

THE OFFICIAL RECEIVER *v.* RAM AUTAR

[FIJI COURT OF APPEAL AT SUVA (C.J. Hammett, President, Sir Francis Adams, J. P. Trainor, JJ/A) 21st July, 1961]

Civil Appeal No. 15 of 1960

(Appeal from H.M. Supreme Court of Fiji—Knox-Mawer, J.)

Bankruptcy Ordinance (Cap. 37)—s. 46—"conveyance or transfer of property"—position regarding a tenancy at will of native land.

One Subbaiya (along with one Govinda) held a share in a tenancy at will of native land from the Native Land Trust Board. Prior to his bankruptcy and with the intention of preferring the respondent over his other creditors, Subbaiya asked the Board to transfer the tenancy at will to the respondent. The Board complied with this request. The Official Receiver, as Subbaiya's trustee in bankruptcy, contended that this was a fraudulent preference, void against the trustee in bankruptcy under section 46 of the Bankruptcy Ordinance (Cap. 37). The Supreme Court held against the Official Receiver who appealed to the Fiji Court of Appeal.

Held.—(1) Subbaiya's share in the tenancy at will was not only not transferable but was an interest in the land that by operation of law would cease to exist upon its "transfer" by Subbaiya.

(2) Accordingly the transaction whereby the tenancy at will of Subbaiya (and Govinda) was determined by the Native Land Trust Board and a new tenancy at will then granted by the Board to Ram Autar (and Govinda) was not a "conveyance or transfer of property", within the meaning of section 46 of the Ordinance.

Appeal dismissed.

Cases cited:

Pinhorn v. Souster E. R. Vol. 155 p. 1292.

Melling v. Leak E. R. Vol. 139 p. 921.

K. C. Ramrakha for the Appellant.

D. M. N. McFarlane for the Respondent.

Judgment: (read by HAMMETT, President).

This is an appeal from the decision of the Supreme Court of Fiji dated 9th September, 1960, in which the plaintiff-appellant's claim, as the trustee in bankruptcy of the estate of Subbaiya to certain declarations in connection with an interest in land held by the bankrupt but disposed of by him before his adjudication, was dismissed.

The circumstances under which the claim arose and the facts found by the court below are set out clearly in the learned trial Judge's judgment and may be summarised briefly as follows.

Subbaiya and his brother Govinda held undivided half shares of an interest in 8½ acres of native agricultural land at Tavua under the terms of a letter from the Native Land Trust Board dated 12th July, 1956, which reads as follows:

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Native Land Trust Board,
Suva,

12th July, 1956

Reference No. 4/4/703

Subbaiya, f/n Patapi and Govinda, f/n Patapi

(as undivided shareholders) of Natawa, Tavua,

C/- Asst. Land Agent, Ba.

Sir,

NATIVE LAND NASILA No. 2

(part of) Lots 5 and 6

I am directed to inform you that the Native Land Trust Board has agreed that you may occupy, and you are hereby authorised to occupy, the described land as a tenant-at-will on the following terms and conditions:

" Land	Nasila No. 2 (part of) Lots 5 and 6
Area	8½ acres
Rent	£29 15s. 0d. per annum w.e.f. 3/7/56
Tikina	Tavua
Mataqali	Tavasi
Purpose	Agricultural

Conditions :

- (1) The right to occupy and to use the land is not transferable.
- (2) The lands described may be used solely for agricultural purposes and no buildings whatsoever may be erected thereon after the date hereof.
- (3) In the event of failure on your part to pay the rental as aforesaid punctually this authority may be cancelled without further notice and you will be required immediately to vacate the land.
- (4) This letter shall not operate to create a tenancy in respect of the said lands, and you may be required to vacate the land on receipt of notice to that effect.

Yours faithfully,

(Sgd.) J. O. GILLMORE,

for Secretary.

I hereby accept this tenancy on the terms and conditions as set out above.

.....
Tenant

Signed by the said _____ in my presence and I certify that I read over and explained the contents thereof to him in the language and he appeared fully to understand the meaning and effect thereof.

On 15th January, 1958, knowing he was unable to pay his debts and under pressure from Ram Autar, one of his creditors, Subbaiya wrote to the Native Land Trust Board asking the Board to transfer "the land" to Ram Autar. The learned trial Judge held that he did this with the intention of giving preference to the respondent over his other creditors.

On 5th February, 1958, the Native Land Trust Board cancelled the "Tenancy at Will" dated 12th July, 1956, in favour of Subbaiya and Govinda and granted a similar "tenancy at will" in undivided shares to the respondent and Govinda. This was effected by a letter dated 5th February, 1958, signed on behalf of the Board which was couched in very similar terms to the letter of tenancy addressed to Subbaiya and Govinda dated 12th July, 1956.

On 16th May, 1958, a receiving order in bankruptcy was made against Subbaiya on a petition in bankruptcy presented on 27th March, 1958.

On 13th January, 1959, the Official Receiver instituted this action claiming, *inter alia*, a declaration that the transfer was void as against the trustee in bankruptcy of the estate of Subbaiya as a fraudulent preference under section 46 of the Bankruptcy Ordinance (Cap. 37). This section reads as follows:

"(1) Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or of any person in trust for any creditor, with a view of giving such creditor, or any surety or guarantor for the debt due to such creditor, a preference over the other creditors, shall, if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy.

