000115

IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

AT LAUTOKA

Appellate Jurisdiction

Civil Appeal No. 5 of 1980

Between

S A D H U
s/o Matyalu — Appellant

- and -

SUBARMANI
s/o Veera Samy — Respondent

Mr. Verma — Counsel for the Appellant
Mr. Mohammed — Counsel for the Respondent

J U D G M E N T

In this case an area of land was jointly owned under a lease from the Native Land Trust Board by one Sadhu and Kaniamma the mother of the appellant. In 1973 the respondent had Sadhu's share of the land transferred to him, and in 1976 had Kaniamma's share transferred to him. At the time and for many years prior to the transfer the appellant lived on the land in a house constructed by him. It is the appellant's occupation of this house and the small portion of land going with it which is the subject of this action. It is not in dispute that the appellant has no written or registered title to justify his occupation. What the appellant claimed was that under a family arrangement between himself and his mother Kaniamma he had an equitable licence to occupy the premises for life. He further claimed that the respondent was aware of the said equitable licence when Kaniamma transferred her interest in the land to him and was thus bound by it.

It was never suggested that the respondent was a party to the family arrangement or was a party to any agreement or arrangement with the appellant himself, but it was pleaded and claimed by the appellant that it was a "condition precedent" of the transfer of Kaniamma's interest to the respondent that the appellant and his children would be permitted to remain on the land free of interference and rent free for their lives. Why it was said to be a "condition precedent" is not in the lease clear. The appellant was not present when the transfer was effected and the only evidence to support his claim that the transfer was subject to the condition above stated was given by a law clerk who said he took a statement from Kaniamma shortly before her death. The magistrate in the court below was not surprisingly

rather sceptical about this statement. It was not an affidavit, it was not even taken by a notary. It was taken when the old lady was in a very feeble condition and apparently in the presence of the appellant, although the law clerk said otherwise. It was not even in the words or language of Kaniamma who was illiterate and spoke only Hindi. The law clerk took the statement down in English and clearly in his own rather legalistic words - as he said it was his own interpretation into English of what she had said. He merely produced the statement. Hence its evidential values was almost negligible. However there was no evidence from the respondent so it was virtually unchallenged.

The magistrate in the lower court found that the appellant had no right or title to occupy the premises and gave judgment for the respondent. It is against this judgment that the appellant appeals on the following grounds:-

1. The learned trial Magistrate misdirected himself in holding that he was not required to decide whether the family arrangement made between Kaniamma and the defendant some years before she sold the land required the consent of the Native Land Trust Board.

2. The learned trial Magistrate erred in not assessing and considering Kaniamma's statement and giving it its proper weight.

3. The learned trial Magistrate erred in failing to ascertain from the evidence whether the defendant had an equitable licence to occupy the land.

4. The learned trial Magistrate erred in not holding that the plaintiff was guilty of fraud in claiming to hold the land for an unencumbered estate in wilful disregard of the defendant's rights.

5. The decision is unreasonable and cannot be sustained in view of the whole of the evidence before the trial.

With regard to ground 4 there was no evidence of fraud whatsoever. The appellant said he was "suspicious" but his evidence went nowhere near establishing a case of fraud.

With regard to ground 2 the magistrate has quite clearly considered the position firstly if he were to accept Kaniamma's statement as true, and secondly if he were to reject it. Either way he came to the conclusion that the appellant's claim failed so this ground of appeal has no merit.

With regard to ground 1 - the appellant refers to a passage in the judgment dealing with the arrangement between the appellant and his mother in which the magistrated said "this arrangement was made some years before

she sold the land. Whether or not such a family arrangement is a dealing with the land requiring the consent of the Native Land Trust Board I am not now required to decide." He then went on to consider the position on the basis that whether such consent was necessary or not Kaniamma transferred the land to the respondent on condition that he permit the appellant to remain on the land rent free for life. So he was considering the whole question as though he were giving the appellant the benefit of the doubt on the question of the family arrangement.

The case had clearly been presented before him on behalf of the appellant on the basis that the arrangement whereby Kaniamma's son, the appellant, should come and live on her land was no more than the sort of family arrangement entered into by almost every Indian family in Fiji and was thus not a dealing in land. This was the gist of the evidence given by the appellant, this was the way counsel for the appellant argued the case.

It was pleaded by the respondent that the arrangement was unlawful since it was a dealing in land for which prior consent of the Native Land Trust Board in accordance with Section 12 of the Native Land Trust Ordinance, had not been obtained. Thus under Section 12 any such arrangement would be null and void. In so far as the arrangement purported to give the appellant any right or licence to the land it would have been a dealing in land and would have been unlawful and of no effect. (See Chalmers v Pardoe (1963) 3AER 552 and Phalad v Sukh Raj (FCA) Civil Appeal No. 43 of 1978).

If the arrangement did not give the appellant any right on licence to the land, but was merely an Indian family arrangement as argued by counsel for the appellant, so that it did not amount to a dealing in land, this could hardly assist the appellant's case. I leave aside the question of whether the court would have assisted Kaniamma had she sought an eviction order against the appellant. Since she had invited the appellant on to the land and allowed him to spend money to build a house and establish a home there the doctrines of equity would no doubt have been sought in the appellant's aid. But the court could hardly have given the appellant any right or licence to the land, which would have been in direct conflict with the provisions of section 12 of the Ordinance.

I have no doubt, from other things he has said in his judgment, that if the magistrate had considered the position of the family arrangement he would have come to the same conclusion that I have done, so that there is no merit in the first ground of appeal.

With regard to ground 3 - it is difficult to see how the appellant could have acquired an equitable licence to the premises. The respondent was not a party to the family arrangement, the appellant was not a party to the transfer to the respondent. The appellant had not acquired any right or licence which would run with the land. It was pleaded that the respondent was aware when he acquired title to the land that it was encumbered with the appellant's equitable licence. There was no evidence to this effect. There were no encumbrances referred to in the transfer deed. As the magistrate pointed out, the inference was that the land was being transferred to the respondent free from all encumbrances. At the date of transfer there was no caveat lodged on the title. The appellant did lodge a caveat later on 29/10/76, on what grounds I don't know, but as he said it didn't help. I am not surprised; he had no title or right which could be registered, or which could run with the land without the consent of the Native Land Trust Board.

If the respondent knew that the appellant was living on the land, was there any reason for him to believe that the appellant's presence there was anything more than the usual Indian family arrangement?

The magistrate considered the appellant's case at its highest, namely on the basis that when Kanianma transferred the land to him she made it a condition that the appellant should be allowed to remain rent free for his life. Clearly she could not have considered the appellant to have any legal right to remain otherwise the transfer would have referred to such right as an encumbrance. In so far as she may have been purporting to bind the respondent, she was attempting to convert the appellant's occupation of the premises under a family arrangement into some licence or right to remain there. This would be a dealing in the land which Section 12 of the Ordinance would render null and void, and the appellant cannot rely on it.

This ground of appeal fails. On the evidence before him the magistrate's decision was clearly right and the appeal is dismissed with costs, to be taxed if not agreed.

LAUTOKA
4th July, 1980

(sgd.) G. O. L. Dyke
JUDGE