IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 49 of 1977

Between:

1. BADAL s/o Shankar
2. ARJAN also known as ARJUN s/o Badal
3. PHULKUMARI f/n Badal

Appellants

- and -

BHIM SEN s/o Badal

Respondent

M.S. Sahu Khan for the Appellants
G.P. Shankar for the Respondent

Date of Hearing : 6th March, 1978.
Date of Judgment: 22nd March, 1978.

JUDGMENT OF MARSACK, J.A.

This is an appeal against a judgment of the Supreme Court sitting at Lautoka, given on the 26th August, 1977, holding that the respondent is entitled to a freehold interest in that part of the land comprised in Certificate of Title No. 6657 which he presently occupies and farms.

The basic facts may be shortly stated. A piece of freehold land containing 4 acres 3 roods 15 perches at Yalalevu, Ba was purchased in 1934 with money furnished by the appellant Badal. He had the title placed first in the name of Sukhia who was his common-law wife. Later one half interest in the land was transferred from Sukhia to Sukhraji who was the sister of Sukhia and the legal wife of Badal. The appellants Arjan and Phulkumari are the son and daughter of Badal by Sukhraji; respondent is the son of Badal by Sukhia. Some years after the purchase of the land Badal's brother-in-law, Udham Singh, under instructions from Badal, divided the land into two portions; one to be occupied by Sukhia and her family and the other by Sukhraji and her children. In 1954 by registered transfer Sukhia conveyed half the land to Sukhraji. In 1957 Sukhia's half share was transferred to Sukhraji; there was evidence that this transfer was to avoid the possibility of Sukhia's share being seized by her creditors who were contemplating bankruptcy proceedings.

After the division of the land by Udham Singh the respondent put a fence round his portion and built a house on the land. Later, in 1972, the original house was demolished and a substantial concrete house built. A cane contract covered the whole of the land; Arjan and the respondent both cultivated their own cane crops and each received the appropriate share of the proceeds.

Sukhraji died intestate on the 2nd December 1973 and Letters of Administration of her estate were granted by the Supreme Court on the 24th October 1974 to "Bhim Sen step-son and Arjan the lawful son of the said deceased". In September 1976 appellant Badal renounced his interest in the estate of Sukhraji in favour of her children Arjan and Phulkumari. Some time prior to this he had become blind; Sukhia had left him and the respondent ceased to support him. Although, as the learned Judge finds in his judgment, administration was taken out in the names of Arjan and the respondent because Badal had told them the land belonged to the two of them, yet when respondent ceased to support him Badal decided that respondent should not be given any part of the land, and that was the reason why he renounced his share in his wife's estate in favour of the two children Arjan and Phulkumari. A little later the appellants brought action against the respondent by way of originating summons asking for a declaration that the appellants were the only persons entitled to share in the estate of Sukhraji deceased; or for an order that Certificate of Title No. 6657 covering the land in dispute be vested in the names of either all three appellants or alternatively of Arjan and Phulkumari. The learned Judge held that the respondent, Bhim Sen, is entitled to a freehold interest in that part of the land comprised in the Certificate of Title No. 6657 which he presently occupies and farms.

It is against that judgment that this appeal is brought.

The Notice of Appeal sets out five grounds. The fifth of these is the general ground that the verdict is unreasonable and cannot be supported having regard to the evidence. The other four grounds merely amount to saying that the learned Judge was wrong in his judgment. It is impossible to ascertain from the grounds, as filed, in what respects it is claimed that he had erred as to the facts, and in what ways he had misapplied the principles of law.

In the course of the argument, however, it appeared that the first ground upon which the appeal is based was that the respondent's claim to part of the land was founded on illegality, that is the transfer of her share by Sukhia in order that if bankruptcy proceedings contemplated against her by her creditors resulted in her being declared bankrupt, this particular asset should not be available to the Official Assignee.

The second ground was that respondent's title was held to be founded on an estoppel, and that the evidence did not justify such a finding by the learned trial Judge.

