HARILAL

A

v.

HARI SHANKAR
and
DIRECTOR OF LANDS

B

[COURT OF APPEAL]

Gould, V.P., Spring, J.A., Chilwell, J.A.

Date of Hearing: 15 July 1981
Date of Judgment: 31 July 1981

C *Crown Land—Crown lease—where portion of land had by wrong description been included in lease. Land Transfer Act s. 168 permitted correction of Certificate of Title.*

R. D. Patel for the Appellant
H. C. Patel & M. S. Khan for the 1st Respondent
S. Matawalu for the 2nd Respondent

D

Appeal by Harilal against a decision of the Supreme Court whereby it had been declared that in a Crown Lease to him of Farm No. 8706 there had been wrongfully and mistakenly included a dwelling and domestic compound which should have been included in a Crown Lease of Farm No. 8645 which had been transferred to Hari Shankar.

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The Department of Lands (the Department) had been a second defendant and respondent in the appeal. The department was released from attendance, having agreed to submit to any order the court might make.

A block of 1000 acres at Sarava had been leased to James Clark by Colonial Sugar Refining Company (C.S.R.).

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In 1948 or 1949 Manfal became a share cropper by arrangement; with Mr Clark on portion of that land. Prior to his death he gave portion of his land to the plaintiff being Farm No. 8645 referred to above to be worked as a share cropper. He also gave "similarly" to the defendant Farm No. 8706. A third person Shiu Shankar was allowed to occupy Farm No. 8707. The recipients were the sons of Manfal. Manfal and the sons mentioned being the plaintiff and the defendant respectively had built and occupied houses on the area mentioned. Manfal's house was the family home, later occupied by Janki. Manfal died leaving surviving the widow and sons mentioned above. The areas occupied by the houses was never under cane. It had been intended that the house occupied by the plaintiff would be part of his Farm No. 8765 and that occupied by the defendant part of his Farm No. 8706. It is not necessary to consider in detail the similar intention for separate inclusion of the house occupied by Janki.

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In 1973 the C.S.R. transferred its freehold land to the Crown. Following upon this and after consideration by representatives of the Lands Department the Crown leases referred to were made available to the plaintiff and defendant. By mistake, included in Crown lease 8706 were the other houses referred to.

Before and after Manfal's death the sons, the plaintiff and the defendant each worked his own cane farm and lived in the houses they had erected near Manfal.

The trial Judge had found it had been the intention of the Crown through the Lands Department to ensure each farmer should receive the land they currently occupied when leases were granted.

In 1975 the defendant/appellant gave the plaintiff/respondent Hari Shankar a notice to Quit of the house which had been occupied by him but which at that stage, so it was found later had been included by mistake in the Crown lease of the appellant/defendant i.e. cane farm No. 8706.

The Land Transfer Act 1971 s.39 and 168 empowered the court in proceedings such as these to be correct any instrument of title. The Judge relying on these sections made the declaration (or intended so to do) conformably to his finding referred to above.

In the appeal the appellant lodged numerous grounds of appeal not all of which the Appeal Court found it necessary to discuss. In particular there was a challenge to the general findings of fact of the learned trial Judge whereby he had accepted the evidence of Mr Clark for e.g. the house sites of Hari Shankar and Janki were contiguous with but not part of Farm No. 8706. This argument was rejected.

Further, it was argued that the Department may have decided in its discretion when granting the Crown lease of Farm No. 8706 to the defendant/appellant to include in it the houses other than that occupied by the defendant/appellant. The Appeal Court was satisfied that the fact that the boundaries of the said Crown Lease had been shown to be 'erroneous' within the meaning of s.39 (above) was a significant matter.

It is not necessary here to refer to the family home occupied by Janki, she not being a party to the action.

Held:

When Manfal transferred Farm No. 8645 to the Plaintiff/Respondent the latter should have also succeeded as part of his share to his house site, as did the defendant in acquiring Farm No. 8706.

