A

RAM MANOHAR

v.

LALLU CHAUDHARY

B

[COURT OF APPEAL, 1967 (Mills-Owens P., Gould J.A., Bodilly J.A.), 15th, 23rd February]

[SUPREME COURT, 1966 (Hammett J.), 19th, 23rd, September]

Civil Jurisdiction

C

Appeal—civil appeal—application to call fresh evidence—proposed evidence inconsistent with appellant's case—evidence not unavailable at time of Supreme Court hearing.

Practice and procedure—pleading—claim of title by adverse possession not pleaded—no simple plea of possession—effect of Land (Transfer and Registration) Ordinance (Cap. 136) Pt. 22—Rules of the Supreme Court 1883, 0.21 r.21.

Crown land—protected Crown lease—consent of Director of Lands to action in relation to—counterclaim involving relief of different nature—jurisdiction—further consent to counterclaim required—Crown Lands Ordinance (Cap. 138) s.15(1).

D

Court—jurisdiction—protected Crown lease—counterclaim affecting—consent of Director of Lands required—Crown Lands Ordinance (Cap. 138) s.15(1).

Gift—imperfect gift—will not be perfected by equity—Indemnity, Guarantee and Bailment Ordinance (Cap. 199) s.59.

E

In the Supreme Court the respondent claimed from the appellant, his son, possession of premises (held under a Protected Crown Lease) which had been occupied by the appellant for three years past. The appellant claimed that the premises had been given to him by the respondent, whereas the respondent's case was that the occupation was part of an amicable family arrangement. The registered lease was in the name of the respondent and no consent had ever been given by the Director of Lands to a transfer to the appellant. Further, the Director of Lands had consented under section 15(1) of the Crown Lands Ordinance, to the action for possession by the respondent but not to the relief sought by the appellant in his counterclaim for specific performance of an alleged agreement to transfer the lease to him. The trial judge held that the appellant occupied the premises as a licensee and became a trespasser when demand for possession was made; that even if the evidence justified giving the appellant the relief he sought (which it did not) the court had no jurisdiction to do so by reason of section 15 of the Crown Lands Ordinance; and that even if there had been a gift it was, on the appellant's own evidence imperfect, and equity would not complete an imperfect gift. On appeal the appellant sought to call further evidence on the question of the alleged gift and to put forward a claim based on adverse possession.

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Indemnity, Guarantee and Bailment Ordinance, s.59: "No action shall be brought.......................

(b) upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them.......................

unless the agreement upon which such action is to be brought or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

Held: 1. The further evidence sought to be called was inconsistent with the appellant's own case in the court below and there was no allegation that it was unavailable at that time; it was also inconsistent with the appellant's case on appeal and the application would be refused. A

2. No claim based on adverse possession had been pleaded and there was no evidence to support such a claim. (Per Mills-Owens P.: His plea was not a simple plea of possession and in any event the effect of Part XXII of the Land (Transfer and Registration) Ordinance overrides the rule that a simple plea of possession embraces any ground of defence other than an equitable one). B

3. The trial judge was correct in holding that the gift, if any, was an incomplete gift, which would not be enforced at law or in equity. (per Mills-Owens P.: Not only will equity refuse to complete an imperfect gift in favour of a volunteer but also it will not do so indirectly by treating an imperfect gift as a declaration of trust). C

4. The counterclaim sought relief of a nature quite different from that claimed in the action and the trial judge was correct in holding that in the absence of consent by the Director of Lands under section 15 of the Crown Lands Ordinance, the court had no jurisdiction to grant it.

Cases referred to: *Milroy v. Lord* (1862) 4 De G.F.&J.264; 45 E.R. 1185: *Heath v. Pugh* (1881) 6 Q.B.D.345; 44 L.T.327B; affirmed (1882) 7 App.Cas.235. D

Appeal from a judgment *(infra)* of the Supreme Court in a suit for possession of a protected Crown leasehold.

M. V. Bhai for the appellant.

D. N. Sahai for the respondent.

D. N. Sahai for the plaintiff in the Supreme Court. E

F. M. K. Sherani for the defendant in the Supreme Court.

The facts sufficiently appear from the judgments.

