

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 56 of 1981

Between:

- 1. SUBARMANI s/o Malaiya
 - 2. MARIA f/n Subarmani
- Appellants

- and -

DHARAM SHEELA AND 3 OTHERS Respondents

S.M. Koya and Iqbal Khan for Appellants
 Dr. M.S. Sahu Khan for Respondents

Date of Hearing: 25th March, 1982

Date of Judgment: 2 APR 1982 1982

JUDGMENT OF THE COURT

Marsack, J.A.

This is an appeal against a judgment given by a Judge in Chambers at Lautoka on 11th September, 1981 ordering appellants to give up to respondents possession of an area of approximately 1 rood being part of the land described in Certificate of Title 10219 in the name of the respondents.

The relevant facts may be shortly set out. The land concerned, which is freehold, consists of 22a. 3r.

7.4p. known as part of Naisosovu at Nasoso, Nadi, and respondents are the registered proprietors. The property formerly belonged to one Hubraji, grandmother of respondents; and was transferred to respondents by transfer dated 8th August, 1969, the consideration stated being "natural love and affection". This transfer was duly registered with the Registrar of Titles on 1st October, 1970. Appellant Subarmani has been in possession of approximately 1 rood of this land, according to his affidavit, since July 1961; Dharam Sheela, for the respondents in her affidavit agreed that Subarmani was occupying the section of land in question, but did not know when that occupation began. Certificate Title 10219 shows no other interest in the land save the title of respondents.

At the hearing no reference was made to second appellant Maria, and no appearance was entered on her behalf. It would seem, however, that she is a member of first appellant's family, and her occupation of the land in question would depend on any rights held by first appellant.

Dharam Sheela in her affidavit deposed that on 31st January, 1981 the present registered proprietor gave an option to a company called Kumar V.J. (Pty) Ltd. to purchase all the land in certificate title 10219, and that option was exercised by the Company on 30th May, 1981. The company's interest in the land is protected by a caveat registered on 17th February, 1981.

In his affidavit first appellant swears that in July 1961 one Parshu Ram Shukla son of Hubraji and acting on her behalf, verbally leased to him 1 rood of the land for use as a home site, at an annual rental of £1.10/-, together with an option to purchase the section for £150.00; such option to be exercised within 25 years.

First appellant duly built on the section a house valued at \$3,000 and, he says, paid the agreed rental until the end of 1968. No rent has since been paid, though first appellant avers that he has regularly but unsuccessfully tendered it.

Respondents made application under section 169 of the Land Transfer Act for possession of the area occupied by appellants, filing an affidavit of Dharam Sheela setting out the facts on which they relied. First appellant filed an affidavit in reply, and the learned Judge heard both parties under section 172. The Judge held that appellants had not satisfied the Court that they had any right to possession as against respondents, and that there were no matters to be tried in open Court. He then made an order in terms of respondents' application.

The grounds of appeal are:

- (1) That there were triable issues which should have gone to open Court for determination;
- (2) That first appellant had already taken action against respondents in the Supreme Court for a declaration as to the rights of appellants to remain on the land;
- (3) That the option given to appellant by respondent's predecessor in title was still binding upon respondents.

As to ground 1: No convincing argument was put forward to satisfy us that the issues were such as could not properly be decided by a Judge in Chambers. The basic facts were not in any way disputed and what was required was a judicial pronouncement as to the effect of the law involved in those facts. On one authority cited in support of his argument counsel for appellants referred to the judgment of this Court in Raniga v. Trikam Nominee (F.C.A. No. 48/1978). That was an appeal, as is this, from a decision of the Judge sitting in Chambers, and concerned an application under section 169 in circumstances somewhat similar to those in the present case. Nothing in that judgment indicates that there was any impropriety in the hearing before a Judge in Chambers. In the judgment of this Court in Shyam Lal v. Schultz 18 FLR 152 it was held that when a case fell within the ambit of section 169, and the basic facts were not in dispute, the proceedings were rightly entertained by a Judge in Chambers.

These authorities make it clear that the original hearing in this case was correctly held in Chambers. This ground fails.

Ground 2: The fate of the action referred to in this ground will largely be determined by the judgment of this Court in the present case; and the fact that such action has been taken affords no reason for setting aside judgment now under appeal.

Ground 3: The greater part of the argument of counsel for appellants was devoted to this ground, and to the legislative provisions affecting it. We cited section 39(b) of the Land Transfer Act and contended that, in accordance with the wording of that section, the term "registered proprietor" should always be interpreted as meaning "purchaser for value". In our opinion this argument

is untenable. The whole issue depends on what is referred to as the "indefeasibility of title" of the registered proprietor. Section 39 in the Land Transfer Act provides that a registered proprietor, except in case of fraud, holds the land free from all encumbrances except those registered against the title; but sub-section 39(b) provides an exception to this in the following terms:

"(b) so far as regards any portion of land that may by wrong description or parcels or of boundaries be erroneously included in the instrument of title of the registered proprietor not being a purchaser or mortgagee for value or deriving title from a purchaser or mortgagee for value;"

It is in our opinion clear that the restriction of the definition of registered proprietor to purchaser for value applies only in the case specified, that is to say an erroneous description of the land concerned. There is nothing in sub-section (b) to indicate that "registered proprietor" in any other circumstances is to be interpreted only as "purchaser for value". The indefeasibility of title under the Land Transfer Act is well recognised; and the principle is clearly set out in a judgment of the New Zealand Court of Appeal dealing with provisions of the New Zealand Land Transfer Act which on that point is substantially the same as the Land Transfer Act of Fiji. The case is *Fels v. Knowles* 26 N.Z.L.R. 608. At page 620 it is said:

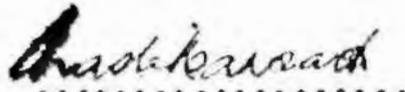
"The cardinal principle of the statute is that the register is everything, and that, except in case of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world."

The question of indefeasibility of title of the registered proprietor is fully examined and determined with authority by their Lordships' of the Privy Council in Frazer v. Walker, their judgment being set out in full in 1967 N.Z.L.R. 1069. This Court must therefore hold that the title of the respondents as registered proprietors is not subject to any unregistered encumbrances such as those put forward on behalf of appellants. Accordingly this ground fails.

For these reasons the appeal is dismissed. Appellants will pay respondents their costs to be taxed if not agreed upon.



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Vice-President.


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Judge of Appeal
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Judge of Appeal