The declaration (or intended declaration) of the Supreme Court that the Respondent/Plaintiff Hari Shankar should have had included in his Crown Lease of Cane Farm No. 8645 the dwelling house and domestic compound hitherto occupied by him was confirmed.

Appeal dismissed.

A

Liberty to apply generally to judge of the Supreme Court.

GOULD Vice President.

Judgment of the Court

The action from which this appeal arises was brought as a result of a family dispute over a land. A large block of land (some 1000 acres) at Sarava near Ba was leased to one James Clark by the Colonial Sugar Refining Company Ltd. It was the policy of the Clark family to work the land for cane growing purposes through share croppers, who in some cases became sublessees. From about 1948 or 1949 one Manfal became one of these share croppers. He had three sons who survived him. One was Hari Shankar, the plaintiff in the action and the present respondent, one was Harilal, the defendant and present appellant, and the third was Shiu Shankar, who is not a party to the proceedings. Janki the widow of Manfal, was likewise not made a party to the action, though she gave evidence for Hari Shankar and appeared to align herself with his case.

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We have referred to Hari Shankar has the plaintiff and Harilal as the defendant and will continue to do so, rather than as respondent and appellant, but there was in fact a second defendant, the Director of Lands, At an early stage Counsel for the Director obtained, by consent, an order that he be released from further appearances, but the learned Judge has recorded in his judgment—

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> "The Lands Department have indicated that they do not wish to contest the issues arising between the plaintiff and first defendant concerning rights in and to the housing area and the 2nd defendant is ready to follow any direction given by the Court in that respect."

E

Manfal apparently worked more than one piece of land but the proceedings particularly concern an area of about twelve acres known as farm No. 8706, which he held from Mr Clark. Manfal, prior to his death permitted the defendant to take it over and work it as a share cropper. Manfal also "gave" another farm to the plaintiff—it was No. 8645. According to the plaintiff it was 40 chains away from the house site we are about to mention, and which is the subject of the proceedings. Shiu Shankar, the third brother occupied farm 8707, which adjoined 8706. All of these areas were unsurveyed.

F

On an area either forming part of farm no. 8706 or adjacent to it, first Manfal and in course of time the plaintiff and the defendant built houses. That built by Manfal was the family house occupied by Janki; it was damaged or destroyed by a hurricane but has been rebuilt. The factual issue in the proceedings was expressed in the judgment as follows—

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> "The area of land on which Manfal and the defendants had their houses adjoins farm 8706 but it has never been under cane and no cane contract attaches to it. The defendant claims that all 3 dwellings are on farm 8706. The plaintiff alleges that the land on which the houses stand is not and never has been part of farm 8706 but was a separate piece of land on which Mr Clark's father and Mr Clark allowed Manfal to erect his house which permission was subsequently extended to the parties herein."

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The defendant is now the holder of a Crown lease of farm 8706 and it is common ground that the plan annexed to it includes the site on which the houses stand. It is necessary therefore, in order to understand how the plaintiff claims to be entitled to relief in respect of the area occupied by him and his mother Janki, to look further at the background of the case. A

Mr W.J. Clark, son of the original lessee of the 1000 acre area gave evidence, which was unreservedly accepted by the learned Judge. From his evidence it appears— B

1. That the family policy in relation to share croppers was to allot them house sites not on the farms but on unproductive land so far as practicable.
2. That the housing site attached to Manfal's land was about 3–5 acres as well as the 12 acre farm; it was not specifically assigned to any of the parties.
3. Manfal assigned his interests to the farmers in occupation. C
4. Manfal entered into an agreement on the 2nd June, 1970, with the defendant, to sublease to him 11 acres more or less "now in occupation of the tenant"; this was Ex. D1 and related to farm 8706.

