

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 33 of 1980

Between:

DEVI DAYAL
s/o Narsa Maharaj Appellant

- and -

- 1. JAGDISH KUMAR
s/o Devi Dayal
- 2. ADESH KUMAR
s/o Jagdish Kumar Respondents

Mr. M.T. Khan for the Appellant
Mr. J.R. Reddy for the Respondents

Date of Hearing: 11 September 1980
Delivery of Judgment: 30. 9. 80

JUDGMENT OF THE COURT

Henry J.A.

This is an appeal against a refusal by the Supreme Court at Lautoka to order specific performance in respect of a contract concerning an area of lands, of approximately two acres, being part of land containing approximately seventeen acres and called Farm No. 866 - Nanuku Sector. In 1964 one Charles Burness was the registered proprietor in fee simple of an area of some 4,000 acres which he had leased to the Colonial Sugar Refining Company Limited (called "the C.S.R. Company"). Under some agreement, not proved in evidence, the C.S.R. Company, allotted

defined areas to farmers for the purpose of growing sugar cane under contract. The occupiers of the separate areas combined to form a corporate body under the Co-operative Societies Act (Cap. 219) for the purpose of acquiring the fee simple of the said land. In the result a body corporate was formed under the name of the Nanuku/Wailevu Land Purchase Co-operative Society Limited (called "the Nanuku Co-operative Society"). The land was then acquired in the name of the Nanuku Co-operative Society by each member subscribing for shares for the aliquot amount required for the purchase of the area occupied by him.

The lease to the C.S.R. Company was later surrendered thus leaving the way clear for a direct legal relationship to be established between the Nanuku Co-operative Society as registered owner of the freehold and the individual members in respect of the land then occupied. There are now some 81 members cultivating defined areas. Appellant had, for some 59 years, occupied an area of approximately seventeen acres in respect of which he, in due course, subscribed for 4,084 shares. Each member entered into a separate contract with the C.S.R. Company for the sale of sugar cane he produced.

Appellant was adjudicated bankrupt in 1970. An arrangement was made whereby first respondent cultivated and produced sugar cane from Farm No. 866. The proceeds were paid to the Official Assignee in Bankruptcy. By 1975 all debts had been paid and appellant was discharged from bankruptcy on April 4, 1975. Appellant was thus able to retain Farm No. 866 and then followed a series of transactions, but first some background is relevant. Earlier, in anticipation of his services in cultivating Farm No. 866

and paying the proceeds to discharge appellant's debts, an arrangement had been made by appellant that first respondent would acquire fifteen acres of Farm No. 866 and that appellant would remain the holder of the remaining two acres. The term "arrangement" is used advisedly because it is not necessary further to define what took place since the transactions relevant to this appeal were later reduced into writing. First respondent already held the rights to another farm by virtue of shares held in the Nanuku Co-operative Society, but, by its rules, he could not also acquire Farm No. 866. Accordingly it was agreed that his son - appellant's grandson - should be substituted. The grandson is now second respondent. This appears to be the reason for joinder of father and son.

A number of written transactions then took place. On June 12, 1975 appellant and second respondent entered into a written agreement. Appellant was named as the seller and second respondent as the buyer and the land was described as Farm No. 866 of Mallau Sector. The following provisions appeared, namely:

- "(b) That out of the land Farm No. 866 Two (2) Acres more or less land will be held back by Mr. Devi Dayal for his personal use and that the land is situated adjacent to Mr. Bhaskra Nand's residence and there will be no interference by Mr. Adesh Kumar Sharma s/o Jagdish Kumar Sharma over the area now also in future.
- (c) That the Sugar Cane Contract No. 866 of Mallau Sector, Ra presently in the name of Mr. Devi Dayal will be transferred at the same time as the signing of the Agreement is completed to Mr. Adesh Kumar Sharma s/o Jagdish Kumar Sharma.

- (e) That it specifically agreed by him (Devi Dayal) that he will be totally responsible for obtaining the consent, for the cost of survey and any other expenses involved in subdividing Two (2) acres land referred to above.
- (f) That it specifically agreed by Mr. Devi Dayal as from this day he will AUTHORISE the transfer of all grazing land which form part of Contract Number 866 of Mallau Sector, Ra AND TRANSFER all shares held by him in Nanuku Cane Farmers Thrift and Credit Society and any other shares pertaining to above Society. "

The same day an attempt to transfer "all rights and shares" in Farm No. 866 to second respondent was made in the form of a letter from appellant to the Nanuku Co-operative Society. This letter was not accepted. However, the next day formal documents were executed between appellant and second respondent. For a consideration of \$8,781 an assignment was executed in which the following words appear:

".....I the undersigned Pandit Devi Dayal f/n Narsa Maharaj of Nanuku, cultivator, do hereby transfer, assign and set over all my rights and interests whatsoever in the abovementioned farm for the said sum of Eight Thousand Seven and Eight Thousand Seven and Eighty One dollars (\$8781.00).

