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RAM PALI

v.

JAGMAN

B [SUPREME COURT, 1968 (Moti Tikaram Ag. P.J.), 21st October,
27th November]

Civil Jurisdiction

C *Native land—sublease—consent of Native Land Trust Board given conditionally—
consent withdrawn on non-fulfilment of condition—dealing inoperative—Native Land
Trust Ordinance (Cap. 115—1967) s.12.*

*Landlord and tenant—Native Land—sublease—consent of Native Land Trust Board
given conditionally—consent withdrawn on non-fulfilment of condition—dealing in-
operative—recovery of possession by landlord by virtue of strength of own title—
Native Land Trust Ordinance (Cap. 115—1967) s.12.*

D A sublease of ten acres of native land from the plaintiff to the defendant
contained a clause providing that the agreement was subject to the defend-
ant obtaining a new cane contract. Under section 12 of the Native
Land Trust Ordinance (Cap. 115) the dealing required the consent of the
Native Land Trust Board. The Board gave its consent conditionally
upon the defendant obtaining a cane contract, which was, however, refused
him by the Fiji Sugar Board; the Native Land Trust Board then withdrew
its consent. In an action by the plaintiff to recover possession of the
E land —

Held: 1. (a) The arrangement between the parties was inoperative
until fulfilment of the stipulation of the Native Land Trust Board relating
to the cane contract.

F (b) The provision in the sublease regarding the cane contract was a
condition precedent which was never fulfilled.

2. The non-fulfilment of the condition precedent and the withdrawal of
the conditional consent rendered the defendant's occupation of the land
illegal.

G 3. The plaintiff was entitled, by virtue of the strength of her title, to
recover possession of the land, but not to any other relief by way of
mesne profits or damages.

Action in the Supreme Court to recover possession of native land.

M. V. Pillai for the plaintiff.

S. M. Koya for the defendant.

H The facts sufficiently appear from the judgment.

MOTI TIKARAM J.: [27th November, 1968]—

In this action the plaintiff seeks to recover from the defendant possession of ten acres of land which he is occupying under a purported sub-lease (also referred to in the pleadings as tenancy agreement) dated the 20th November, 1964 for a period of seventeen years with effect from the 1st January, 1965 at the annual rental of £5.10.0 per annum, the first payment being stipulated to be made on the first day of January, 1965. The sub-lease by clause 3 provided that the agreement was subject to the tenant obtaining a new cane contract. The plaintiff is the registered lessee by virtue of Native Lease No. 10727 of approximately thirty acres of native land out of which she purported to sub-lease to the defendant ten acres. Native Lease No. 10727 is issued subject to a number of conditions, restrictions and covenants, one of these being that the lessee shall not alienate or deal with the land leased or any part thereof, whether by sale, transfer or sub-lease or in any other manner whatsoever without the consent in writing of the lessor first had and obtained. The lessor, of course, is the Native Land Trust Board. Although the sub-lease (Exhibit B) was not specifically made subject to the consent of the Native Land Trust Board, nevertheless, it is agreed that by operation of law this sub-lease will be of no effect without the requisite prior consent. Section 12(1) of the Native Land Trust Ordinance, Cap. 115, applies to the land in question. The whole of this Section reads as follows :-

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“12. (1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Ordinance to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void:

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Provided that nothing in this section shall make it unlawful for the lessee of a residential or commercial lease granted before the twenty-ninth day of September, 1948, to mortgage such lease.

(2) For the purposes of this section “lease” includes a sublease and “lessee” includes a sublessee.”

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The sublease was presented to the Native Land Trust Board for consent. Giving their consent conditionally, the Native Land Trust Board stipulated by letter dated the 8th day of December, 1964 that the consent is subject to the tenant, Jagman, father’s name Bhagwandin obtaining a cane contract and on the understanding that both parties will surrender their titles for issue of separate leases. In reply to the defendant’s application for a cane contract, the Fiji Sugar Board, by letter dated March 30th, 1967 replied as follows :-

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“The overall quota of cane for Fiji has already been completely allotted to existing contracts. The millers, therefore, are not able to enter into any more new contracts.”

