

MOHAMMED ISSAC

v.

ABDUL KADIR AND ANOTHER

[SUPREME COURT, 1962 (Hammett P.J.),  
12th, 13th June, 12th July]

Civil Jurisdiction

*Land—lease—power of attorney given by lessee while serving sentence of imprisonment—lessee not a convict within s.8 of Forfeiture Act 1870—prohibition against alienation of property by that section not applicable—power of attorney and transfer pursuant thereto valid—Forfeiture Act 1870 (33 & 34 Vict., c.23) (Imperial) ss.6,8,9—Supreme Court Ordinance (Cap. 4) ss.35,37—Criminal Justice Act 1948 (11 & 12 Geo. 6, c.58) (Imperial) ss.78, 83, 8th Schedule, 10th Schedule Pt. 1—Penal Code 1944, ss.24, 415, Schedule 1—Malicious Damage Act 1861 (24 & 25 Vict., c.97) (Imperial)—Offences Against the Person Act 1861 (24 & 25 Vict., c.100) (Imperial)*

*Native land—lease—transfer executed—consent of Native Land Trust Board granted but not endorsed on transfer—purported revocation by transferor of lease ineffectual.*

*Native land—lease—consent to transfer—consideration misstated in application to Native Land Trust Board—consent granted—consent not vitiated in absence of withdrawal thereof by Board or declaration by Court.*

*Power of Attorney—executed by person serving sentence of imprisonment—distinction between penal servitude and imprisonment—prohibition against alienation of property in s.8 of Forfeiture Act 1870 inapplicable—power of attorney valid—forfeiture Act 1870 (33 & 34 Vict., c.23) ss.6,8,9—Supreme Court Ordinance (Cap. 4) ss.35,37—Criminal Justice Act 1948 (11 & 12 Geo. 6, c.58) ss.78,83, 8th Schedule, 10th Schedule Pt.1—Penal Code 1944, ss.24, 415, Schedule 1.*

*Interpretation—Imperial statute—statute of general application—to be read with verbal alterations not affecting substance—Forfeiture Act 1870 (33 & 34 Vict., c.23) ss.6,8,9—Supreme Court Ordinance (Cap. 4) ss.35,37.*

While serving a sentence of imprisonment with hard labour for the felony of attempted murder the plaintiff executed in favour of the first defendant a power of attorney. Under the powers therein contained the first defendant sold a native lease owned by the plaintiff to the second defendant. The consent of the Native Land Trust Board was obtained (though in the application for consent a false consideration was stated) and on the 26th March, 1956, the transfer was executed by the first defendant as attorney for the plaintiff. On the 22nd May, 1956, the plaintiff (as the court accepted) instructed the first defendant not to sell the lease. The consent of the Native Land Trust Board, though granted, was not endorsed on the transfer until after that date. In an action by the plaintiff to set aside the transaction —

**Held:** 1. Assuming that the Forfeiture Act, 1870, was a statute of general application and therefore in force in Fiji, section 8 thereof (which provides that a convict shall be incapable of alienating any property) did not apply, as by definition a convict was a person

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A A punishable by penal servitude, which was inherently different from a sentence of imprisonment; the plaintiff was not a convict within the meaning of the section as he was sentenced only to imprisonment with hard labour. The power of attorney was therefore not null and void.

B B 2. By the time the plaintiff instructed the first defendant not to sell the lease the transfer had been signed and, notwithstanding that the consent of the Native Land Trust Board had not then been endorsed on the transfer the first defendant could not lawfully have halted the process whereby the second defendant was entitled to perfect his title.

3. The mis-statement of the consideration in the application for consent, would not vitiate the consent unless a court declaration to that effect were obtained or the Board in fact withdrew or revoked the consent.

C C Action in the Supreme Court for a declaration that a transfer of lease executed by the attorney for the plaintiff, was void.

K. C. Ramrakha for the plaintiff.

R. D. Patel for the first defendant.

K. A. Stuart for the second defendant.

D D The facts are stated in the judgment.

HAMMETT P.J. : [12th July, 1962]—

E E It is not disputed that on 14th March, 1955, the Plaintiff was convicted by the Supreme Court of Fiji of the offence of Attempted Murder, a felony, and sentenced to 15 years' imprisonment with hard labour. This sentence was reduced on 30th September, 1955, to one of 9 years' imprisonment with hard labour by the Fiji Court of Appeal. He was discharged from Prison on 13th March 1961, after earning full remission.

