

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION .

CIVIL APPEAL NO. ABU0055 OF 1996

(High Court Civil Action No. 38 of 1996)

BETWEEN:

RAM NAND

APPELLANT

-and-

NIRMALA LAL
SHIU LAL

RESPONDENTS

Mr. A. Sen for the Appellant
Mr. A. Kohli for the Respondents

Date and Place of Hearing : 12 November 1997, Suva
Date of Delivery of Judgment : 14 November 1997

JUDGMENT OF THE COURT

The appellant appeals against a decision of the Chief Justice given in the High Court at Labasa on the 7 November 1996. By consent, the appeal was considered on the written submissions of counsel.

The appellant is registered as lessee under a Crown Lease of some 28 acres of land near Labasa. The respondents occupy a house on part of the land. After the

appellant had given one month's notice to quit to the respondents, he commenced proceedings in the High Court under s.169 of the Land Transfer Act (Cap.131). In terms of that section the appellant filed a summons addressed to the respondents to appear before a Judge in chambers to show cause "why the person summoned should not give up the possession for the applicant". The summons was accompanied by an affidavit from the appellant setting out that he was the registered proprietor under a Crown Lease and that the defendants were occupying a house on the land which he needed for cultivation.

In their affidavit in reply, the respondents exhibited a written agreement dated 25 November 1992 whereby the appellant had purported to sell some 1.5 sq chains of land to the respondent, Nirmala Lal, for \$2,500. The appellant did not mention this agreement in his affidavit, as in our view he should have. The Court is entitled to full disclosure from those who invoke its jurisdiction. The respondents depose that, after paying a deposit of \$1,000 to the appellant, the Health Inspector told them that the land was reserved for drainage purposes; they said that the appellant had then agreed to relocate them on another portion of land, onto which he had towed their house. They had paid a further \$360 of instalments on the purchase price.

They further alleged that the appellant had refused to accept further instalments in terms of the agreement but had demanded a further \$4,000 in cash, that he had harassed them and that they had lodged complaints with the Police. They exhibited a letter dated 21 August 1995 from the appellant's solicitor which claimed a further \$4,000 in addition to the purchase price, as payment for the removal from the original site to the alternative

site. We can see no possible justification for the outrageous demand contained in the letter for \$22 for costs of the notice.

The appellant's affidavit in reply asserted that the agreement was of no effect because the consent of the Director of Lands to the sale had not been obtained. Contrary to his solicitors' letter referred to earlier, he denied that the \$4,000 was a payment for re-locating the respondents but rather it was compensation for their occupation of their current site which was causing a loss to him. He did not deny that he had received the \$1,000 deposit plus further instalments from the respondents.

At the hearing before the Chief Justice on 26 September 1996, neither deponent was called for cross-examination. There were oral submissions; counsel for the appellant (then plaintiff) filed extensive written submissions referring to a number of legal matters.

The learned Chief Justice delivered a very brief reserved decision on the 7 November 1996. He stated that he had read the papers. It considered that the case raised questions of fact and law which could not in his opinion to be dealt with under the summary jurisdiction of the Court. In these circumstances, he considered that the respondents had "shown cause" why they should not give up the possession of the land; he dismissed the summons with costs. It is unfortunate that the learned Chief Justice did not articulate the serious questions of fact and law.

473

We consider that the appellant had utilised the correct procedure. S.169 of the Land Transfer Act gives the right to a registered proprietor to summon any person in possession of his or her land to appear before a Judge in chambers to show cause why possession should not be given up. O.5 r.3 authorises the originating summons procedure for "proceedings by which an application has to be made to the High Court or a Judge thereof under any Act". O.28 deals with the originating summons procedure which, in general terms, is to be conducted by way of affidavit evidence. O.28 r.9 allows the Court to continue proceedings begun by way of originating summons as if they had been begun by a writ. O.28 r.5(3) gives wide powers to the Court to give directions as to the just, expeditious and economical disposition of the proceedings. In fact at a pre-trial conference on 18 September 1996, the Chief Justice gave directions as to the filing of affidavits.

It seems with respect that the learned Chief Justice confused this originating summons procedure with the summary judgment procedure. In general terms, the Court can decline summary judgment and require the parties to proceed to a defended hearing or it can enter summary judgment if there is no credible defence shown.

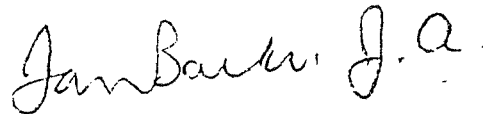
We consider, in the circumstances, that we have no option but to allow the appeal and to remit the originating summons back to the Chief Justice for a determination on the merits.

It does seem likely, however, that the appellant is correct to submit that the transaction recorded by the agreement of 25 November 1992 for the sale to the respondents of part of the appellant's interest in the land held under Crown Lease 9088, required the consent of the Director of Lands under s.13 of the Crown Lands Act (Cap.132). D. B. Waite (Overseas) Ltd v Wallath 18 FLR 141 and Chalmers v Pardoe, (1963) 3 All ER 552. Those cases make the situation fairly clear that, without consent, the transaction is illegal. We hope that before the case comes back to the Chief Justice, an application be made to the Director of Lands for consent and that favourable consideration be given by the Director to approving this minor transaction.

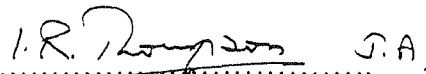
We think it unconscionable that the appellant should retain the respondents' deposit and other payments and then assert that the transaction was illegal.

Appeal allowed; case remitted to the High Court for a determination in the merits.

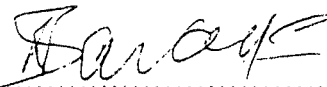
No order as to costs.



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 Sir Ian Barker
Judge of Appeal



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 Mr. Justice I. R. Thompson
Judge of Appeal



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 Mr. Justice Savage
Judge of Appeal