I hereby declare that herein- after the said Adesh Kumar Sharma f/n Jagdish Kumar Sharma is to be accepted as a member in the society in my place with full rights and titles.

I hereby further assign all my rights and titles to the said Adesh Kumar Sharma f/n Jagdish Kumar Sharma and shares which I hold in the Nanuku Cane Farmers' Cooperative Thrift & Credit Society Limited.

The said shares are to the value of
NIL.

That this assignment share entitle
the said Adesh Kumar Sharma f/n Jagdish
Kumar Sharma to obtain the assignment
of cane contract in his own name."

Further, a formal assignment was entered into
for the same consideration whereby appellant's Sugar
Cane Contract was assigned to second respondent.
This was duly approved by the C.S.R. Company as
required by section 24(1) of the Sugar Industry Act
1961 which provision also limited assignments to one
non-corporate person. This would also prevent an
assignment to first respondent who, as stated, already
held a contract.

One further document ought to be noted. It is
a receipt signed by first respondent who was not a
named party to the agreement of June 12, 1975. This
document reads:

" Received from Devi Dayal (f/n
Narsa Maharaj) of Nanuku, Ra,
retired, the sum of One thousand
and four dollars and seventy cents
(\$1,004.70) being settlement in full
in respect of dealing concerned with
the sugar cane Farm No. 866 and house
site.

It is specifically agreed
between the parties that part of the
land comprised in Farm No. 866 lying
between the creek and Mr. Bhaskara
Nand's boundary, 2 acres more or less
in area will become the property Devi
Dayal and all responsibility and costs
for separating the titles, money etc.,
will be borne solely by Mr. Devi Dayal.

Dated at Vaileka, Ra this 7th day
of July, 1976.

\$1,004.70

(Sgd.)
JAGDISH KUMAR SHARMA

Witness:
District Officer, Ra.

On appeal it was conceded by counsel for appellant that he relied on the written documents of June 12, 1975 and July 7, 1976 as constituting the Contract upon which relief was sought and that extrinsic evidence must be confined to proof of surrounding circumstances. The amended statement of claim asked for the following relief:

- "(a) Specific performance of the agreement dated the 7th July, 1976;
- (b) An order that the first and second defendants perform all acts and deeds required of them so that a title to the said two (2) acres of Farm Number 866 be vested in the plaintiff;
- (c) That in the alternative, the second defendant grants to the plaintiff and unregistered Lease for a period of 999 years;
- (d) Damages. "

The Supreme Court held that the transactions between the parties were illegal by virtue of the provisions of the Subdivision of Land Act (Cap. 118) and refused relief. From this refusal the present appeal has been brought.

The following provisions of the Subdivision of Land Act (Cap. 118) are relevant:

" 'subdivide' means dividing a parcel of land for sale, conveyance, transfer, lease, sublease, mortgage, agreement, partition or other dealing or by procuring the issue of certificate of title under the Land (Transfer and Registration) Act in respect of any portion of land, or by parting with the possession of any part thereof or by depositing a plan of subdivision with the Registrar of Titles under the last-mentioned Act and the corresponding noun shall be construed accordingly. "

"5. Notwithstanding the provisions of any other law for the time being in force no land to which this Act applies shall be subdivided without the prior approval of the Director to be obtained in the manner hereinafter prescribed:

Provided that it shall be lawful to subdivide such land without such approval if -

- (a) no part of the land is situated in any town or within three miles of the boundaries of a town; and
- (b) the land is subdivided in such a manner that no lot is less than five acres in area. "

Section 6 sets out the procedure to obtain consent. Section 18(1) provides for a penalty against "any person who contravenes or fails to comply with any of the provisions of this Act". "Land" is defined in the Interpretation Act 1967 as follows:

"'land' includes messuages, tenements and hereditaments, corporeal or incorporeal, of any tenure and description, and whatsoever may be the estates therein."

We find it unnecessary to deal with cases on the question of illegality. Well settled principles apply and no special considerations arise. Each case depends upon its own facts as applied to the statutory provision upon its true construction. If the transaction, in the present case, contravenes the act it is clear that it is illegal.

