IN THE FIJI COURT OF APPEAL

CIVIL APPEAL NO. 14 OF 1987

Between:

DAMODAR & RATANJI LIMITED	Appellant
- and -	
REDWOOD INVESTMENT LIMITED	1st Respondent
RAM SUMERAN & DHANIRAM LIMITED	2nd Respondent
NATIVE LAND TRUST BOARD	3rd Respondent

Mr. J. R. Reddy for the Appellant
Mr. Anand Singh for the 1st Respondent
No Appearance for the 2nd Respondent
Mr. E. Tavai for the 3rd Respondent

Date of Hearing: 26 May 1988
Date of Judgment: 1 July 1988

JUDGMENT OF THE COURT

The appellant appeals against the judgment of Mr. Justice Dyke dated the 30th January, 1987 granting the 1st respondent five declarations sought by it.

The declarations are as follows:-

"1. That the Agreement and the Assignment of the lease is a sale, transfer or sub-lease or a dealing within the meaning of Section 12(1) of the Native Land Trust Board Act and the prior consent of the NLTB is necessary.

2. That prior consent of the NLTB was neither had or obtained to the Agreement and the Assignment.

3. That the Agreement and the Assignment being effected without the prior consent of the NLTB is null and void.

4. That the Agreement per se is not prohibited within the meaning of Section 12(1) of the Native Land Trust Board Act and in terms of clause 3 of the Agreement, the condition precedent namely, the grant of the consent by the Native Land Trust Board is not satisfied. In the premises the Plaintiff is entitled to avoid the payment of the purchase price as provided in the Agreement and the Assignment.

5. That in the premises the personal guarantee of the director is null and void and ineffectual."

The relief sought by the appellant is for an order setting aside the judgment and for the following additional orders:-

"(i) That no further consent of Native Land Trust Board was necessary to the Assignment of sublease from the First Defendant to the Plaintiff.

(ii) That the Sale and Purchase Agreement and the Assignment are not null and void for breach of Section 12 of the Native Land Trust Act.

(iii) That the Personal Guarantees of the directors of the Plaintiff to the Second Defendant are enforceable and not null and void."

The declarations were sought by originating summons. On that summons the learned Judge was required either to grant or refuse the application. On his consideration of the evidence before him the learned Judge may have made comments or findings along the lines of the orders now sought by the appellant but he was not required and indeed was not empowered to make the additional orders of the nature which the appellant seeks from this court. In fact the statements cannot be the subject of orders but could be the subject of a declaratory judgment which the appellant is not entitled to seek on this appeal.

We are of the view that this court likewise is not empowered to make the additional orders and therefore decline to do so.

The appeal is against the judgment of the learned judge which the appellant seeks to set aside. This is the only matter we can consider.

There are now three grounds of appeal but it is only necessary to consider the following ground:-

> That in any event, the Learned Judge erred in law in granting declaration (iv) sought by the Plaintiff in its entirety, namely, "that the Agreement per se is not prohibited within the meaning of Section 12(1) of the Native Land Trust Board Act and in terms of clause 3 of the Agreement, the condition precedent namely, the grant of the consent by the Native Land Trust Board is not satisfied in the premises the Plaintiff is entitled to avoid the payment of the purchase price as provided in the Agreement and the Assignment."

It will become apparent from what we say later that consideration of this ground will meet the appellant's objections to the legality of the judgment.

The facts giving rise to this appeal may be shortly stated so that the application to the Court below be understood.

The second respondent, which was not represented on the hearing of this appeal, and which has no interest in the outcome, is the lessee of Native Lease No. 8283 situate in Nadi on which is erected a cinema theatre called the Natraj Theatre. This theatre was leased to the appellant under a tenancy agreement dated the 19th September 1980. It is common ground that this agreement did not have the necessary consent of the Native Land Trust Board and was null and void.

About a year later, the appellant entered into a sale and purchase agreement with the first respondent. The agreement was conditional upon the vendor (appellant) obtaining "a legally enforceable lease properly consented by the Native Land Trust Board" and to the vendor obtaining the consent of the sub-lessor, the second respondent and of the head lessor, the third respondent to the assignment of the sublease. The "legally enforceable lease" was in fact a tenancy agreement but we shall continue to refer to it as a sublease.

All the conditions were met except for obtaining the consent of the Board to the assignment of the sublease. It is common ground that it was never specifically sought or granted.

Notwithstanding this state of affairs the appellant purported to assign the sublease to the first respondent which went into occupation of the theatre premises on the 2nd November, 1981 and remained in occupation for close on 5 years. The purchase moneys due and payable under the sale and purchase agreement were duly paid to the appellant.

It is difficult to understand why the 1st respondent initiated this action seeking the declarations. It is clear from the nature of the declarations sought that it was well aware that the transaction the appellant entered into required the consent of the Native Land Trust Board under section 12(1) of the Native Land Trust Act before it could legally be performed. It had pursuant to the transaction gone into possession of the property purchased and accepted delivery of all chattels involved in the sale. Its solicitor disclosed to the Court below that "moneys" (presumably the purchase moneys) had been paid to the appellant's solicitors and paid out by them to the appellant. On the face of it the transaction though illegal had been fully performed.

The learned Judge granted all 5 declarations without amendment.