In 1973, the Colonial Sugar Refining Company transferred its freehold land to the Crown. Following upon this, representatives of the Lands Department called the Clarks' tenants to the office of the Fiji Sugar Corporation and asked them to produce any documents of agreement they had with Mr Clark. The defendant produced his agreement, presumably Ex. D1. As a result, according to the defendant's evidence he was given an approval notice for a Crown lease. The Crown lease followed. Shiu Shankar said he also had received a Crown lease in respect of farm 8707. D

It will be helpful to quote certain passages from the judgment under appeal— E

"It is significant that each party worked his own cane farm prior to Manfal's death and they all lived in the houses they had erected near to Manfal.

After Manfal's death in 1964 the parties continued to farm their separate farms and they continued to live in the same houses as they had done during Manfal's life. There is nothing in the evidence which leads me to conclude that during Manfal's life and for some years after his death that the defendant 1 laid claim to the land on which the dwellings stood." F

"During the defendant's evidence the defendant 1's registered lease was first tendered and the plaintiff objected to it because it had not been revealed in the defendant's affidavit of documents. But it was only at the beginning of the hearing that defendant 2, Lands Department, made it known that the Lands Department had registered the lease; the first defendant had been unaware of its existence as is indicated in his Statement of Defence." G

"To determine whether the Lands Department survey mistakenly included a housing site occupied by the plaintiff in farm 8706 I need to know what was actually sub-leased to the first defendant by Mr Clark (P.W. 1) in 1970 under the agreement Ex. D1. Mr Clark is currently the Minister for Lands. He was an obviously impartial and neutral witness and I accept unreservedly the evidence he has given. It is the Lands Department's obvious intention to ensure that the farmers in occupation when the C.S.R.'s freehold reverted to the Crown receive Crown leases covering the areas which they currently occupy." H

The learned Judge then indicated that he had no hesitation in believing Mr Clark's evidence which we have already mentioned i.e. that the housing area was not part of cane farm 8706. With regard to Ex. D1 the learned Judge said—

"The words "now in occupation" are important in the absence of a survey. Clearly he was not in occupation of the area used by the plaintiff or Manfal's widow as house-sites. That statement defining the land as that "now in occupation" of defendant 1 is repeated in Clause 1 of the agreement and it states that the boundaries are indicated in a sketch plan attached. The sketch plan attached to Ex. D1 includes farm 8706 and the housing-sites within one boundary but it is significant that it does not reveal any area as a housing-site."

Having discussed an aerial photograph the learned Judge continued—

"Defendant 1's evidence shows that he indicated to the Crown surveyors the area he regarded as being in his possession and occupation. As a result they treated all three housing sites as being occupied by defendant No. 1. It would be difficult to say that defendant 1's motives were fraudulent. He could have been relying on his own interpretation of the lease Ex. D1 and of the aerial photo Ex. D2.

Following the Lands Department's survey and before issue of the registered lease the defendant No. 1 received an Approval Notice of Lease, Ex. D6 dated 6.8.74, indicating that the term would commence on 1.1.75. The defendant 1 then regarded himself as being on safe ground and in 1975 he gave the plaintiff notice to quit.

The approval notice Ex. D6 shows the estimated areas as 11 acres, as does the lease Ex. D2. The registered lease shows that just under 13 acres were surveyed. This suggested to me that the area farmed by defendant No. 1 was about 11 acres and that the housing area was just under 2 acres.

In reply to a question put by the Court Mr Clark said that the 3–5 acres on which Manfal had his family compound was not included in the farm 8706 or in 8707. He stated that the area, i.e. the housing sites were not specifically assigned to any one. It appears from his evidence that the whole of the housing area was not leased to defendant 1. Obviously the lease Ex. D1 in granting to defendant No. 1 the land which he currently occupied was expressing what Mr Clark had in mind. It was the intention of the Lands Department to lease to defendant No. 1 the land which he had held from Mr Clark. He had never occupied the land on which the houses of Manfal's widow and the plaintiff are erected. It could not have been the intention of the Lands Department to include those areas in a lease to defendant No. 1.

I find that the Registered Lease erroneously includes the land occupied by the plaintiff as his housing site."