In the Supreme Court.

HAMMETT J.: [23rd September 1966]—

F The Plaintiff's claim is for the recovery of possession of the land comprised in Crown Lease No. 1693, a Protected Lease within the meaning of the Crown Lands Ordinance, together with the dwelling house erected thereon situated at Nabua Road, Samabula, Suva, which is at present occupied by the defendant who is the plaintiff's eldest son.

Many of the facts are not in dispute and I hold them to be as follows.

In 1948 the Crown compulsorily acquired certain land and premises owned and occupied by the plaintiff at Koronivia. He was paid £890 compensation and was granted Crown Lease No. 1693 of Lot 10, Section 50, Samabula East, dated 22nd October, 1948. G

With the compensation given him and with the aid of his family and relations he built a residence on Crown Lease No. 1693. Upon completion this house was occupied by the plaintiff and his sons and relatives. Amongst the occupants was the defendant, the plaintiff's eldest son. H

About three years ago unhappy differences arose in the family. This resulted in the plaintiff and all his sons and relatives, except the defendant leaving the premises. The defendant who has lived there since it was

built did not move and he has declined to comply with the plaintiff's requests to him to vacate the premises.

A

It is the case for the plaintiff that he allowed the defendant and other members of the plaintiff's family to occupy the premises on an amicable family arrangement. The plaintiff says he himself has paid all the rent and rates for the premises since 1948, and I acept his evidence on this issue. The plaintiff says the friction arose in the family at this residence because of the misconduct and misbehaviour of the defendant due to his excessive drinking habits.

B

It is the case for the defendant that the plaintiff gave the premises to him, the defendant as his eldest son, as a gift. He said that his father gave him the house and told him he was to look after the rest of the members of the family.

C

The plaintiff is well over 70 years of age and it is possible that this was what both he and the defendant believed would in fact take place. Nevertheless nothing has been done to perfect this alleged gift which is undoubtedly imperfect.

The registered title to this land is still in the name of the plaintiff and I hold as fact that no consent has ever been given by the Director of Lands to it being transferred by the plaintiff to the defendant. The Director of Lands has consented to the plaintiff bringing this action for possession and has not consented to the relief sought by the defendant in his counter-claim being granted by this Court. In the absence of such consent, under the provisions of Section 15 of the Crown Lands Ordinance, this Court has no jurisdiction to give the defendant the relief he seeks, even if the evidence justified this course, which in my view it does not.

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E

The defendant occupied the plaintiff's house rent free and in return for no financial or other legal obligation. He was not a tenant of the plaintiff but was a mere licensee with his father's permission to reside in the house. His occupancy did not rest on any contractual rights or obligations. Upon his father, the owner, withdrawing his permission to the defendant to continue residing in his house the defendant became a trespasser. The defendant admits that such permission was in fact withdrawn in 1964.

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The plaintiff is the registered owner of the legal title to the premises. The defendant appears to be setting up a claim to a right in equity to the premises as a result of an alleged gift. If there ever was a gift, on the defendant's own evidence it was an imperfect gift. It is well established that equity will not perfect an imperfect gift.

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In these circumstances the plaintiff is entitled to succeed in his claim to recovery of possession. There will therefore be judgment for the plaintiff on the claim that he do recover possession of the premises and for the plaintiff on the counter-claim.

The plaintiff also claimed damages and mesne profits but no particulars were given in the Statement of Claim and no evidence has been called to justify any substantial award under these heads. I am, however, satisfied the plaintiff has suffered some damage and he is entitled to a nominal award on this score. In the circumstances I do therefore award the plaintiff nominal damages in the sum of £5.

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The defendant must pay the plaintiff's taxed costs on both the claim and the counter-claim.

In the Court of Appeal. A

The following judgments were read:

BODILLY J.A.: [23rd February, 1967]—

This is an appeal from the judgment of Hammett J. in exercise of the civil jurisdiction of the Supreme Court of Fiji in first instance.