(2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt."

The learned trial Judge held that the surrender by Subbaiya of his share in the interest in the land to the Native Land Trust Board coupled with his request to the Board to transfer his share to the respondent was made with the intent of preferring the respondent over his other creditors. Against this finding no complaint has been made on this appeal. He did not, however, grant the declaration sought because he did not consider that what was done fell within the provisions of section 46 (1) of the Bankruptcy Ordinance.

The Official Receiver has appealed against that decision on the following grounds:

(1) The learned trial Judge erred in law and in fact in holding that the dealing between the respondent and the bankrupt did not fall within the provisions of the Bankruptcy Ordinance and was fraudulent and void by reason thereof;

(2) The learned trial Judge erred in not holding in any event that the bankrupt having prior to the "Transfer" of the tenancy-at-will of the bankrupt committed an act of bankruptcy was unable to effectively deal with the said tenancy-at-will;

(3) The learned trial Judge erred in law and in fact in not holding that the plaintiff had discharged the onus of proof in relation to proving that the defendant had in pursuant of the "transfer" agreed to pay all the debts of the bankrupt.

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Little was said by Counsel for the appellant in support of ground 3 of the Grounds of Appeal. As to this part of the case the learned trial Judge said in his judgment:

"The Official Receiver seeks in the first place a declaration that the defendant had undertaken in pursuance of the transaction set out above to pay all the other creditors. I find no sufficient evidence to substantiate this."

I have studied the record and in my opinion there are no grounds for disturbing the learned trial Judge's conclusions on this matter.

The first and second grounds of appeal were argued together.

Argument was heard at some length on what exactly was the "interest" which Subbaiya held in this land under the letter dated 12th July, 1956, addressed to him and his brother Govinda by the Native Land Trust Board.

In my opinion, in spite of the somewhat contradictory nature of its own terms this letter purported to create a tenancy at will. The definition of property in the Bankruptcy Ordinance is contained in section 2, the material part of which reads:

"(2) 'property' includes money, goods, things in action, land and every description of property whether movable or immovable and whether situate in the Colony or elsewhere; also obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property as above defined;".

In my opinion the term "every description of interest arising out of or incident to land" is sufficiently wide to include within its ambit a "tenancy at will" which is, therefore, for the purposes of the Bankruptcy Ordinance "property".

It was held by the Court below that Subbaiya's intention when he asked the Native Land Trust Board to transfer his share in this tenancy at will to the respondent was to give him a preference over his other creditors, and this finding has not been challenged. As a result of Subbaiya's request to the Native Land Trust Board the tenancy at will in which he held a half share was in fact determined on 5th February, 1958, by the Board's letter of that date and a fresh tenancy at will on similar terms was on the same date granted by the Board to the respondent jointly with Govinda.

The issue now arises: "Was this transaction 'a transfer or conveyance' from the bankrupt to his creditor Ram Autar or to a trustee on behalf of Ram Autar?" If it was, then, in the circumstances of this case, it was a transfer caught by section 46 (1) and must be deemed to be fraudulent and void as against the trustee in bankruptcy—if it was not such a transfer or conveyance then it is a transaction that is not caught by the section.

One of the conditions of the tenancy at will in favour of Subbaiya and Govinda, according to the express terms of the document creating it, was that the rights of Subbaiya and Govinda as tenants at will were not transferable.

Again it is well settled that a tenancy at will is determined by the tenant demising, leasing or assigning the premises. *Pinhorn v. Souster*, see English Reports Volume 155 at page 1292; *Melling v. Leak*, see English Reports Volume 139 at page 921.

It appears in this case that Subbaiya did not in fact transfer or attempt to transfer his undivided half share in the tenancy at will—he merely asked the Native Land Trust Board who had granted the tenancy at will to Subbaiya and Govinda to transfer it to Ram Autar.

In my opinion Subbaiya's share in the tenancy at will was not only "not transferable" but was an interest in the land that by operation of law would cease to exist upon its "transfer" by Subbaiya.

In these circumstances, I do not find it possible to hold that the transaction whereby the tenancy at will of Subbaiya and Govinda was determined by the Native Land Trust Board and a new tenancy at will then granted by the Native Land Trust Board to Ram Autar and Govinda was a transfer or conveyance of property from Subbaiya to Ram Autar, within the meaning of that term in section 46 (1) of the Bankruptcy Ordinance.

I have come to this conclusion with considerable reluctance because I am of the opinion that this view may result in Ram Autar in fact securing a preference over the other creditors of Subbaiya. This is a matter which however it is quite within the powers of the Native Land Trust Board to remedy by determining the tenancy at will of Ram Autar. Nevertheless since a tenancy at will cannot in fact be transferred or conveyed by a tenant at will and this particular tenancy at will was expressly stated in the document creating it to be not transferable, I do not feel able to hold that the two transactions namely the termination of the tenancy at will of Subbaiya and Govinda by the Native Land Trust Board and the grant by the Board of a fresh tenancy at will on similar terms, to Ram Autar and Govinda was a "transfer of an undivided half share in the tenancy at will from Subbaiya to Ram Autar" even though these transactions were carried out by the Board after receipt of Subbaiya's request to them to do so.

Appeal dismissed by the Court.

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