F F On 25th August, 1955, whilst he was serving this sentence in Prison, the Plaintiff gave the first Defendant, who is the brother of the Plaintiff's wife, a Power of Attorney purporting to give him full powers to deal with his property. This Power of Attorney, No. 1729, was registered with the Registrar of Titles on 27th August, 1955.

G G Shortly before the Plaintiff was convicted he had applied to the Native Land Trust Board for a lease of 22 acres of land in Vatuyaka Subdivision in Ba, which he had been occupying under a temporary permit. On 27th November, 1955, the Native Land Trust Board granted lease No. 9198 of this property to the Plaintiff and this was duly registered with the Registrar of Titles on 9th December, 1955, by the 1st Defendant, acting for the Plaintiff under the Power of Attorney.

H H Acting under the Power of Attorney granted him by the Plaintiff, the 1st Defendant then arranged to sell the Plaintiff's lease, No. 9198, to the 2nd Defendant for the sum of £390. On 16th February, 1956, the application of the parties, signed by both the 1st Defendant,

as Attorney for the Plaintiff, as vendor, and the 2nd Defendant, as purchaser, was forwarded seeking the consent of the Native Land Trust Board to this transfer. In the application the consideration was stated to be £90 instead of £390 as had in fact been agreed.

By its letter dated 20th February, 1956, the Native Land Trust Board gave its consent to the transfer subject to the payment of the rent for 1956. This rent was duly paid by the 1st Defendant for the Plaintiff.

On 26th March, 1956, the 1st Defendant executed on behalf of the Plaintiff, and as his Attorney, the transfer of the Plaintiff's lease to the 2nd Defendant. Although the consideration was stated to be £90 in that transfer, the full consideration of £390 was in fact paid. £200 was deposited with Messrs. Rice & Stuart, Solicitors, (and it is agreed that this is now held by Mr. Stuart, Solicitor of Lautoka, the successor to Messrs. Rice & Stuart, on behalf of the Plaintiff), and £190 was paid in cash to the 1st Defendant who perfectly properly expended all this money and more for and on behalf of the Plaintiff. This was spent principally in paying for the costs of the Plaintiff's defence at his trial and his appeal to the Court of Appeal, and the arrears of rent due to the Native Land Trust Board on his lease.

On 22nd May, 1956, the 1st Defendant visited the Plaintiff in prison. The Plaintiff says he then instructed the 1st Defendant not to sell his lease. The 1st Defendant on the other hand had by then already executed a transfer of the lease. The 1st Defendant says that he asked the Plaintiff's approval to Mr. Rice being appointed his administrator for the purpose of selling the lease. This was because doubts had arisen as to whether the Power of Attorney previously given by the Plaintiff, a convicted felon serving a sentence of imprisonment, was effective to give the 1st Defendant lawful authority to deal with the Plaintiff's property. The 1st Defendant denies that the Plaintiff forbade him to sell his lease, but on the contrary approved the appointment of Mr. Rice for the purpose of selling it. I find it difficult to accept the 1st Defendant's evidence on this point especially in view of the fact that on 30th May, 1956, the Plaintiff executed a revocation of his Power of Attorney to the 1st Defendant dated 25th August, 1955. This revocation was registered on 14th June, 1956.

Nothing was then done for nearly two years.

On 9th April, 1958, the Native Land Trust Board endorsed its approval on the transfer dated 26th March, 1956, pursuant to its previous consent on 20th February, 1956, and the transfer was later registered by the Registrar of Titles on 1st July, 1958, as transfer No. 68114.

In this action the Plaintiff claims a declaration that this transfer No. 68114 from the 1st Defendant as Attorney for the Plaintiff to the 2nd Defendant is void, damages against the 1st Defendant, an account and costs, and sundry other declarations and ancillary relief.

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The grounds upon which the Plaintiff relies are as follows:

1. That by reason of the Forfeiture Act 1870 the Power of Attorney granted by the Plaintiff to the 1st Defendant was null and void;

2. That the 1st Defendant should have rescinded or revoked the transfer to the 2nd Defendant as soon as the Plaintiff forbade him to sell his lease.