The appellant before this Court is the original defendant in the Court below and the respondent the original plaintiff. B

The cause of action was a claim for recovery of possession by the respondent from the appellant of certain land comprised in a Crown Lease No. 1693, being a protected lease within the meaning of the Crown Lands Ordinance together with the dwelling house erected thereon and situated at Nabua Road, Samabula, in Suva. That land is presently occupied by the appellant who is the eldest son of the respondent. C

The facts as found by the learned trial Judge in the Court below are quite short and are as follows:

In 1948 the respondent owned and occupied certain land at Koronivia which, in that year, the Crown compulsorily acquired and in compensation therefor paid to the respondent the sum of £980 and also granted to him the Crown Lease now in issue in this case, namely No. 1693 in Lot 10, D Section 50, Samabula East, dated 22nd October, 1948. That lease is, and at all material times has been, registered in the name of the respondent. With the £980 cash compensation and the assistance of his sons, including the appellant, and other persons, the respondent erected the dwelling-house which is now part of the matter in dispute. In that dwelling-house the respondent and his sons, including the appellant and his family, took up residence and there lived together until friction arose E between the respondent and the appellant regarding the latter's drinking habits which resulted in the respondent and his other sons moving out of the premises and leaving them in the sole possession of the appellant. That took place about three years before the institution of proceedings in this case. The exact date of the move is not disclosed by the evidence and no finding was made upon it. In the Court below the respondent maintained that the property belonged to him and that he had permitted F his sons, including the appellant, to dwell in the house together with himself as a convenient family arrangement. As a result of the friction which arose between himself and the appellant, the respondent, as already stated, left the premises in 1964 and later withdrew his permission for the appellant to continue to occupy the premises. According to the record of the evidence that withdrawal was communicated to the appellant by solicitor's letter dated 11th August, 1964, and receipt is not disputed. G The appellant has failed to vacate the premises and is still in possession. Finally the respondent commenced these proceedings by writ dated 28th May, 1965. By his statement of claim, after pleading substantially the above facts, the respondent prayed for an order for possession of the land and buildings in question, mesne profits or damages and other relief with costs in the cause. The appellant pleaded in defence, inter alia, that he denied that the land in respect of which the compensation of H £980 had been paid to the respondent was the property of the respondent, and counter-claimed for a decree of specific performance in respect of an alleged parol agreement between himself and the respondent, made

in 1964, to the effect that the respondent would transfer registration of the Lease No. 1693 from his own name into that of the appellant. By
A way of defence to the counterclaim the respondent pleaded section 59 of the indemnity, Guarantee and Bailment Ordinance. And so the case came up for trial. The learned trial Judge found in favour of the respondent as to recovery of the property, awarded him nominal damages and the costs of the action and dismissed the counter-claim.

Against that decision the appellant has appealed to this Court on four
B grounds. He has also filed an affidavit seeking leave to introduce fresh evidence. I shall deal at once with the affidavit. The fresh evidence which it is sought to introduce concerns two matters — firstly it is sought now to call evidence in support of the second paragraph of the defence to the effect that the respondent had given the land at Koronivia to the appellant before its compulsory acquisition by Government and that the respondent had given the resultant compensation paid him to the appellant
C also; and secondly to establish that it was not the respondent but the appellant who had subsequently erected the premises on Crown Lease No. 1693. Only the appellant gave evidence for the defence in the Court below and he gave no evidence whatsoever in support of either of these allegations. On the contrary he stated on oath that it was the respondent who had built the house. The affidavit does not suggest that the evidence which the appellant now wishes to introduce was not known and available
D to him at the time of the proceedings in the Court below and could have been produced there had he taken steps to do so. The appellant enjoyed the benefit of counsel and it can only be presumed that he elected not to call such evidence. For these reasons this Court refused leave to adduce such evidence at this late stage, and rejected the application.

I shall deal now with the four grounds of appeal seriatim.

E As to the first ground, namely that the learned trial Judge failed to consider the fact that house and land at Koronivia was given to the appellant by the respondent. There was no shred of evidence adduced to support that allegation and of course it was rightly rejected.

