IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 74 of 1984

Between:

VINOD PRASAD — Appellant

and

1. SATISH CHANDRA VISHWA
2. SHAFIULLAH & 5 OTHERS trading as ROYAL TRANSPORT — Respondents

Mr. G.P. Shankar for the Appellant
Mr. I. Khan for the Respondents

Date of Hearing: 19th March, 1985

Delivery of Judgment: 22.3.85

JUDGMENT OF THE COURT

Mishra, J.A.

This is an appeal against the dismissal by the Supreme Court of the appellant's claim for damages in respect of erosion allegedly caused to his land by excavation done to widen an access-way running along his property.

The appellant and the respondent own neighbouring blocks of land (blocks 3 and 4) in a new sub-division. Appellant's land has a direct frontage and respondent's is a rear lot with an access-way to it running between the appellant's block and another (block 6).

The appellant's evidence was that the access-way to respondent's lot was first formed by the land developer in 1974 or 1975 but that the respondent Satish Chandra Vishwa had widened it later cutting away part of his (the appellant's) land causing continuing damage and erosion which could now be contained only by the construction of a retaining wall. The respondent denied that he had done any excavation of any kind on or along the access-way and stated that the sides of the access-way were already fully formed in 1975 when he purchased his block of land from the developer. He had done some levelling on it but the width of the access-way had remained unchanged since then.

A surveyor, Viliame Volavola, called by the plaintiff said :-

> " The cutting encroached onto Lot 3 as shown in this plan. It encroached as much as 5 feet into Lot 3 and for a length of about 105 feet. The extent of that encroachment is shown on the plan. The actual cutting had encroached into Lot 3 and erosion had extended the encroachment furthr into Lot 3. The cutting had been angled into Lot 3. The cutting was not vertical. At the bottom it angled, or sloped, to the left, thus cutting into the land of Lot 3. Erosion had increased that encroachment.
>
> There is need for a concrete retaining wall on the boundary. Erosion can be retarded by planting creepers but, because of the height of the cut there is need for a concrete wall in the particular case. "

There was no quarrel with this account of the encroachment and the resulting damage. The only issue before the court was whether, on the evidence before it the appellant had proved, on a balance of probability, that the encroachment was caused by the respondent.

A bulldozer owner Ali Mohammed called by the appellant was of no assistance to him. He admitted doing some work for the respondent in 1978 but said :-

> "That job did not involve widening the cutting at all. The job was on the main part of Lot 4. The bulldozer was used in the cutting but only to tidy the bottom, not to widen the cutting. "

The driver of the bulldozer, Arvin Sharma, also called by the appellant, supported Ali Mohammed's evidence.

The learned Judge accepted this evidence and said :-

> "In my view, the plaintiff has failed to prove the factual basis of his claim on the balance of probabilities. He has failed to show that it was the first defendant, either himself or through the agency of some other person, who widened the cutting. "

The appellant's main complaint in his grounds of appeal is that the learned Judge did not attach sufficient weight to the evidence of another witness, Ram Charan Lal, the owner of block 6, called by him. This witness said he had noticed a bulldozer working on the access-way widening it towards the appellant's land. He thought it was during 1978 but could not say whose bulldozer it was. He admitted he had watched it only for a few minutes and had taken little interest in what it was doing.

In our view the learned Judge was perfectly entitled to prefer the evidence of Ali Mohammed and Arvin Sharma, who were also appellant's witnesses and whose evidence was more precise and categorical. There was little in Ram Charan Lal's evidence that could cast any significant doubt on their veracity.

Both Counsel agree that the appeal involves no issue of law, the question for the learned Judge having been one entirely of fact. On the evidence before him, it is difficult to see how he could have arrived at any result other than the one he did.

The appeal is dismissed with costs to be taxed if not agreed.

VICE PRESIDENT

JUDGE OF APPEAL

JUDGE OF APPEAL