The provisions of the Supreme Court Ordinance, Section 35, read as follows:

"35. The Common Law, the Rules of Equity and the Statutes of general application which were in force in England at the date when the Colony obtained a local Legislature, that is to say, on the second day of January, 1875, shall be in force within the Colony subject to the provisions of section 37 of this Ordinance."

The material part of Section 37 reads:

"37. All Imperial laws extended to the Colony by this or any future Ordinance shall be in force therein so far only as the circumstances of the Colony and its inhabitants and the limits of the Colonial jurisdiction permit . . . and for the purpose of facilitating the application of the said laws it shall be lawful for the Court to construe the same with such verbal alteration not affecting the substance as may be necessary to render the same applicable to the matter before the Court . . . ."

It is the contention of Counsel for the Plaintiff that the Forfeiture Act 1870 is a statute of general application and therefore in force within Fiji by virtue of Section 35 of the Supreme Court Ordinance. Counsel for the 1st Defendant agrees with this contention, but Counsel for the 2nd Defendant does not. I am inclined to the view that the Forfeiture Act 1870 is a statute of general application. If it were not a statute of general application it is clear that the first ground upon which the Plaintiff relies must fail. Assuming for the moment, therefore, that it is a statute of general application, its precise provisions must first be examined to see if they could be called in aid effectively on behalf of the Plaintiff.

The Plaintiff relies on the provisions of Sections 8 and 9 of the Act. The material parts of Section 8 read as follows:

". . . . . every convict shall be incapable . . . . . of alienating . . . . . any property . . . . . save as hereinafter provided."

Section 9 of the Act provides means whereby an administrator may be appointed to manage a convict's property and such an administrator may alienate it and the convict is bound by the acts of such an administrator.

Alienation of his property by a convict can only therefore be made whilst he is in prison by the administrator appointed not by him, but for him, under Section 9.

The definition of "convict" is contained in Section 6 of the Act which reads :

“The expression ‘convict’ as hereinafter used, shall be deemed to mean any person against whom judgment of death, or of penal servitude, shall have been pronounced, or recorded by any Court of competent jurisdiction in England, Wales, or Ireland upon any charge of treason or felony.”

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In England, prior to the passing of the Criminal Justice Act 1948, sentences of penal servitude were authorised by the law. In Fiji, prior to the passing of the Penal Code in 1944 (Ordinance No. 18 of 1944), many serious crimes were punishable by sentences of penal servitude under the Malicious Damage Act 1861 and the Offences against the Person Act 1861.

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In 1944 the Penal Code laid down a penal code in substitution of the criminal law of England which, by and large, had previously been applied in Fiji.

By Section 415 and Schedule 1 of that Penal Code the provisions of the Malicious Damage Act 1861 and the Offences against the Person Act 1861 ceased to apply to Fiji. Section 24 of that Penal Code also laid down the only punishments that could be inflicted by a Court in Fiji, and “penal servitude” was not one of these. In its place was substituted a sentence of imprisonment which could be imposed either with or without hard labour, but the Courts had no power to pass a sentence of penal servitude. It has to be considered whether Section 6 of the Forfeiture Act should be construed as meaning that a convict, within the definition of that term in Section 6 of the Forfeiture Act 1870, should be deemed to be a person in Fiji upon whom a sentence of imprisonment, with or without hard labour, has been passed in view of the provisions of that part of Section 37 of the Supreme Court Ordinance which reads:

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“All Imperial laws extended to the Colony by this or any future Ordinance shall be in force therein so far only as the circumstances of the Colony and its inhabitants and the limits of the Colonial jurisdiction permit . . . and for the purpose of facilitating the application of the said laws it shall be lawful for the Court to construe the same with such verbal alteration not affecting the substance as may be necessary to render the same applicable to the matter before the Court . . .”

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I am of the opinion that a sentence of imprisonment is not the same as a sentence of penal servitude and Section 6 of the Forfeiture Act should not be construed as if it is.

