Privy Council Appeal No. 4 of 1972

James Subbaiya – – – – – – – – *Appellant*

v.

Paul Nagaiya – – – – – – – – *Respondent*

FROM

THE FIJI COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH JANUARY 1973

Present at the Hearing:

LORD WILBERFORCE

VISCOUNT DILHORNE

LORD KILBRANDON

[*Delivered by* LORD KILBRANDON]

The property which is the subject matter of this family dispute was conveyed to the respondent, by persons who are not concerned in the case, on 13th November 1939. The only term of the deed which has to be noticed is that setting out the purchase price, £125, of which £30 is declared to have been paid to the vendors as a deposit and in part payment of the price, the balance being payable by monthly instalments of £4, with interest on the balance outstanding. It appears, partly from the statement of claim and partly from the evidence of the respondent, that he at that time became registered owner of the property, which was described in Certificate of Title Vol. 54 Folio 5387: that certificate was in 1965 superseded by two certificates, exhibits 1 and 2, which both refer in their headings to " previous Title 5387 ".

The dispute lies in very small compass. The appellant claims that in 1939 the respondent was supplied with the money to make the purchase out of a common family fund, on the understanding that he was to take the title in his own name, and thereafter to hold the property in trust. The respondent maintains that he bought the property with his own money as his own property, and allowed his family to live there until 1947. From 1939 to 1949 he lived, with his wife, in the house also. In 1963 he returned: having converted the house into two, he lives in one, and the family in the other.

There are many details upon which the testimony of the parties is irreconcilable. For example, the appellant gave evidence to the effect that before the purchase of the property, which had on it a shop with two bedrooms, the family lived together in a rented house next door. Four or five months after the purchase, the building having been altered by turning the shop into additional bedrooms, the family, including the respondent, moved into it. On the other hand the respondent says they were all living in the property, the father being the tenant, when it was bought. The learned judge did not say which of these versions he accepted.

Again, it was proved that the respondent married in 1938, yet the appellant said he was sure that the respondent was not married until after the property was bought.

The appeal does not raise a question of law. What has to be decided is whether, upon the facts proved and upon the inferences of fact proper to be drawn from the evidence, the appellant has proved his case. The credibility of witnesses will influence the decision, and, in the narrow sense, an appellate court will not readily depart from the estimates made by the trial judge. On the other hand, in the drawing of inferences, and on the sufficiency or otherwise of the evidence to support the conclusions which have been founded on it, a Court of Appeal is as competent as the court which heard the witnesses.

It was submitted on behalf of the appellant that Marsack J.A., in saying that the evidence of the existence of a trust limiting the rights of a registered owner must be " cogent and compelling ", was exacting too high a standard. Their Lordships do not consider the selection of suitable epithets for application to evidence in order to define its sufficiency to be generally a profitable exercise: in any event the learned judge, in the following sentence, holds that the evidence " falls far short of establishing " the relevant facts " with reasonable certitude ". Reasonable certitude must undoubtedly characterise the evidence necessary to support the burden of proof lying on a plaintiff in such an action. In their Lordships' opinion the evidence adduced by the appellant does not satisfy that standard.

There are some circumstances which may be said to support the appellant's claim. The whole family, including the respondent and his wife, lived together before the purchase was made. They continued to do so for some time—whether they moved house after the purchase or not is for the purpose of the present inference irrelevant—after the purchase was made, in the property in dispute. The inference from this may be that it is unlikely that the nature of the family home should change, for no reason which has been offered, from being premises rented for the family by the father to being premises the absolute property of one of the sons, the family thereafter being licensed to dwell therein at that son's pleasure. The occupation—rent free—by the family was acquiesced in by the respondent until after the death of the father and mother, who, were the respondent's claim to absolute ownership unfounded, would have been in a position to deny it. Moreover the learned trial judge rejected the respondent as a credible witness, and accepted the version given by the appellant of the circumstances in which the instructions were given to the respondent that he should buy the property in his own name as trustee.

