IN THE COURT OF APPEAL
FIJI ISLANDS
CIVIL JURISDICTION

Civil Appeal No. ABU 6 of 2007
(On appeal from Lautoka High Court HBC 468 of 1981L)

BETWEEN : **SITAMMA and MUNIAPPA REDDY**

Appellants (Original Plaintiffs)

AND : **RAJESH KUMAR**

Respondent (Original Defendant)

JUDGMENT

Of: **J. Byrne, AP**
S. Inoke, JA

Counsel Appearing: **Dr Sahu Khan for the Appellant**
Mr I Samad for the Respondent

Solicitors: **Sahu Khan & Sahu Khan for the Appellant**
M K Sahu Khan & Co for the Respondent

Date of Hearing: **9 November 2009**
Date of Judgment: **19 July 2010**

INTRODUCTION

[1] This appeal is from a judgment concerning the occupation of Crown land. The two main points of appeal are: (1) whether the learned trial Judge was correct in considering the application of **s 13(1)** of the **Crown Lands Act** when it was not raised in the pleadings; and (2) whether His Lordship properly evaluated the evidence.

THE BACKGROUND

[2] This dispute was over a 10 acre farm previously held by the Colonial Sugar Refinery Company Limited ("**CSR**") in the Rarawai Sector. The farm was previously held by one **Sada Siwan Reddy**. In 1964, Sada Siwan Reddy gave to **Pon Samy**, the original plaintiff in this action and the late husband of the present Plaintiff Sitamma, a one acre block out of the farm as a "**house site**" on which Pon Samy built his home and occupied it. In 1973, after CSR ceased operating in Fiji, the land became owned by the Government. The subject land was purchased from Reddy by one **Lekh Ram**, the original defendant in this action and the father of the present Defendant Rajesh Kumar, who eventually became the registered proprietor of a lease over the farm in Crown Lease, No. 5641, on **28 August 1979**.

[3] About two years later Lekh Ram asked Pon Samy to leave the house site which he refused and instead brought an action in the High Court in October 1981 seeking a declaration that Lekh Ram was holding the farm as trustee for both of them, a restraining order and damages. This is the action the subject of this appeal.

[4] Lekh Ram died on 8 June 1997 and his son Rajesh Kumar, as executor and trustee of his estate, became substituted as the Defendant on 26 June 1998. After Pon Samy died in July 2003, his wife Sitamma and his son Muniappa Reddy, as joint executors and trustees of his estate, became substituted as the Plaintiffs on 27 May 2004.

THE ARGUMENTS BELOW

[5] The Defendant argued that the Plaintiff had only a mere licence for a home site. The Plaintiff contended it was a gift of part of the land that was leased from CSR which later became a Crown lease.

[6] The Plaintiff said the relevant authorities had notice of her husband's claim and that the conduct of the Defendant in denying the claim amounted to fraud.

THE GROUNDS OF APPEAL

[7] The Grounds of Appeal were:

1. **That the Learned Trial Judge erred in law and in fact in dealing with the issue of the requirement of the consent of the Director of Lands to institute the proceedings under Section 13(1) of the Crown Lands Act when the same was not pleaded as an issue in the Pleadings until the Written Submissions made by the Respondent.**

2. **That the Learned Trial Judge erred in Law and in fact in dealing with the issue of consent under Section 13(1) of the Crown Lands Act when it was not made as an issue in the Pleadings.**

3. **That the Learned Trial Judge did not properly and/or adequately evaluate the evidence of the Appellants on the one hand and that of the Respondent on the other when coming to his conclusions.**

4. **That the Learned Trial Judge did not take relevant matters into account and took irrelevant matters into account in coming to his decision.**

5. **That the Learned Trial Judge did not properly and/or adequately determine the substantive issues involved in the matter.**

6. **That the Learned Trial Judge did not properly and/or adequately deal with the issue of fraud in the matter.**

GROUNDS 1&2

[8] Grounds 1 and 2 are dealt with as one. The simple point in issue is whether a trial Judge could consider an issue which was not specifically pleaded.

[9] In so far as the appellate court being able to deal with such a point, our Supreme Court in **Murti** v **State** **[2009] FJSC 5; CAV0016.2008S (12 February 2009)** has considered and followed the law as decided in **Suttor** v **Gundowda Pty Ltd** [1950] HCA 35; (1950) 81 CLR 418, 438 (26 September 1950), by the High Court of Australia[1] –

[1] Latham CJ, Williams and Fullagar JJ

> The circumstances in which an appellate court will entertain a point not raised in the court below are well established. Where a point is not taken in the court below and evidence could have been given there which by any possibility could have prevented the point from succeeding, it cannot be taken afterwards. In Connecticut Fire Insurance Co. v. Kavanagh (1892) AC 473, Lord Watson, delivering the judgment of the Privy Council, said, "When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below." (1892) AC, at p 480. The present is not a case in which we are able to say that we have before us all the facts bearing on this belated defence as completely as would have been the case had it been raised in the court below.