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In my view to construe it otherwise would be to construe it with a verbal alteration affecting the substance of Section 6 of the Forfeiture Act 1870, and such a construction would be contrary to the provisions of Section 37 of the Supreme Court Ordinance. The Forfeiture Act 1870 never intended the same results to follow a sentence of imprisonment as followed a sentence of penal servitude. I say this because for one thing under English Law a sentence of penal servitude could not be passed for a period of less than three years (see *Halsbury: Laws of England* 2nd Ed. para. 316), whereas a sentence of imprisonment could not usually be passed for a period of more than two years (see *Halsbury* 2nd Ed. paras. 319 and 320). These two forms of punishment were inherently dif-

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A ferent. A sentence of penal servitude was never the same as a sentence of imprisonment in England. It was apparently for this reason when the Criminal Justice Act 1948 was passed in England, by which the punishment of penal servitude was abolished, that by the provisions of Section 83, and Part 1 of the 10th Schedule to the Act, the provisions of sections 6 to 30 of the Forfeiture Act 1870 were repealed. Further it was apparently considered necessary expressly to provide, by Section 78 and the transitory provisions of the 8th Schedule of the Criminal Justice Act 1948, that persons who at the commencement of the Act were undergoing a term of penal servitude should in future be treated as if they had been sentenced to imprisonment. It appears to me that this would not have been necessary had it been that a sentence of imprisonment was of no difference in substance from a sentence of penal servitude.

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C For these reasons I am of the opinion that the Plaintiff, in this case, who was serving a sentence of imprisonment, and not of penal servitude, was not a "convict" within the meaning of that term in Section 6 of the Forfeiture Act 1870. Even if, therefore, this is a statute of general application, the Plaintiff was not a person to whom the restrictions against alienation of his property applied. From this it follows that the Power of Attorney given by the Plaintiff to the 1st Defendant was not null and void.

D The second ground upon which the Plaintiff relies is that even if the Power of Attorney he gave the 1st Defendant was not null and void, the 1st Defendant should have rescinded or revoked the transfer to the 2nd Defendant as soon as the Plaintiff forbade him to sell the Plaintiff's lease.

E The 1st Defendant executed the transfer of the Plaintiff's lease, under the Power of Attorney, on 26th March, 1956. According to the Plaintiff, it was not until 22nd May, 1956, that he told the 1st Defendant not to sell his land. By then it was too late—the transfer of his land had already been signed. It was contended, however, that the previously given consent of the Native Land Trust Board had not yet been endorsed on the transfer nor had the transfer been registered with the Registrar of Titles. Even if the F 1st Defendant had not taken any steps to get these matters completed by 22nd May, 1956, it would not have made any difference because the 2nd Defendant himself could have taken the necessary steps to effect them notwithstanding the opposition of the Plaintiff or the 1st Defendant.

G A lot has been made of the undoubtedly reprehensible conduct on the part of the 1st and 2nd Defendants and their legal advisers, in deliberately giving a false statement that the consideration for the sale of the Plaintiff's land by the 1st Defendant to the 2nd Defendant was £90, instead of the true consideration of £390, in both the application to the Native Land Trust Board for its consent to transfer and in the transfer itself. I do not, however, think this misstatement itself vitiates the actual consent given by the Native Land H Trust Board unless and until they have obtained a declaration from the Court to that effect, or until the Native Land Trust Board in fact withdraws or revokes that consent. All the facts have been made

known to the Native Land Trust Board and they have chosen not to treat their consent as nugatory on vitiated by this mis-statement. In my view it is not open to either of the parties to the transfer or their agents to impeach it on the ground of their own or their agents' deceit of the Native Land Trust Board, unless there was some element of fraud in the transaction. The Native Land Trust Board did, in fact, consent to the transfer and the transfer did in fact take place. No question of fraud by one party on the other arises and I do not consider, therefore, that this mis-statement of fact affects the issue in the particular circumstances of this case.

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By the time the Plaintiff, according to the Plaintiff's evidence, instructed the 1st Defendant not to sell his land, the 1st Defendant could not lawfully and properly have halted the process by which the 2nd Defendant was entitled lawfully to perfect his title.

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In these circumstances the Plaintiff's claim on this ground also must fail.

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Having given the whole of the evidence careful consideration, I am quite satisfied, especially by the evidence of Mr. Foster, the Manager of the Native Land Trust Board, which I accept, that the 1st Defendant did not sell the Plaintiff's land at an under-valuation. In my view the 1st Defendant acted *bona fide* in the best interests of the Plaintiff exercising his powers under the Power of Attorney and the Plaintiff has entirely failed to satisfy me he is entitled to succeed in his claim to any of the reliefs sought in the Statement of Claim.

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There will, therefore, be judgment for each of the Defendants against the Plaintiff on the claim.

Before making any order for costs I will first hear Counsel if they wish it.

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*Judgment for the defendants.*

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