On the other hand, the evidence as to the constitution of the trust rests upon the uncorroborated evidence of the appellant. Paraphrasing that evidence in the manner which puts it in the most favourable light for him, it amounts to this, that he was present on an occasion when their mother, in accordance with their father's wishes, caused one of the sisters to count out and hand over money, which came from the family stock of money, to the respondent, and that the latter was instructed with that money to buy the property " for all the brothers ". The absence of corroboration is striking. The sister who counted out the money, Nagamma, is alive, according to the plaintiff's evidence, and married to the witness Ram Rattan. Her testimony would have been vitally important, yet no reason is suggested for her non-appearance. The appellant has three brothers, Ram Krishna, Sangaiya and James Venkataiya, on whose behalf also he is alleged to be pursuing the present claim; it is astonishing that none of them should have spoken to this or been able to provide any confirmation, from family circumstances, of their beneficial interest in the property as alleged by the appellant. Not only is corroboration lacking and its absence unexplained, but also the trial judge found that in two

important matters, namely his transactions with Shiu Prasad and Narayan Sami, consistent as they were with the evidence of his own witness Ram Rattan, the appellant was not telling the truth. That untruthfulness can only have been deliberate: it is impossible to hold that the uncorroborated evidence of such a witness furnishes that reasonable degree of certitude as is necessary to set up a trust against a legal owner.

The judgment of Thompson J. is open to this criticism, that, after finding the appellant's evidence to have been unreliable on the incidents referred to, it does not go on to consider what effect that should have on the circumstantial probability of the appellant's case. The incidents were as follows.

(*a*) Narayan Sami gave evidence, which does not appear to have been subjected to cross-examination, that after the death of the mother the appellant told the witness that he would buy the house if the respondent would sell it, and made, through the witness, an offer of £600, which was refused.

(*b*) Shiu Prasad deposed that in 1968 the appellant said that the property belonged to him, that he was going to arrange to buy it, and that he was offering £600. In cross-examination the witness is reported as saying—although this may have been merely an affirmative reply to a leading question—" He was seeing if he could buy his brother out "; it was suggested that this meant that he was in part offering to buy his brother's share in the property and in part offering to pay his brother for abandoning his claim to the whole interest. On the other hand Ram Rattan says unequivocally that " The defendant asked for £800. I went to the plaintiff. He agreed to buy for £800." The witness goes on to say that the defendant (respondent) then changed his mind.

The learned judge disbelieved the appellant's denials that these incidents took place, but he does not draw a conclusion from those denials; their Lordships agree with the majority of the Court of Appeal in considering that the conclusion which should be drawn is that the appellant, at the time of the incidents, did not regard the property as one in which he and his brothers had a beneficial interest, or believe that the respondent's ownership was in a fiduciary capacity.

Another incident which casts doubt on the appellant's belief in the existence of a family trust is that of the sale or lease by the respondent to to the Levuka Club of a building erected by him on part of the land in dispute, and the appellant's failure, either at the time of the transaction or in the course of his present claim, to call upon the respondent to account to the beneficiaries for the proceeds of what, on his view, was trust property. The learned trial judge merely mentions this matter in his statement of agreed facts, and appears to draw no inference from it.

While the learned judge rightly examines closely the evidence concerning the initial deposit of £30, his treatment of the subsequent instalments is rather less satisfactory. That they were in fact paid by the respondent cannot be disputed in the face of the receipts exhibited. The learned judge draws the inference that " no doubt the instalments were part of the joint family expenses, although possibly paid by the defendant." The contradictory passage on this topic in the evidence of the appellant does not justify this inference.

Assuming that it was proved that the respondent had bought the property in a fiduciary capacity, it would be necessary to find it proved also who were beneficiaries. The appellant's case on this is not altogether clear. In his Statement of Claim he alleges that the respondent bought the property for himself, his parents and other immediate members of the family, and the subjects purchased are said to be held as " joint family

property". In evidence the appellant certainly excluded his sisters from the *cestuis que trust*, and possibly his parents, claiming that the property was to be held for the brothers. Their Lordships would have been prepared to take the case on that footing, on a fair reading of the evidence as a whole.

Their Lordships are, however, of opinion that the criticisms of the judgment of the Supreme Court by Marsack J. A. and Hutchison J. A. were justified, and agree that the evidence was insufficient to support the case which the appellant set out to prove. They will therefore humbly advise Her Majesty that the appeal be dismissed with costs.

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In the Privy Council

JAMES SUBBAIYA

v.

PAUL NAGAIYA

DELIVERED BY

LORD KILBRANDON

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