In Patel v. Premabhai [1954] A.C. 35, 48 their Lordships of the Privy Council said in respect of section 39:

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" Nor is the definition of 'subdivide' in section 3(a) inimical to this opinion. All that that definition means is that a division or subdivision takes place within the meaning of the Ordinance, if the land is in fact divided, whether it is divided for the purpose of sale or conveyance or transfer or lease or sublease or mortgage, making an agreement, partition or otherwise dealing with the property."

The statute is directly aimed at acts of subdividing so any contract having that effect would be illegal.

To return to the agreement of June 12, 1975. It designates appellant as "seller of the above land" which is described as Farm No. 866 of Mallau Sector. Second respondent is described as the buyer. Clause (b) provides that "2 acres more or less land" will be "held back" by appellant for his personal use and the land held back is then described. The document of July 7, 1976, provides that part of the land comprised in Farm No. 866 as defined will become the property of appellant. This appears to be a variation of the agreement. However, the evidence is clear that pursuant to these documents second respondent took all interests of appellant in fifteen acres of the land and that appellant retained his interest in the remaining two acres. Possession was given to second respondent accordingly. They each cultivated their respective portions - second respondent under the assigned Sugar Cane Contract formerly held by appellant and appellant as an independent supplier.

The steps taken up till the commencement of the action resulted in second appellant having the legal title to all rights formerly held by appellant but he was under an obligation to return a title to appellant in respect of the area of two acres of which appellant

remained the beneficial owner. A dispute arose as to the nature of the interest which appellant had retained. He contended he remained "the absolute owner". That is that second respondent had no interest. On the other hand both respondents contended that it was a life interest only. They were prepared to grant a life interest. The present proceedings are aimed at recovering the former rights held by appellant in the said two acres. We have used the term "title" for the sake of convenience but will later examine the evidence on this topic.

In our opinion appellant has parted with possession of, and all interests in, an area of fifteen acres. He now seeks the aid of the Court in perfecting a title to the remaining two acres so that he will be restored to full ownership thereof. If this relief is granted then second respondent will have full ownership and possession of the fifteen acres and appellant will have full ownership and possession of two acres. The contract to effect this has been substantially carried out and only formal re-transfer of the title is sought in respect of land which appellant claims he has always remained the owner either as the absolute owner, or as the beneficial owner after the contract was partly performed by the transfer of the whole area. The granting of the relief sought would perfect a scheme, substantially performed, for dividing Farm No. 866 into two separate titles leaving one title - or one lot - less than five acres. Such a division contravenes section 5 of the Subdivision of Land Act and is illegal. It is nothing to the point that clause (e) of the agreement provides for consent to be obtained because a division in fact has already been effected without any consent. The consent required by section 5 is the prior approval of the Director of Town and Country Planning. The Court will not lend its aid to perfecting such a scheme already carried out in fact. The defence of illegality succeeds.

We have assumed that appellant had put second respondent in a position to give the title sought but appellant faces a further difficulty. There is no proof of the title under which appellant held the land. He is not the owner in fee simple - that is vested in the Nanuku Co-operative Society. So none of the orders sought under paragraphs (a), (b) or (c) can be made. The Court cannot conjecture on the question of title. It was incumbent on appellant to prove the precise title which he had passed on to second respondent in respect of the seventeen acres and which he now requires second respondent to be ordered to execute documents conferring a title on appellant in respect of two acres. Appellant was the seller, that is clear from his document, and he reserved ("held back") two acres. The deal was carried out to the point where second respondent, according to appellant's case, got the whole of appellant's interest in the land. It was incumbent on appellant, as plaintiff in those circumstances, to prove the title he formerly held and was now seeking to recover. In this appellant has failed. In dealing with uncertainty of the subject matter, Halsbury's Laws of England 3rd Edn. Vol. 36 pp. 285 and 286 para. 399 says concerning a matter insufficiently described:

"..... the defect may be cured if the identification of the subject matter can be completed by admissible extrinsic evidence. In some cases the court acts on the maxim id certum est quod certum reddi potest. The description must be such as to enable the court to ascertain what the parties intended to be the subject of their contract, and if this cannot be done specific performance is refused."

Apart from the question of illegality that is precisely the position here. Appellant did not lead any evidence to establish the identity of the title he sought in his statement of claim.

The appeal is dismissed with costs.

(Sgd.) T. Gould
VICE PRESIDENT

(Sgd.) T. Henry
JUDGE OF APPEAL

(Sgd.) B.C. Spring
JUDGE OF APPEAL