



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kwach, Tunoi & Shah JJ A)

CIVIL APPEAL NO 147 OF 1989

BETWEEN

HABIB BANK A. G. ZURICH.....APPELLANT

AND

POP-IN (KENYA)RESPONDENT

RAJNIKANT K. SHAH.....RESPONDENT

HASMUKU D. SUMARIA.....RESPONDENT

RATILAL K. SHAH.....RESPONDENT

(Appeal from the order of the High Court of Kenya at Nairobi (Mr Justice Shields) dated the 27th day of October 1986

in

Civil Case No 2066 of 1986)

JUDGMENT

Kwach JA. On 21st January, 1981 Pop-In (Kenya) Ltd (the first respondent) executed a floating debenture in favour of Habib Bank AG Zurich (the appellant) to secure a loan of Shs 10,000,000/- granted to the first respondent by the appellant. This loan was also secured by two charges. The first charge dated 21st January, 1981 was given by Rajnikant Shah (the second respondent) and Hasmukh Sumaria (the third respondent) over their piece of land in Parklands Nairobi, Plot LR No 209/3007/3. The second charge also dated 21st January, 1981 was given by the second respondent and Ratilal Shah (the fourth respondent) over their property on Plot LR No 209/2779/5. The debenture gave the appellant the power to appoint a receiver in the event of default by the first respondent and the two charges gave the appellant as chargee, the power to exercise its statutory power of sale in the event of default by the first respondent.

On 1st October, 1985 the appellant demanded from the first respondent immediate payment of Shs 16,849,135/- under the terms of the debenture, which the first respondent was not able to pay, and the appellant there and then appointed a receiver and manager who took over the control and management of the business of the first respondent.

On 11th March, 1986, the appellant served statutory notices on the second, third and fourth respondents

demanding payment of Shs 17,862,057/- within 21 days and intimated that in default of payment, the appellant would exercise its statutory power of sale by selling the properties charged. The amount demanded by the appellant was not paid. Before the appellant could carry out its threat the respondents filed a suit against the appellant in the superior court challenging the appointment of the receiver and manager and also seeking an injunction restraining the appellant from exercising its statutory power of sale under the two charges; seeking the termination of the receivership and removal of the receiver and manager, and restoring control of the business of the first respondent to the second and third respondents. There was also a claim for special damages made on the basis that when the receiver and manager took over the business goods to the value of Shs 6,832,460/05 and furniture and fixtures valued at Shs 3,000,000/- and monthly profits estimated at Shs 1,800,000/- were lost. I should point out that the second, third and fourth respondents were directors and shareholders of the first respondent. The appellant filed a defence denying the respondents' claim in its entirety and reiterating that it had acted lawfully in appointing a receiver and manager and attempting to exercise its statutory power of sale under the charges.

Simultaneously with the plaint, the second, third and fourth respondents took out a chamber summons under order 39 rules 1 & 9 of the Civil Procedure Rules by which they sought *inter alia* a temporary injunction restraining the appellant from selling the two properties. The affidavit in support of this application was sworn by the third respondent on his own behalf and on behalf of the second and fourth respondents. He repeated in general terms the averments contained in the plaint and claimed that no statutory notices had been served on them as required by section 69A of the Transfer of Property Act 1882. He also deponed that the first respondent had substantial claims against the appellant and that until this was determined by the Court, an injunction should issue to restrain the appellant from realising its security under the two charges. There was a second application made on behalf of the first respondent seeking the termination of the receivership and restoring the undertaking to the directors of the first respondent. The affidavit in support of this application was sworn by the second respondent on behalf of the other directors. The affidavit contained a number of averments including one that the receiver and manager had wrongfully sold goods, furniture and fixtures belonging to the first respondent valued at approximately Shs 9,832,460/05 but had not credited the account of the first respondent with the proceeds of such sales. He also claimed that the receiver and manager had acted in a high-handed manner and as a result the first respondent's business had been ruined and that the first respondent had been injured in its credit and reputation and so on.

Both these applications were heard by Shields, J resulting in his ruling dated 27th October, 1986 which has given rise to the present appeal. Although the securities were in standard form the judge was for some strange reason convinced by Mr AL Shah, for the respondents, that interest was not chargeable on the amount borrowed by the first respondent. This was totally erroneous both on the express terms of the securities themselves and also as a matter of commercial practice. The judge also questioned the legality of making the first respondent to pay the remuneration of the receiver and manager. It seems to me that the attention of the judge was not drawn to the clause in the debenture which stated that a receiver and manager appointed by the appellant was to be the agent of the first respondent. Again, that is a standard clause in debenture. The judge held that the receiver and manager had damaged the first respondent's business to such a degree that an injunction would serve no useful purpose and dismissed its application.

In relation to the application by the second, third and fourth respondents the judge again was of the view that the demand was excessive and thought that they had established a *prima facie* case with a probability of success and granted the injunction sought. Mr Gautama for the appellant has challenged the temporary injunction issued by the judge on a number of grounds. First, he submits that the judge's understanding that interest was not to be paid on the principal sum was plainly erroneous. This submission must be correct in view of what I have said with regard to the provisions in the securities relating to payment of interest. Mr Gautama's second submission was that even assuming interest was not payable as alleged by the respondents, the principal sum has not been paid and this default is in fact admitted by Mr Shah, for the respondents. That clearly is an admission of default and as I understand the law a dispute as to the exact amount owed under a mortgage is not a ground upon which a mortgagee, who has served a valid statutory notice, can be restrained from exercising its statutory power of sale. If any authorities were needed for this elementary proposition one need not look beyond *Pharmal Kanji Shah & anor v Shah*

Depaj Devji [1965] EA 91; *JL Lavuna & others v Civil Servants Housing Co Ltd another* (Civil Application No NAI 14/95) (unreported): and *Halsbury's Laws of England*, Volume 32, 4th edition, paragraph 725. I summarised the position in my ruling in *Lavuna* case in these terms:

“Notwithstanding the stand taken by Mr Nagpal, in the ultimate analysis this is a suit brought by chargors to restrain a chargee from exercising its statutory power of sale under the charges executed by them as security for money advanced to them and receipt of which they have unequivocally acknowledged. Default is not denied. Service of statutory notice is admitted. I have always understood the law to be that a Court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage.”

It is plain beyond argument that the judge completely misapprehended the law and as a result reached a perverse decision. I would allow this appeal, set aside the order of the judge and substitute therefore an order dismissing the application for injunction brought by the second, third and fourth respondents with costs to the appellant. I would also grant the appellant the costs of this appeal.

As Tunoi and Shah, JJA also agree, it is so ordered.

Tunoi JA. I have had the advantage of reading in draft the judgment of Kwach, JA of which I entirely agree with. I have nothing useful to add.

Shah JA. I have had the advantage of reading in draft the judgment of my Lord Kwach, JA before proceeding on leave. I agree entirely with what has fallen on him and I have nothing useful to add.

Dated and delivered at Nairobi this 8th day of December, 1995

R.O KWACH

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JUDGE OF APPEAL

P.K TUNOI

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JUDGE OF APPEAL

A.A LAKHA

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JUDGE OF APPEAL