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See Exhibit A.(1)

A By letter dated 1st February, 1967, the plaintiff asked the defendant to give up possession of the land in question. Subsequent correspondence shows that the defendant refused to give up possession, relying for his rights on the tenancy agreement, Exhibit B, entered into between the parties on the 20th day of November, 1964. On the 3rd March, 1967, the Native Land Trust Board withdrew its consent, stating that as no cane contract has been issued, the approval of a sublease or tenancy is withdrawn in the terms of the approval and the agreement, (see Exhibit D.).

B The parties to this action also agree that the plaintiff's title, i.e. Native Lease No. 10727, was never surrendered for the purpose of the issue of separate leases.

The issues in this case were agreed upon and reduced to writing as follows :-

C "The plaintiff and the defendant agree that the matter in issue is whether the Tenancy agreement dated the 20th November, 1964 and made between the plaintiff of the one part and the defendant of the other part and whereby the plaintiff agreed to grant a sublease of a piece or parcel of land containing 10 acres more or less being portion of the land known as "DELAISOMUTU" situated at Vutua-levu in the district of Nadi in the Province of Ba and being part of the land comprised in Native Lease No. 10727 is a lawful and binding contract between the parties.

E The plaintiff's counsel, Mr. Pillai, has argued that the sublease referred to in the agreed issues as the tenancy agreement is not a valid and binding document, firstly because a condition precedent, namely obtaining of a cane contract, was never fulfilled and secondly, noncompliance with the conditons imposed by the Native Land Trust Board rendered the agreement null and void. Indeed, he argues, Section 12 of the Native Land Ordinance is a complete answer to the plaintiff's counter-claim asking for specific performance. Mr. Koya, Counsel for the defendant has argued that the obtaining of a cane contract is not a condition precedent but is a term that may be fulfilled subsequently. Furthermore, he submits, the Native Land Trust Board had no power to give consent conditionally. Even if it had such power, it is his contention that having once given consent, the Native Land Trust Board in law cannot withdraw its consent. He argues that the purported withdrawal of consent has no validity in law. He has drawn the Court's attention to the approval endorsed by the Secretary of the Native Land Trust Board on the tenancy agreement, Exhibit B, which endorsement does not contain any qualification. In so far as the pleadings are concerned, it has never been the defendant's contention that the Native Land Trust Board had given an unqualified consent to the proposed dealing. It is quite obvious to me that the conditional consent given by the Native Land Trust Board is referable to the endorsement made on the purported sublease itself. Had there been an unconditional consent to the proposed dealing separate and apart from the one referred to in the pleadings, the defendant would have undoubtedly referred to it, either in his defence or in his counter claim with a view to pleading estoppel. In my view, the arrangement entered into between the palintiff and the defendant amounted to a dealing within the meaning of Section 12 of the Native Land Ordinance and that

such dealing was inoperative and of no effect until fulfilment of that part of the stipulation made by the Native Land Trust Board which related to obtaining of a cane contract. Furthermore, in my view, clause 3 of the tenancy agreement as between the parties themselves was a condition precedent which was never fulfilled. I am also of the opinion that there has been a *de facto* but unlawful dealing of native land without the effective consent of the Native Land Trust Board. The fact that the condition precedent was not fulfilled and the fact that the conditional consent was withdrawn clearly render the defendant's occupation of the land in question illegal. In my view, the defendant should never have gone into occupation of the land until and unless he had satisfied the condition precedent relating to the obtaining of a cane contract. Similarly the plaintiff ought not to have given possession. I hold that the tenancy agreement (sublease Exhibit B) is not a lawful and binding contract between the parties. Consequently the plaintiff is entitled to rely on the strength of her title to support her claim for possession. It follows therefore that the defendant's claim to remain on the land and his counter claim for specific performance cannot succeed because he will have to assert the illegal transaction and the unfulfilled condition precedent. This he cannot lawfully do. By reason of the illegality of the transactions the defendant is deprived of the aid of equity. There is no evidence to justify awarding damages against the plaintiff for any breach of contract. His defence therefore must fail and his counter claim is dismissed in its entirety. There will therefore be judgment for the plaintiff but it is limited to an order for possession only of the land in question. In my view the plaintiff is not entitled to any other relief by way of mesne profits or damages. Furthermore, each party will bear its own costs.

Judgment for the plaintiff for permission.