

RAJA RAM

v.

RAMRAJI

[SUPREME COURT, 1964 (Knox-Mawer P.J.), 28th May, 23rd
September]

Civil Jurisdiction

Land—registration of title—transfer of lease—transferee having knowledge of unregistered sublease containing right of renewal—intention to deprive sublessee of benefit of right—fraud—Land (Transfer and Registration) Ordinance (Cap. 136) s.29.

Landlord and tenant—registered lease—unregistered sublease containing covenant for renewal—covenant running with land.

Practice and procedure—particulars—pleading of fraud—lack of particulars alleged in reply—no application for particulars made—right to prove any material allegation in the pleadings.

By a transfer registered on the 9th April, 1959, the plaintiff became the lessee under a Native Lease originally granted for the term of twenty-one years from the 9th August, 1936, but extended for nine years from the 9th August, 1957. The defendant's predecessor in title became the sub-lessee of portion of the land comprised in the Native Lease for the period of seventeen years from the 7th August, 1940, under a tenancy agreement made with a predecessor in title of the plaintiff; the agreement, which was not registered, contained provision for its extension or renewal for the period of any extension or renewal of the headlease. In the plaintiff's action for possession of the land occupied by the defendant, the latter counterclaimed for the execution of an extension of the sublease, and pleaded fraud.

Held: 1. In the absence of any application by the plaintiff for further and better particulars of the alleged fraud it was open to the defendant to give evidence which supported any material allegation in the pleadings.

2. That the provision for renewal in the sublease attached to the land and the burden of it ran against the original sublessor and her successors in title.

3. That on the evidence the plaintiff acquired his registered title in full knowledge of the covenant for renewal and with a view to depriving the beneficiary thereunder of the benefit thereof; this conduct constituted fraud within the meaning of section 29 of the Land (Transfer and Registration) Ordinance.

Cases referred to: *Chester (Dean and Chapter) v. Smelting Corporation* [1902] W.N. 5; *Hewson v. Cleeve* [1904] 2 Ir. R. 536; *Merrie v.*

McKay (1897) 16 N.Z.L.R. 124: *Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd.* [1923] N.Z.L.R. 1137: *Webb v. Hooper* [1953] N.Z.L.R. 111.

A Action for possession and accounts; counterclaim for execution of extension of sublease.

F. M. K. Sherani for the plaintiff.

B K. A. Stuart for the defendant.

KNOX-MAWER P.J.: [23rd September, 1964]—

C By a Memorandum of (Native) Lease (Ex. 1A) executed on 31st October 1939, and registered on 4th November 1939, one Rama (d/o Sheo Nath) acquired from the Director of Lands (acting for the native owners) a lease of some thirteen acres of land in Vitogo, Lautoka. This lease, which I shall call the Headlease, is stated to be for a term of twenty-one years, commencing on 9th August, 1936 at an annual rental of £3.9.0. By a Transfer of Native Lease (Ex. 1C) executed on 1st September, 1952 and registered on 18th December 1952, Rama transferred her interest in the Headlease to one Shiu Narayan Prasad. By an extension of Native Lease (Ex. 1B) executed D on 17th May 1961, and registered on 4th July 1961 the Native Land Trust Board (on behalf of the native owners) granted to Shiu Narayan Prasad an extension of the Headlease. The extension is stated to be for a further period of nine years, from 9th August 1957 at an annual rental of £13.3.2. By a Transfer of Native Lease (Ex. 1D) executed on 9th April 1959 and registered on 10th January 1962, Shiu Narayan Prasad transferred his interest in the Headlease to the E Plaintiff.

By a Tenancy Agreement (Ex. 1E) dated 5th November 1940, Rama granted to one Dwarka a Sublease of some six acres of the land comprised in the Headlease. This Sublease is stated to be for a term of seventeen years, commencing 7th August 1940. Clause 7 of F the Sublease reads as follows :—

G “7. The Landlord shall within a reasonable time before the expiry of the Landlord’s head lease apply for a renewal or extension thereof for the longest term and on the most favourable conditions reasonably available and if successful the Landlord shall thereupon extend or renew these presents for the same period for which the head lease has been extended or renewed but subject to the following conditions :—

(a) The tenant shall first pay to the Landlord a proportionate cost of obtaining the extension or renewal of the head lease including premia reasonably paid by the Landlord.

H (b) The renewal or extension of these presents shall be varied so that the rent shall be proportionate to any increase or diminution in the renewed or extended head lease and so as to include any variations in the head lease.