[10] It seems to us that the same principles should apply equally to the trial Judge. The trial Judge should not be constrained from deciding on the point and be forced to leave the matter to be decided on appeal.

[11] **Section 13** of the Crown Lands Act [Cap 132] provides:

> **13.-(1) Whenever in any lease under this Act there has been inserted the following clause:-**
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> **"This lease is a protected lease under the provisions of the Crown Lands Act"**
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> **(hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.**
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> **Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void.**
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> **(2) On the death of the lessee of any protected lease his executors or administrators may, subject to the consent of the Director of Lands as above provided, assign such lease.**
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> **(3) Any lessee aggrieved by the refusal of the Director of Lands to give any consent required by this section may appeal to the Minister within fourteen days after being notified of such refusal. Every such appeal shall be in writing and shall be lodged with the Director of Lands.**

> **(4) Any consent required by this section may be given in writing by any officer or officers, either solely or jointly, authorised in that behalf by the Director of Lands by notice published in the Gazette. The provisions of subsection (3) shall apply to the refusal of any such officer or officers to give any such consent.**
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> **(5) For the purposes of this section "lease" includes a sublease and "lessee" includes a sublessee.**

[12] It is not in dispute that the lease in this case was a "protected lease" and the requisite consent of the Director of Lands was not obtained both for the dealing and for the issue of the High Court action. The learned trial Judge found that "the gifting of land or rights over land as alleged in this case was a dealing in land" or at least otherwise caught by the phrase "or in any other manner whatsoever" as used in s. 13. Such prior consent as required by the section being absent, the court was not able to grant the relief sought by the Plaintiff. These were decisions on points of law based on facts that were not in dispute.

[13] The learned trial Judge in our view therefore correctly dealt with the point and disposed of the case on the application of the section. Even if the trial Judge could not have done so, which we think he could, we are able to deal with the point in this appeal and dismiss the appeal on these two grounds.

[14] We would also like to add that s. 13 also made the grant or **continuation** of the Plaintiff's occupation of the house site illegal and void as the Director's consent was not obtained when the lease was issued and registered to the Defendant. It is now settled that a plaintiff occupier in this position cannot get the assistance of the court: **Regan** v **Verma** [1965] 11 FLR 240; **Chalmers** v **Pardoe** [1963] 3 All E R 552; **Bakar** v **Talib** [2010] FJHC 8; HBA022.2008L (21 January 2010).

[15] This appeal therefore fails on Grounds 1 and 2.

GROUNDS OF APPEAL 3, 4, 5 & 6

[16] The remaining grounds of appeal raise the same point of law and that is whether an appellate court should interfere with the trial judge's findings of fact. The difficulty of such a task was faced by this Court[2] in **Nagaiya** v **Subaiya** [1969] FLR 212 in which the Court was split and the majority overturned the trial judge's findings of fact. Marsack JA of the majority said this:

> **I am fully aware of the reluctance of an appellate tribunal to interfere with the findings of fact made in the Court below, particularly when those findings are based upon the opinion of the Court as to the credibility of the witnesses. Even so an appeal Court must sometimes do so as a matter of justice and of judicial obligation; and the Court is less reluctant to interfere when the findings, on some of them as is the case here, are inferences drawn from the accepted evidence.**

[17] The main complaint by the appellant as stated in counsel's written submissions was that "the learned trial Judge seems to have placed a lot of reliance on the fact that the Plaintiff's witness Krishna Reddy had signed the document Exhibit P1 in his presence in 1981 but in cross examination he said he did not recognise the signature". Counsel went on further in his submissions to complain that "the document in which the signature that was given to the witness to (identify) was a photocopy of another document and not the document produced as exhibit P1" and "that photocopy document was not produced to the Court nor any evidence led by the Respondent to show that the signature in that photocopy document shown to the witness was in fact the signature of Sada Siwan Reddy. It was a round about way of saying that the photocopy given to the witness in cross examination was a "bad photocopy" which led him to say that he did not recognise the signature. The thrust of the submission was that the trial Judge had no evidence before him to support his finding that the Plaintiff's witness, Krishna Reddy, said in cross-examination that he did not recognise the signature Sada Siwan Reddy.

