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IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO: ABU0070 OF 1995S

(High Court Civil Action No.547 of 1982)

RAM SWAMY F/N SHIU NARAYAN
ADI NARAYAN F/N SHIU NARAYAN

APPELLANTS

-AND-

PADMA WATI F/N VIRAIYA

RESPONDENT

Mr C.B. Young for the Appellants/Applicants
Mr. H.A. Shah for the Respondent

Date and Place of Hearing : 21 May 1997, Suva
Date of Delivery of Judgment : 29 May 1997

DECISION OF THE COURT
(Leave to Appeal and Stay Application)

On 28 February 1997 this Court dismissed the Appellants appeal against the Judgment of Sadal J. delivered on 3 November 1995. The Appellants now apply -

- (1) for leave to appeal to the Supreme Court;
- (2) for those Judgments to be stayed pending a final determination by the Supreme Court.

The leave sought by the Appellants is based on two grounds viz:

- (a) The questions involved in this appeal are of "..... great general or public importance or otherwise -----"(Section 117 (2) (a) of the Constitution).
- (b) The appeal involves "..... a question respecting property or a right of the value of 20,000 dollars or upwards; "(Section 117 (1) (b) of the Constitution).

In the Appellants amended motion for leave to appeal the two questions which are claimed to be of "great general or public importance" are stated as follows:-

- “(i) *the right to occupation of land to the exclusion of those who cannot show a better title in law.*
- (ii) *the right of an occupier or user to land to raise estoppel against a person who seeks ejection of the occupier who purports to claim a better title and the length of time that estoppel may continue to operate in favour of a occupier.”*

It must be acknowledged that the predicament of having built two houses on some one else's land is a matter of great importance to the Appellant's. We cannot accept, however, that such a predicament involves in this case questions of such great general or public importance that they ought to be submitted to the Supreme Court. The subject matter of the proceedings is essentially a matter relating to the rights of private individuals in relation to the occupation and use of private land and in itself is not of “great general or public importance” although of course, as already stated it is of great importance to those individuals.

The two questions specifically urged as being of “great or general public importance” are not, in our view, ones that arise or can be resolved in this case. The first, the right to occupy land to the exclusion of all others who cannot show a better title, referred to in the judgment of the Court of Appeal as the *jus tertii* principle, does not apply for the following reasons:-

- (1) The Judgment of Sadal J. Dated 3 November 1995 establishes that the Native Land Trust Board has issued a lease to the Respondent; that the Appellants have no lease and have no cane contract; and that the Appellants are living on the Respondents land.

(2) The Judgment of this Court dated 28 February 1997 stated -
“----- the Appellants were living on the Respondents land. That finding was clearly correct. The evidence was overwhelming and Mr Young for the Appellant’s---- conceded that he could not maintain that his clients had any legal title to the land they were occupying.”

(3) A copy of the Lease of this land in favour of the Respondent is attached to her affidavit dated 11 March 1997. The plan attached to the lease clearly encompasses the land on which the houses have been built.

(4) It follows that the jus tertii principle, which might have had application if there was some doubt about the area leased by the respondent, cannot apply.

The second question relates to the right of an occupier or user of land to invoke the principle of estoppel. We do not think estoppel can be invoked for the following reasons:-

(1) Whatever original “promise” was made in relation to the occupation and use of the land on which the houses were built, was made by the respondent’s father to the appellant’s father.

(2) Both parents are now dead and have been so for many years.

(3) Any contention that further promises were made to the appellants by the respondent "standing by" while they spent substantial moneys in the construction of the dwellings and the development of the area requires evidence of all the circumstances at the time. No such evidence was given at the trial. In fact quite the contrary. Shiu Narayan s/o Shiu Narayan, the 3rd Defendant, and a son of the 1st Defendant in giving evidence stated -

"C.S.R. Co. Gave us that land"

"Father was on C.S.R. Co's land"

"The present house site was given by C.S.R. Co. Plaintiff did not allow them to build a house and live here. That land was given by C.S.R. Co."

(4) Further, no evidence was given by appellants of the nature of the alleged "standing by" on the part of the respondent, nor was she cross-examined on the issue at all. Consequently the matter of an estoppel of this nature was not dealt with in the judgment of the High Court or of the Court of Appeal and so it follows that any such contention cannot be raised now.

The second ground upon which the Appellants rely for leave to appeal is based on S.117(1)(b). The affidavit of the second Appellant dated 5 March 1997 claims that the total value of these improvements are worth at least \$100,000. However, the affidavit of the respondent in reply dated 11 March 1997 claims that the Appellants value of \$100,000 "----- is a mere exaggeration." The appellants have not put before the court any independent valuation to establish whether the matter in dispute is of a value of \$20,000 or upwards nor whether it involves a claim to or a question respecting property or a right of the value of \$20,000 or upwards. Whatever way the appellants' case is approached it appears that if they are entitled to some relief it would be in the nature of personal rights and could not be regarded as an interest in land. It is thus difficult to determine how any such rights should be valued. That however is not a matter for us though we record that if it should be of a value of \$20,000 or upwards the appellants do not need leave from this court to appeal.

In the course of his submissions Mr Young explained what he perceived as a dilemma viz. whether to apply to this Court for leave to appeal to the Supreme Court or in the alternative to appeal direct to the Supreme Court as of right based on the value of the property in dispute.

In concluding his submissions Mr Young urged this Court to grant leave even if the questions raised by him were held not to be of great general or public importance, on the basis that the words "or otherwise" appearing in Section 117(2)(a) were intended to meet special cases. He argued that the long period of occupancy and the ill health of the appellants made this a special case. We are unable to agree that the circumstances pertaining to the appellants in this case elevate this application to the category of a "special case."

We are therefore not prepared to grant leave to appeal for the reasons already stated.

Sadal J.'s judgement was based essentially on findings of fact. These findings were accepted by the Court of Appeal.

In Fiji Sugar Corporation Ltd. V. The Labour Officer - Civil Appeal No. ABU0020 of 1995 this Court said -

"In our view the appeal is destined to fail if leave were granted because the decision of the Court of Appeal was based on facts found by the trial magistrate and inferences drawn from those facts."(p.11).

We adopt the same approach in this case.

We also note the appellants' failure to either produce evidence or cross-examine the respondent in the Court below on issues essential to establish liability against the respondent.

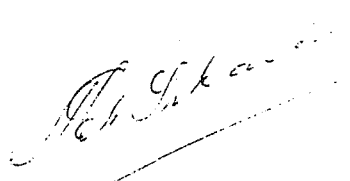
If however the appellants wish to seek the leave of the Supreme Court to appeal out of time then a stay in such circumstances would be appropriate. Mr Shah advised the Court that he would not object to such an order.

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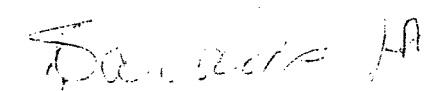
Accordingly if an appeal for leave to appeal out of time is lodged with the Supteme Court within 21 days from the date hereof, then the Judgment of the High Court will be stayed pending a final decision by the Supreme Court, or a single judge thereof.

Application for leave to appeal is dismissed.

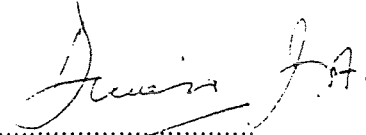
Costs in favour of the Respondent to be fixed by the Registrar if not agreed upon.



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Sir Moti Tikaram
President Fiji Court of Appeal



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Mr Justice R. Savage
Judge of Appeal



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Mr Justice J.D. Dillon
Judge of Appeal