As to the second ground, namely that the block of land comprising Crown Lease No. 1693 made available by Government in compensation for
F the compulsory acquisition of the land at Koronivia, was made available for the use and benefit of the appellant and his family. That ground of appeal falls with the first ground. There was no evidence adduced in support of any such thing. On the contrary, Crown Lease No. 1693 was in fact registered in the name of the respondent without reservation as long ago as 1948 and is still so registered and the appellant has taken no steps whatever until now to seek to alter the position.

G As to the third ground of appeal, namely that the learned trial Judge erred in rejecting the appellant's claim to title by adverse possession. As no such claim was pleaded in the proceedings before the trial Judge I fail to see how he can be said to have fallen into error; and there was in any event no evidence which could support such a claim.

The final ground of appeal alleges that the learned trial Judge erred in refusing to grant specific performance to the appellant. This relates
H to the counter-claim in the action, namely that by an oral agreement made between the respondent and the appellant on some date unspecified in 1964, the respondent agreed to transfer Crown Lease No. 1693 to the appellant. In answer to the counter-claim the respondent pleaded section

59 of the Indemnity, Guarantee and Bailment Ordinance. That provision rendered the gift, if any, an incomplete gift and no amount of oral evidence to the contrary can circumvent the Ordinance, nor can equity be called in aid. This is sufficient to dispose of the last ground of appeal. However, it was argued before the learned trial Judge on behalf of the respondent that in any event the court had no jurisdiction to entertain the counter-claim by reason of the provisions of subsection (1) of section 15 of the Crown Lands Ordinance (Chapter 138), relating to protected leases, because the appellant has failed to obtain the consent of the Director of Lands to that claim. That subsection provides that no protected lease, and the lease in question is a protected lease, "shall be dealt with by any court or under the process of any court of law" without the written consent of the Director of Lands. No such consent had been obtained in respect of the counter-claim. For the appellant it was argued that once an action was commenced with the consent of the Director such consent was sufficient to cover any counter-claim set up in the same action. The learned trial Judge rejected that view, and the point was taken again before this Court. There is no authority on the point so far as the interpretation of local legislation is concerned, but, with respect, in my opinion the learned trial Judge was correct in the view which he took. The Ordinance requires that consent be obtained before a lease may be dealt with in any court. The consent clearly will involve a consideration by the Director of the relief claimed. In this case, for example, the relief claimed was recovery of possession from a trespasser by the registered lessee. It would be strange, and would go far to defeat the object of the section, if a counterclaim, claiming some quite different relief, as in this case a change in the registered ownership of the lease, could be dealt with without the Director having opportunity to consider whether or not such a change in ownership was acceptable. For those reasons I am of the view that in dealings with suits regarding leases protected by virtue of the Crown Lands Ordinance, both claim and counter-claim require the consent of the Director of Lands.

In the result, for the reasons I have given, I consider that all four of the grounds of appeal before this Court fail, and I would dismiss the appeal with costs.

MILLS-OWENS P. —

I agree that there is no merit in either the appeal or the application to adduce fresh evidence.

Paragraph 2 of the appellant's affidavit lodged in support of the application to adduce fresh evidence claims that the appellant has a witness, not previously available, to prove that the house at Koronivia was given to him by the respondent. An alleged gift of the house at Koronivia also forms the basis of ground No. 1 of the appeal. But the affidavit and ground No. 1 are themselves at variance in that the affidavit says that "the plaintiff had given me completely the house and land at Koronivia" whereas ground No. 1 says that "the house and land at Koronivia was given to the defendant as a gift by the plaintiff for the defendant to reside therein during the life time of the defendant". The Statement of Defence alleged that the plaintiff/respondent gave the land only to the appellant, who himself received compensation of £980 for it from the Crown when it was resumed by the Crown. In the course of the trial, and in particular in the appellant's evidence, no reference whatsoever

was made to an alleged gift to the appellant of the house or land at Koronivia, either completely or for life. The respondent's evidence that the compensation of £980 was paid to him and that he used it to construct the house at Samabula was not contradicted.