PROVIDED HOWEVER that if the Tenant so elects the Tenant may when the head lease expires at the Tenant's own cost in all things try to secure a new and separate lease in the Tenant's own name of the land hereby demised and if successful the Landlord shall execute any surrender or consent necessary to enable the Tenant to take such new separate lease." A

The Sublease has not been registered under the Land (Transfer and Registration) Ordinance, Cap. 136. Dwarka died sometime between 1956 and 1962—the exact date of his death is not in evidence. The Defendant is the wife of Dwarka and the executrix of his estate. B

The Plaintiff commenced this action against the Defendant by a Writ dated 24th June 1963 claiming, *inter alia*, possession of the land comprised in the Sublease and an account of the rents and profits received in respect thereof by the Defendant from 11th January 1962.

In her amended defence and Counterclaim the Defendant states as follows:— C

"3. . . . she admits that she was on the 10th day of January 1962 in possession of the land and that her possession arises from the . . . agreement dated the 5th day of November 1940 made between Rama daughter of Sheonath the plaintiff's predecessor-in-title as lessor and the defendant's husband as lessee . . . and she further says that she is still in possession of the said land and that the plaintiff is acting fraudulently in attempting to dispossess her thereof. D

5. . . . the defendant admits that no document has been registered to protect her said tenancy agreement dated the 5th day of November 1940 . . . and says that since she was in possession of that part of the said land comprised in the said agreement dated the 5th day of November 1940 when the plaintiff took a transfer of the said land the plaintiff was under a duty to enquire as to her rights. E

7. The defendant . . . says that the plaintiff has at all times had knowledge of the defendant's rights and is guilty of fraud in seeking to claim the land the subject of the agreement dated the 5th day of November 1940 in contravention of the defendant's rights." F

In the next paragraph (8) of the amended Defence and Counterclaim, the Defendant sets out Clause 7 of the Sublease cited above and in paragraph 9 she points out that by letter dated 17th April 1962 (see Ex. 2G), she has called upon the Plaintiff to comply with Clause 7. In the prayer to her Counterclaim, the Defendant seeks an order that the Plaintiff do execute an extension of the Sublease, or alternatively a declaration that the Defendant be deemed the Sub-lessee of the six acres for the unexpired portion of the Headlease. G

In paragraph 2 of his Reply to the amended Defence and Counterclaim, the Plaintiff has objected that no particulars have been given of the alleged fraud. Counsel for the Defendant has answered at the hearing, that he has given sufficient particulars of fraud in that the fraud consisted in the plaintiff's acquiring the registered transfer. H

knowing of Clause 7, and then endeavouring to make use of the position he has obtained to deprive the Defendant of her rights thereunder. Moreover, there is in this connection authority that where an opponent omits to ask for particulars evidence may be given which supports any material allegation in the pleadings (see the *Annual Practice* (1934), p. 354; *Dean of Chester v. Smelting Corporation* [1902] W.N.5; *Hewson v. Cleeve* [1904] 2 Ir.R. 536). The Plaintiff has at no stage applied for an Order against the Defendant for further and better particulars of the alleged fraud.

A

B The Plaintiff has said in evidence that the 1952 transfer of the Headlease was acquired by Shiu Narayan Prasad as a trustee for the Plaintiff. He has also stated that since 1952 he has been living on the land while Dwarka was living alongside on the land comprised in the Sublease.

C Clause 7 of the Sublease is clearly a covenant attaching to the land, the benefit of which runs in favour of Dwarka and his successors-in-title., (the Defendant is agreed to be such a successor-in-title) and the burden of which runs against Rama and her successors-in-title (the Plaintiff is agreed to be such a successor-in-title).

D I have concluded that the only inference that can reasonably be drawn from the whole of the evidence (and I refer in particular to what the Plaintiff himself has said) is that the Plaintiff undoubtedly acquired his registered title to the land in full knowledge of the covenant and what it involved, and with a view to depriving the beneficiary thereunder of the benefit thereof. This constitutes a fraud within the meaning of section 29 of Cap. 136, (see *Merrie v. McKay* (1897) 16 N.Z.L.R. 124; *Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd.* [1923] N.Z.L.R. 1137; *Webb v. Hooper* [1953] N.Z.L.R. 111).

E

Accordingly the Plaintiff must be held to hold the land in question subject to the rights of the Defendant (as executrix of Dwarka's estate) under the covenant. The Plaintiff is therefore ordered to extend or renew the Sublease in favour of the Defendant for the same period for which the Sublease has been extended subject to the compliance by the Defendant of the conditions (a) and (b) of Clause 7. The Plaintiff's action is dismissed and the Defendant is awarded judgment in these terms upon the Counterclaim, together with an order for costs against the Plaintiff.

F

Action dismissed; judgment on the counterclaim for the Defendant (plaintiff on the counterclaim).