The learned Judge, having repeated that the Lands Department (second defendant) were ready and willing to be bound by any direction of the Court, said that it followed that it accepted the finding that it had erroneously included in the registered lease the house site occupied by the plaintiff. It will be seen, however, that when, a little later, he made a declaration, he extended the error to the land hitherto used by Manfal, his widow and the plaintiff.

The learned Judge was satisfied that the error between the lessor Lands Department and the lessee the defendant was mutual, as the defendant thought he was entitled to the house sites under Ex. D1, and the defendant simply accepted his word.

There being no holder or purchaser of the land subsequent to the defendant and no question of a bona fide purchaser for value, the learned Judge found a situation to exist which was covered by section 39(1) of the Land Transfer Act, 1971, in that a portion of land had, by wrong description of boundaries, been erroneously included in the lease. He found power to correct the situation by applying section 168 of the Land Transfer Act, 1971.

Section 39(1) reads (in part)—

"39(1).....the registered proprietor of any land subject to the provisions of this Act, or of any estate or interest therein, shall, except in the case of fraud, hold the same subject to such encumbrances as may be notified on the folium of the register.....but obsolutely free from all other encumbrances whatsoever except—

(a) .....

(b) So far as regards any portion of land that may by wrong description or parcels or of boundaries be erronously included in the instrument of title of the registered proprietor not being a purchaser or mortgagee for value or deriving title from a purchaser or mortgagee for value;"

Section 168 reads—

"168. In any proceedings respecting any land subject to the provisions of this Act, or any estate or interest therein, or in respect of any transaction relating thereto, or in respect of any instrument, memorial or other entry or endorsement affecting any such land, estate or interest, the court may by decree or order direct the Registrar to cancel, correct, substitute or issue any instrument of title or make any memorial or entry in the register or any endorsement or otherwise to do such acts as may be necessary to give effect to the judgment or decree or order of such court."

The final finding and order of the learned Judge was expressed in his judgment, thus—

"I find that under the lease Ex. D2 the defendant No. 1 was only granted a lease of the land of which he was in occupation namely cane farm 8706 that is to say the land which at the time of survey was under cultivation plus that portion of the housing site which he has occupied as his home and domestic compound.

I therefore Declare that the 2nd Defendant, the Lands Department were in error in not surveying the land in the presence of the plaintiff and defendant No. 1 and their mother and in not excluding from their grant of a Crown Lease to defendant No. 1 that portion of the land which hitherto has been used by Manfal, his widow and the plaintiff as housing sites and domestic compounds.

AND I Direct the Registrar to correct the Defendant No. 1's certificate of title in accordance with the boundaries should they be amended in accordance with the aforesaid declaration."

In the appeal the appellant is the first defendant. On his behalf Mr R. D. Patel has lodged numerous grounds of appeal, some of them repetitive, and we do not find it necessary to deal with them all individually and in detail. First, there was a challenge to the general findings of fact of the learned Judge, resulting in his acceptance of evidence that the house sites were contiguous with but not part of farm 8706. Counsel characterised the evidence of Mr W. J. Clark, accepted by the learned Judge, as too general. He sought, by examination of the various plans in evidence to demonstrate that the learned Judge had misinterpreted them. All we need say on this is that we do not find acceptance of the evidence of Mr Clark, a quite independent witness, was open to challenge on the ground suggested, or by reason of any lack of cogency. The learned Judge's assessment of the important Exhibit D1, based largely on that evidence, was, in our judgment, entirely justifiable. The document obviously played a part in the implementation of the Lands Department policy in the area and there was no quarrel with the learned Judge's statement of what that policy was. How the boundaries of these unsurveyed farms were adjusted pursuant to that policy, hinted at in the evidence, was stated by Mr Khan, of counsel for the plaintiff, in his argument in this Court and without objection by Mr Patel—"If there is a dispute as to boundaries they get all the parties and the neighbours together and resolve it". In the present case that was not done, presumably because the Department did not know of the dispute. As to the various plans, we have not been able to see that the learned Judge misdirected himself in relation to them.