Putting the case for the appellant in the Court below at its highest he was claiming: (a) that the house at Samabula had been given to him by the respondent; (b) that he had obtained a title to it by adverse possession. On the appeal the appellant is apparently attempting to sustain his claim to possession on a third basis, namely that the respondent, having given him the property at Koronivia but not having executed a registered transfer of it, became a trustee of that property and later of the compensation moneys for the appellant, and, when those moneys were used by the respondent for the building of the house at Samabula, thereupon became a trustee of that house for the appellant. Not only will equity refuse to perfect an imperfect gift in favour of a volunteer but also it will not do so indirectly by treating an imperfect gift as a declaration of trust (*Milroy v. Lord* (1862) 4 De G.F. & J. 264).

Ground of appeal No. 2 suggests that in the case of the land resumed by the Crown at Koronivia the appellant was one of the 'evictees'; that when the Crown made a grant of the land at Samabula the purpose was to provide alternative land for the evictees; and that therefore the appellant is entitled to the property at Samabula. All this was not pleaded and there is no evidence whatsoever to support it.

With regard to paragraph 2 of the affidavit it need only be said that the Reply filed by the respondent gave the appellant the clearest notice of the case he had to meet, namely that his pleading that the property at Samabula was given to him as a gift was denied. This ground for adducing fresh evidence fails by any test; the appellant is simply endeavouring to litigate the matter afresh. Counsel for the appellant argued that a son was not to be regarded as a volunteer, in relation to rule that equity will not perfect an imperfect gift; he could cite no authority, for the very good reason, I am sure, that there is none.

Ground of appeal No. 3 and paragraph 5 of the affidavit relate to the matter of adverse possession. This was not pleaded. If the matter rested on Order 21 rule 21 of the (Eng.) R.S.C. alone it could be said that a mere plea of possession would have entitled the appellant to raise this issue (*Heath v. Pugh* (1881) 6 Q.B.D. 345 at 353). But the appellant not only pleaded that he was in possession but raised other specific issues by way of defence and counterclaim; he thereby, in my view, surrendered any right to raise the issue of adverse possession at the trial, that is to say without amendment of his pleadings. Further, under the procedure laid down by Part XXII of the Land (Transfer and Registration) Ordinance (Cap. 136) it is for the defendant to show cause why an order of ejectment should not be made; this, in my view, overrides the rule that a simple plea of possession entitles the defendant to raise any ground of defence (other than an equitable ground). Apart from these considerations, no such claim to a prescriptive title could possibly succeed on the facts as found by the trial judge, namely that the defendant lived in the house at Samabula together with his father (the respondent) and other members of the family, until some two or three years ago; there was no suggestion, even in the appellant's own evidence, of any such exclusive possession on his part, adverse to the respondent and for the necessary

period, as is necessary to found a claim to such a title. Further, if as he alleged in his Statement of Claim, he was in possession as a donee under an imperfect gift he was, at best, a tenant at will; there is no evidence that he remained in possession for the necessary period after the determination of such tenancy; he agrees that the demand for possession made by the respondent was made but some two or three years ago; time would not run whilst he was there as a tenant at will or licensee of the respondent. A

The appeal is wholly without merit; the judgment of the learned trial Judge is clearly right. B

The appeal is dismissed with costs.

GOULD J.A. —

I have had the advantage of reading the judgments of the learned President and of Bodilly J.A. and for the reasons they have given I agree that the appeal must be dismissed with costs. C

In my view the appeal was a hopeless one *ab initio* and the judgment of Hammett J. in the Supreme Court was entirely correct on the case as presented to him. Quite apart from any question of pleading there was no evidence upon which any valid claim of title by adverse possession could be based. As to the question of a gift, the learned Judge made no firm finding that there was even an incomplete gift, but assuming that there was, he found, correctly in my view, that under the law, for lack of completeness it could not avail the appellant. D

While there was no evidence upon which the counterclaim could have succeeded in any event, I agree also with Hammett J. that having regard to the particular contents of the claim and counterclaim, section 15 of the Crown Lands Ordinance precluded the Court from exercising jurisdiction on the counterclaim to give the relief sought.

Appeal dismissed.