Privy Council Appeal No. 12 *of* 1953

Dyal Singh - - - - - - - - - - - *Appellant*

v.

Kenyan Insurance Limited - - - - - - - *Respondents*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH MARCH, 1954

Present at the hearing:

LORD PORTER
LORD REID
LORD KEITH OF AVONHOLM

[*Delivered by* LORD REID]

This is an appeal from a judgment of the Court of Appeal for Eastern Africa of 10th April, 1952, which affirmed a judgment of the Supreme Court of Kenya at Nairobi of 14th June, 1951, on a case stated by the parties for the decision of the Court. The facts as therein stated are these. Njoroge, son of Daudi, owned a motor omnibus, and borrowed from the respondents a sum of Sh.3.600 on the security of this vehicle; on 12th October, 1946, he gave to them a chattels mortgage which was duly registered in accordance with the provisions of the Chattels Transfer Ordinance, 1930. A creditor of Njoroge obtained judgment against him and execution followed with a sale by public auction of this vehicle by the Court broker on 3rd February, 1948. The vehicle was purchased at that sale by the appellant for Sh.2.000. Thereafter the appellant spent about Sh.7.000 on the vehicle and obtained a passenger bus licence and operated the vehicle between Nairobi and Limuru. On 29th April, 1950, the respondents seized the vehicle while it was in the possession of the appellant.

It was not disputed that by virtue of their chattels mortgage the respondents were entitled to seize the vehicle unless the appellant by purchasing it from the Court broker obtained a title to it good against the respondents. The effect of the chattels mortgage was that the respondents obtained a title to the vehicle and Section 4 of the Chattels Transfer Ordinance provides: "all persons shall be deemed to have notice of an instrument and of the contents thereof when and so soon as such instrument has been registered as provided by this Ordinance." Accordingly when the appellant purchased the vehicle he must be deemed to have had notice of the respondents' mortgage. But the appellant contends that by virtue of the provisions of Section 45 (3) of the Bankruptcy Ordinance, 1930, he obtained a title good against the respondents notwithstanding the fact that he was deemed to have had that notice. This case therefore depends on the proper interpretation of that subsection of the Bankruptcy Ordinance. The question submitted to the Court in the Stated Case was, "Has the plaintiff secured

a clear title in respect of the said bus by virtue of his having purchased the same at a public auction carried out in pursuance of a Court order in that behalf, or have the defendants any enforceable security against the said bus by virtue of the aforesaid Chattels Mortgage, having failed to lodge any objection proceedings before the sale "

Section 45 (3) of the Bankruptcy Ordinance provides:

> "(3) Where any goods in the possession of an execution-debtor at the time of seizure by a bailiff are sold by such bailiff without any claim having been made to the same, the purchaser of the goods so sold shall acquire a good title to such goods, and no person shall be entitled to recover against such bailiff or any other person lawfully acting under his authority, for any sale of such goods or for paying over the proceeds thereof prior to the receipt of a claim to such goods, unless it is proved that the person from whom recovery is sought had notice, or might by making reasonable inquiry have ascertained that such goods were not the property of the execution-debtor:
>
> Provided that nothing in this subsection contained shall affect the right of any claimant, who may prove that at the time of sale he had a title to such goods, to any remedy to which he may be entitled against any person other than such bailiff."

This subsection is a copy of section 15 of the English Bankruptcy Act, 1913, with minor modifications which are immaterial in this case. There was no question of bankruptcy involved in this case, and at first sight it might seem that a provision in a bankruptcy ordinance taken from an English Act of which the long title was "an Act to amend the law with respect to Bankruptcy and Deeds of Arrangement" would not apply. But their Lordships are satisfied that this provision does apply whether or not any question of bankruptcy is involved.

The respondents argued that the subsection does not apply to any case where the goods seized are the subject of a chattel mortgage and are in the possession of the grantor of the security because section 13 (2) of the Chattels Transfer Ordinance provides: "So long as an instrument continues to be registered hereunder the chattels comprised in that instrument shall not be deemed to be in the possession order or disposition of the grantor within the meaning of the Bankruptcy Ordinance." So it is said that the vehicle must be deemed not to have been in the possession of Njoroge for the purposes of the Bankruptcy Ordinance and, as section 45 (3) only applies to goods in the possession of the execution debtor when seized, it does not apply in this case. Their Lordships cannot accept that argument. The phrase "possession order or disposition" is a well known and well understood phrase in the English law of bankruptcy, and it appears to be used in the same sense in the Bankruptcy Ordinance, 1930, section 42 (*c*). In certain circumstances goods in the possession order or disposition of the bankrupt are treated as the property of the bankrupt although the goods do not belong to the bankrupt, and section 13 (2) prevents goods which are the subject of a chattel mortgage from being treated as the property of a bankrupt grantor on the ground that they were in his possession order or disposition. But the phrase "possession order or disposition" is a single and indivisible phrase. The word "possession" cannot be taken by itself and section 13 (2) does not mean that for the purposes of all other provisions in the Bankruptcy Ordinance chattels comprised in an instrument shall be deemed not to be in the possession of the grantor. In particular section 13 (2) does not limit the application of section 45 (3) of the Bankruptcy Ordinance.