Among the arguments put forward were that the second defendant may have decided in its discretion to grant the lease to the defendant, knowing that the plaintiff had another farm. Also that as counsel for the second defendant had obtained leave to withdraw, the finding that it was in error was a decision of an issue not raised and amounted to condemnation of the second defendant in its absence. All that need be said is that any complaint under either of those two heads is for the second defendant, still a party to the appeal, to raise. It has not sought to do so. As it appears to us it is the fact that the boundaries of the lease have been shown to be "erroneous" within the meaning of section 39 of the Land Transfer Act, 1971, which is important, rather than the nature of the error leading up to the position.

We will set out paragraphs 1(g) and 1(h) and 1(k) of the grounds of appeal, as they raise, perhaps obliquely, questions which merit discussion—

> "(g) Manfal's wife not being a party to the action the learned judge erred in concluding that Manfal's wife had any right to occupy the house site in question, and she was a mere licensee as she is the Appellant's mother.
>
> (h)There is nothing in Mr Clark's evidence that the First Respondent occupied the house site by right in himself or for consideration.
>
> (k) The First Respondent having paid no consideration either to Mr Clark or to the Second Respondent at any time in any shape or form and having his own separate farm where he was entitled to build his house, has no right to get a lease from the Second Respondent."

Paragraph (g) states that there is no evidence of payment of rent or other consideration by the plaintiff or Janki to the Clark family or to the defendant. As to the latter, if he has no title to the land in question, neither has he any claim to rent. The rent he was due to pay under Ex. D1 can be assumed to be in relation to the land comprised in that instrument—on the findings the cane land and his own house site. As to the position of the plaintiff and Janki some difficulties arise not so much

in relation to whether they paid rent to the Clark family (probably in the absence of evidence it can be assumed that they did not) but as to whether they had title to challenge the instrusion of the defendant's lease upon the land they occupied. According to Mr Clark's evidence the house site was not specifically leased to anybody. Nevertheless it is implicit that the share croppers lawfully occupied the house sites and if they were not sublessees of the Clarks in relation to them, they were at least licencees. There is no evidence that if a share cropper operated more than one farm he would be allocated more than one house-site and it appears hardly likely that he would. The assumption continues that he would hold the site in relation to all the areas he occupied.

On that basis it would follow that when Manfal arranged to transfer farm 8645 to the plaintiff he would also succeed to a share in the house site, just as the defendant would do on acquiring farm 8706.

So far as we can judge from the evidence, the present position may hinge upon Lands Department policy. Whether the persons concerned have any legal right to enforce the policy is not in evidence, but we consider it right to act on the basis that the policy will be implemented. So far as the plaintiff is concerned he has at the very least a right to lawful possession sufficient to give him status to protect that possession by action.

As to Janki, she occupied the family house. On the findings she was not liable to pay rent to the defendant. The plaintiff said in evidence that his house and Janki's house were on a piece of land measuring three quarters of an acre and Hari Lal's house was on about an acre, and about 1½ chains away. The plaintiff said that he was caring for his mother, that his father (Manfal) gave the house site to him, and "what is mine must be my mother's".

We think that this must be a reference to an Indian family system and that he is treating his house and his mother's as the area "given" him by Manfal. In our opinion this is what explains the approach of the learned Judge, when, although Janki was not a party to the action, he included in his order that portion of the land "which hitherto has been used by Manfal, his widow and the plaintiff as housing sites and domestic compounds." The issue between the parties has been throughout whether the whole of the original "house site" was rightly incorporated into the new Crown Lease to the defendant or whether the house of plaintiff and Janki should be deleted. We do not therefore deem it necessary to raise any point as to whether Janki had, by succession to Manfal, any direct interest otherwise than through the plaintiff on an Indian family basis.

The appeal is dismissed with costs, to be taxed if not agreed. It occurs to us that in the working out of the order of the Supreme Court, if it entails a further survey, questions may arise fit for determination by the court, and to meet such a case we give general leave to all parties (including the second defendant) to appy to a Judge of the Supreme Court.

Appeal dismissed.