Mr. Reddy is now concerned that, left unchallenged, the fourth declaration could lead to action by the 1st respondent seeking recovery of moneys it has paid under the sale and purchase agreement or other relief. Mr. Reddy in his submissions has been forced to argue two contrary points of view. First he argues that the assignment of the sublease did not require the consent of the Native Land Trust Board and was legal. He also argues that the assignment while not illegal per se became null and void and an illegal transaction upon the 1st respondent entering into possession without the prior consent of the Board to the assignment. Both arguments were raised as a defence to a possible future claim by the 1st respondent for recovery of moneys paid under an assignment deemed to be illegal and null and void.

Mr. Reddy's argument that the assignment of the sublease did not require the consent of the board is based, almost entirely on his interpretation of a term in the sublease namely that the grant is to a named lessee who together with the successors and assigns of that lessee are considered to be "lessees". It follows, argues Mr. Reddy, that the Board having granted a lease to a lessee and its successors or assigns in a sublease which contains a clause prohibiting alienation except with the consent of the lessor is not concerned when the sub-lessee assigns the sublease to somebody approved by the sub-lessor. No further consent he argues is required by the board to an assignment.

This argument has no merit. It ignores the fact that the assignment by a sub-lessee to another person is a new transaction or dealing with native land and is caught by the clear provisions of section 12 of the Native Land Trust Act which reads as follows:-

> "Consent of Board required to any dealings with lease
>
> 12. (1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in

his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void.

Provided that nothing in this section shall make it unlawful for the lessee of a residential or commercial lease granted before 29 September 1984 to mortgage such lease.

(2) For the purpose of this section "lease" includes a sublease and "lessee" includes a sublessee."

Each and every alienation or dealing with native land requires the prior consent of the Native Land Trust Board.

The learned Judge considered Mr. Reddy's argument and quite properly rejected it. He stated:-

"Well the consent of Ram Sumeran and Ram Dhani Investment Limited was obtained, and clearly the onus was upon the vendor, at least to ascertain whether the consent of the NLTB was also necessary, and if it was necessary to obtain it. One would have thought that the least the vendor could have done would have been to make enquiries from the NLTB. In the event there was no prior consent by the NLTB to the agreement, and occupation by the plaintiff under the agreement, and therefore (although the agreement itself if not coupled with occupation would not have been illegal) the transaction was null and void ab initio and cannot be made legal by any subsequent consent."

He then stated:-

"In the circumstances the agreement cannot be enforced and the plaintiff is entitled to and will be granted the declarations sought."

It is difficult to understand why the learned Judge having rightly found the transaction to be illegal, granted declaration No. 4. He had been informed that the purchase price had been paid and the 1st respondent had gone into possession without the prior consent of the Board and had been in possession for close on 5 years. He had held the transaction was illegal, null and void. It can only be assumed

that the learned Judge overlooked the fact that the purchase moneys had been fully paid and that the 1st respondent was in possession of the property. The declaration may have been in order if the purchase money had not been paid and occupation of the premises not taken.

The following observations of the Fiji Court of Appeal made in Murray Cockburn and Native Land Trust Board v. Bilo Limited and Others in consolidated Civil Appeal Nos. 13 and 22 of 1984 at page 26 of the judgment are apposite:-

> "The provisions of Section 12(1) are drastic and are very widely expressed. They have been considered and applied in a number of cases, perhaps the leading one being Chalmers v. Pardoe (1963) All E.R. 552 where the Judicial Committee accepted that there must necessarily be some prior agreement, so that the mere fact of its existence is not of itself a breach of the section. In Jai Kissun Singh v. Sumintra (1970) 16 F.L.R. 165, 170 Gould V.P. said a signed agreement, held inoperative and inchoate while consent is being sought, is not caught by section 12. The problem lies in determining what acts done in relation to that agreement constitute it a "dealing" with the land, rendering it illegal. The consensus of the majority in that case suggests that this would occur once it was acted upon as a valid agreement for sale (Tompkins J.A.) or implemented in any way touching the land (Gould V.P.)."

On the face of his finding that the transaction between the interested parties was tainted with illegality the learned Judge clearly erred in granting the fourth declaration. In doing so he was clearly though perhaps unwittingly lending aid to a party to an illegal transaction. It is trite law that equity will not aid a party to an illegality.

The principle on which courts act in cases involving illegal contracts was enunciated by MacKinnon L.J. in his judgment in Harry Parker v. Mason [1940] 2 K.B. At page 601 he said:-

> "The rule **ex turpi causa non oritur actio** is, of course not a matter by way of defence. One of the earliest and clearest enunciations of it is that of **Lord Mansfield**, in **Holman v. Johnson** (1775) I. Cowp. 343. 'The objection that a contract is

> immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is found on general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: **ex dolo malo non oritur actio.** No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise **ex turpi causa** or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault, **potior est conditio defendentis.**'"

We see no reason to consider the other declarations which appear to us to be unobjectionable.

The appeal is allowed to the extent that the learned Judge's judgment is varied by deletion or cancellation of the fourth declaration. The appellant has succeeded in part but substantially and is entitled to costs of this appeal which are to be paid by the 1st respondent. There will however be no variation of the order for costs in the Court below.

Sgd T. Tuivaga
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President, Fiji Court of Appeal

Sgd R. Kasmoo
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Justice of Appeal

Sgd MR Tay
.....
Justice of Appeal