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[2] Gould VP dissenting, Hutchison and Marsack JJA

[18] With respect, that was not a finding of fact. It was simply the Judge repeating what the witness said. The trial Judge's consideration of the evidence on this and other issues is set out in these paragraphs of the judgment:

> [19] ... The defence claim that Sada Siwan Reddy held a tenancy, only from CSR, and that he gave that up in 1965 in favour of Lekh Ram. This divesting is suggested by the Plaintiff's exhibit, P1, a fairly recently discovered document from the archives of Messrs Sahu Khan and Sahu Khan, an acknowledgment signed by Sada Siwan Reddy when on a visit to Fiji from Canada in 1981.
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> [20 Sada Siwan Reddy was not called by the Plaintiff as a witness, nor was his absence explained. He acknowledged in this single page document that he had transferred his "sugar cane farm number 1401, (Ex CSR land) situate at Navatu, Ba to one Lekh Ram ... Sada Siwan's signature was identified by the plaintiff's witness Krishna Reddy. Krishna said he was present when Sada Siwan signed the document, but later in cross-examination he said he did not recognise the signature.
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> [24] Pon Samy was a key witness on the issue of what he was given and whether Lekh Ram knew of it and agreed to the grant prior to the issue of title, the Crown Lease to Lekh Ram. Lekh Ram is now dead and cannot give his side of things, and Sada Siwan Reddy the donor of the gift, the original holder of the lease or sub-lease has not been called.
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> [25] The acknowledgment in itself by Sada Siwan Reddy in 1981 might go to establish a claim against Sada Siwan Reddy, but not against Lekh Ram. For it records no acknowledgment by Lekh Ram that he accepted a grant to Pon Samy when he purchased the farm from Sada Siwan in 1965. It is not disputed that Pon Samy occupied the 1 acre site in those days.
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> [26] The acknowledgment prepared by lawyers, did not mention what the consideration had been for such a gift, It refers to no specific land, but only to a "1acre of house site situate at Navatu, Ba by way of gift". Was this a gift from out of the sugar cane farm Number 1401? If so, what type of land was it?
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> [27] The evidence of the plaintiff's second witness Krishna Reddy was confused and obviously inaccurate. I could place little reliance on it...
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> [29] No evidence has been produced by the plaintiff as to the exact nature of the landholding of the questioned land. It is more likely to have been a Crown Leas all along even prior to the registration of Lekh Ram's lease.
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> [30] The evidence of what was expended by the plaintiff is thrown into doubt by Krishna Reddy's evidence. There is no support for the assertion that fencing had been put up. I do not accept the evidence of any of the plaintiff's witnesses that there was a gift of land without consideration. Pon Samy never said that he had worked for Sada Siwan. I accept Rajesh Kumar's evidence that Pon Samy had not worked on the land, rather he had worked at Central Trading and Tyre Repairs in Ba town.
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> [31] I do not find that Sada Siwan gave a piece of land to Pon Samy. Pon Samy appears to have been allowed by Sada Siwan to stay on the 1 acre of land. Pon Samy was allowed a revocable licence which Lekh Ram freshly granted but later revoked. Sada Siwan may have made promises to Pon Samy, but I am not satisfied that Lekh Ram's purchase from Sada Siwan was of land less the 1 acre house site. There is no evidence that Sada Siwan

applied for and obtained consent for any gift of land to Pon Samy, part of his lease from CSR, which in turn was probably a Crown leasehold. His acknowledgment note referred to a farm, not to a specific landholding.

[19] We think the submission cannot be sustained. The plaintiff/appellant had the onus of proof to show that he was given the one acre block by Sada Reddy. His Lordship clearly disbelieved his witnesses. This Court will be loath to overturn those findings of fact. In any event, it would not have made any difference to the outcome of the case because the trial Judge found against the plaintiff on other grounds.

[20] Similarly, the submission that the trial Judge took into account irrelevant evidence and/or did not give enough weight or failed to consider other relevant evidence must also fail. The trial Judge looked at the evidence as a whole and came to the conclusions that he did. It is not to be done in the way which counsel seems to suggest in his submissions by looking at each bit of evidence in isolation or out of context.

[21] These findings of fact by the trial Judge leave no room for any finding of fraud. We agree with his finding that this situation did not resemble that in **Merrie** v **McKay** (1897) 16 NZLR where the registered proprietors took with full knowledge of the plaintiff's agreement, possession and expenditure.

[22] The appeal fails on all grounds.

COSTS

[23] We think this was an appeal with no real prospects of success. We therefore award costs at the high end of the scale which we summarily assess as $4,000.

ORDERS

[24] The appeal is dismissed with costs to the Respondent of $4,000.

Hon. Justice J. Byrne, AP

Hon. Justice S. Inoke, JA