In construing section 45 (3) it is proper to bear in mind the position before the passing of section 15 of the English Act of 1913 from which it is copied. A bailiff or other officer is only entitled to seize and sell goods which belong to the execution debtor but it is often difficult for him to ascertain the ownership of goods in the possession of the debtor

and he may without negligence sometimes seize and sell goods which do not in fact belong to the debtor. He gives no warranty of title of the goods which he sells. A purchaser can seldom know or ascertain to whom the goods belong but he had to take the risk of the true owner appearing and recovering the goods from him while he could not recover the price which he had paid for them. This was made clear in *Crane & Sons* v. *Ormerod* [1903] 2 K.B. 37. And the liability of the bailiff or other officer when he made a mistake was made clear in *Jelks* v. *Hayward* [1905] 2 K.B. 460. Section 15 of the 1913 Act must have been enacted to deal with this position and it does in fact purport to confer rights on both the purchaser and the officer.

It will be convenient now to use the phraseology of the Kenya Ordinance. The conditions for the application of section 45 (3) are (1) that the goods were in the possession of the execution debtor at the time of seizure and (2) that they were sold by the bailiff without any claim to them having been made by anyone. The subsection then enacts two things: first " the purchaser of the goods so sold shall acquire a good title to such goods ", and secondly " and no person shall be entitled to recover against such bailiff or any other person lawfully acting under his authority . . . ": and it then adds a qualification " unless it is proved that the person from whom recovery is sought had notice or might by making reasonable enquiry have ascertained that such goods were not the property of the execution debtor ". It was argued that this qualification applies both to the first enactment with regard to the purchaser and to the second enactment with regard to the bailiff. But it is in their Lordships' judgment impossible so to construe the words. If the qualification related back to the first enactment it would read " the purchaser of the goods so sold shall acquire a good title to such goods unless it is proved that the person from whom recovery is sought had notice . . ." The words " person from whom recovery is sought " clearly relate back to " no person shall be entitled to recover against such bailiff or any other person lawfully acting under his authority " but they cannot relate back to " the purchaser." Moreover the realities of the situation make that construction probable: one would expect a bailiff to be required to make reasonable enquiry but it is difficult to see what reasonable enquiry as to title could be expected of a person who intended to bid for goods at a sale by auction.

It was then argued that although this might be the only proper construction of the enactment in ordinary circumstances there is a principle of construction which requires general words to be limited if otherwise the enactment would produce highly unjust results, and that it is a very salutary general principle that a purchaser who knows that the seller is not entitled to sell should not be allowed to insist on his bargain. So it was argued that " purchaser " must here be held to mean purchaser without notice of the true owner's rights. But such an argument cannot prevail in the present case. The legislature in this subsection is conferring rights on two persons, the purchaser and the bailiff (or a person acting under his authority). It expressly provides that the bailiff shall not have this right if he had notice but it makes no such provision about the purchaser. It must be inferred that this difference was made deliberately and their Lordships must therefore hold that the subsection gives a good title to purchasers whether or not they had notice of the true position. It was hardly disputed that " a good title " must mean a title good against the true owner. Their Lordships think it right to add that it is not impossible to find reasons which might have led the legislature to confer such an unusual right on purchasers. It may have been thought necessary to give every encouragement to bidders at such sales by auction. There would be very few cases where a bidder in fact had notice of the true position and the possibility of constructive notice may have been neglected. It may have been thought advantageous to assure all purchasers that they could buy without risk even if that meant that in some cases the true owner would be deprived of one of his remedies.

Their Lordships now turn to the proviso. A purchaser is " a person other than such bailiff " and the true owner is a " claimant who may prove that at the time of the sale he had a title to such goods ". So the proviso must mean in this context that nothing in this subsection shall affect the right of the true owner to any remedy to which he may be entitled against the purchaser. The enactment that the purchaser shall acquire a good title to the goods is in this subsection : apart from this enactment, one of the remedies of the true owner is that he is entitled to recover the goods or their value from the purchaser ; so if the proviso were read by itself it would mean that the enactment in the preceding part of the subsection shall not affect the right of the true owner to recover the goods or their value from the purchaser. But that would completely contradict and nullify the enactment. A proviso may limit and severely limit the application of an enactment to which it is a proviso but it could only be held in the most exceptional circumstances that the proviso nullifies the enactment. In the present case if the enactment stands it does not nullify the proviso ; it merely limits its application. There may be others besides the bailiff and the purchaser against whom the true owner has a remedy, e.g., the execution creditor, and the proviso can apply in such cases. Whether the proviso was necessary in any of such cases may be doubtful but at least giving effect to the enactment with regard to the purchaser does not entirely deprive the proviso of meaning.

Their Lordships agree with the decision of the Court of Appeal on this matter in *Curtis* v. *Maloney* [1951] 1 K.B. 736, and would not have thought it necessary to re-examine the matter had it not involved a general question of importance.

Their Lordships will therefore humbly advise Her Majesty that this appeal should be allowed, that the first part of Question A submitted to the Court in the Stated Case should be answered in the affirmative and the second part in the negative, and that the respondents should pay the appellant's costs in the Courts below. The respondents must pay the appellant's costs in this appeal.

(20294) Wt. 8267—24 100 4/54 D.L.

In the Privy Council

DYAL SINGH

v.

KENYAN INSURANCE LIMITED

DELIVERED BY LORD REID

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DRURY LANE, W.C.2.

1954