the equitable charge by the Ghana Bank on the 27th October, 1954 and the execution sale on the 16th April, 1955 would require consideration.

The award of damages for trespass over and above the claim for mesne profits appears to their Lordships to be ill-founded, and Mr. Khambatta, Q.C., for the purchaser said that in any event he would not seek to maintain it.

As to the claim for mesne profits against the Ghana Bank, in respect of the rent received by them from the tenant this claim was allowed in the courts below on the footing that the Ghana Bank had no interest at all in the property. Their Lordships having now decided that the Ghana Bank are in fact interested as equitable mortgagees it is clear that the Ghana Bank must account to the purchaser for all rent received by them from the tenant since the 16th April, 1955 in the ascertainment of the amount owing to the Ghana Bank on the security of the equitable mortgage, and their Lordships consider that a declaration to this effect should be substituted for the award of mesne profits so far as the Ghana Bank is concerned, provided they take proceedings to enforce the equitable mortgage within a reasonable time. As to the order for possession against the Ghana Bank it would seem that the Ghana Bank as equitable mortgagees are prima facie not entitled to possession or receipt of the rents and profits except under an order of the court. This matter of possession as between the Ghana Bank and the purchaser will, their Lordships think, best be dealt with by a declaration to the effect that the purchaser is to be entitled as against the Ghana Bank to possession or receipt of the rents and profits of the premises unless and until otherwise ordered in any further proceedings taken to enforce the equitable mortgage.

The tenant has not been represented in the appeal, but their Lordships see no sufficient justification for the Order for possession and mesne profits made against him, which in their judgment cannot stand. The tenant must however pay all arrears of rent not accounted for by payment to the Ghana Bank. It is clear that if the Ghana Bank pay or account to the purchaser for the rent received by them in accordance

with the present judgment, an order upon the tenant to pay the same rent in respect of the same period to the purchaser would in effect result in the purchaser receiving it twice over, which could not be right.

In all the circumstances of this somewhat unsatisfactory case it appears to their Lordships that the proper course to be taken will be as follows:—

(i) The judgments and decrees of the Land Court and the Court of Appeal should be discharged;

(ii) The rent paid by the tenant to the Ghana Bank since the 16th April, 1955 should be taken to have been paid in or towards satisfaction of the rent payable by the tenant to the purchaser since the same date. As regards any rent not so satisfied the tenant should be ordered to pay the same down to the date of the commencement of the action and will thenceforth be liable for all further rent accruing during the continuance of the tenancy;

(iii) It should be declared that as between himself and the Ghana Bank the purchaser is absolutely entitled to the premises, subject to the charge thereon created by the equitable mortgage of the 16th July, 1954, to the benefit of which the Ghana Bank became entitled on the 27th October, 1954;

(iv) The Ghana Bank should be ordered to pay to the purchaser all rent received by them from the tenant in respect of the premises since the 16th April, 1955 but such order should be suspended for six weeks from the date of Her Majesty's Order in Council herein and should not take effect if the Ghana Bank within that period commence proceedings for the enforcement of the equitable mortgage and submit to account in those proceedings for the rent received as aforesaid;

(v) It should be declared that as against the Ghana Bank the purchaser is entitled to possession or receipt of the rents and profits of the premises unless and until otherwise ordered in proceedings taken to enforce the equitable mortgage.

## DECISION

Their Lordships will humbly advise Her Majesty accordingly.

## **COUNSEL**

**QUASS, Q.C. AND J. S. LE. QUESNE FOR APPELLANTS (GHANA COMMERCIAL BANK).**

**KHAMBATTA, Q.C. AND JOSEPH DEAN FOR FIRST RESPONDENT (CHANDIRAM).**