The appellants' case on the question of illegality was largely based on

the evidence of respondent, Bhim Sen, given at the hearing. In the course of his cross-examination respondent said:

> "In order to save the land she (Sukhia) transferred her share to Sukhraji. I agreed to this arrangement. I was asked about it. It is because of this agreement. that Sukhraji made that I am claiming this land."
>
> "The second half of the land was transferred (to Sukhraji) to save it going in bankruptcy. It is on the strength of that transfer that I am obtaining this share."
>
> "I did say that Sukhia transferred land to Sukhraji because there was a bankruptcy notice against her and it was done to avoid the creditor Burns Philp. I knew all this. I saw that it was transferred on the understanding that Sukhraji was to transfer it to me later. This was discussed with me. I agreed to this arrangement. It is on this arrangement that I seek to have the property transferred to me. "

It is the contention of counsel for the appellants that this evidence clearly establishes that respondent's claim to a share of the land arises solely from an arrangement made with his mother, Sukhia, when she was illegally disposing of her one substantial asset to avoid its being taken over by the Official Assignee; that this transfer of her interest by Sukhia was an illegal transaction; that upon his own evidence the respondent was a party to this illegal transaction and claiming through it; and that, therefore, he can take no

benefit under it. The evidence did not disclose whether or not Sukhia was declared bankrupt; but in any event no action was at any time taken to set aside the transfer in 1957 of Sukhia's share in the land to Sukhraji. Moreover the learned trial Judge held that it was a transfer for good and valuable consideration, in that Sukhraji undertook to assume liability for Sukhia's debt to the Bank.

But even if it could be said that the transfer was to some extent tainted with illegality, it is difficult to see in what way the respondent could be held to have been a party to an illegal transaction. Sukhia was registered proprietor of the half share in the land. Her action in transferring that half share to her sister, Sukhraji, did not in the slightest degree depend upon any pressure or even encouragement from the respondent. His evidence is hard to understand; it may well be that he was merely assenting to questions put to him in cross-examination, though there is nothing in the Record to show that this was so. In any event, there is no indication that he had any comprehension of the strictly legal position regarding the land transaction. I am unable to see in what way any action taken by the respondent with regard to the transfer from his mother to her sister could be effective to deprive him of any interest he might have had, or might subsequently have, in the land in question. I would therefore hold that there is no merit in the first ground of appeal.

With regard to the second ground, the judgment of the learned trial Judge held that the respondent was entitled to an interest in the land to the extent of the area presently occupied by him, "by virtue both of a constructive trust and an equitable estoppel". His finding on the subject of constructive trust may well be based on the statement made by Badal in his evidence which is cited in the judgment :

> " Badal also said that after Sukhraji died the two sons - the son of Sukhraji and the son of Sukhia - took administration because he told them the land belonged to the two of them. "

Be that as it may, I am firmly of opinion that the claim of the respondent to the land in question can be fully supported by what is referred to as the equitable estoppel. In his judgment the learned Judge carefully examined the leading authorities on the equitable doctrine that if a person builds, or in other ways spends money, on land under the mistaken belief that he is entitled to it, and the real owner, while aware of what was happening, takes no steps to prevent the erection of the building or the expenditure of the money, then equity would intervene to prevent the real owner from asserting his title to the land so taken. The leading authorities on the subject, from Ramsden v. Dyson (1865) L.R.1 H.L. 129 onwards, are dealt with comprehensively by the learned trial Judge in his judgment, and I do not find it necessary to make further reference

to them. The evidence accepted by the Judge clearly shows that the respondent had treated the land in dispute as his own from some time shortly after the division of the whole section into two parts by Udham Singh. The date of his so taking over is not definitely stated in the evidence, but it would appear to have been shortly after 1954. He fenced the land, built on it and cultivated it; in every way treating the land as if it were his own. The rest of the family took no exception to what he was doing, over a period of many years. It was not until much later that Badal, resenting the fact that respondent was no longer contributing to his support, decided that the respondent was not to have that part of the land which he was occupying.

By then, in my opinion, it was too late for him to question the right of the respondent to the land in dispute. Respondent had complied with all the conditions detailed in Snell's Principles of Equity 26th Edition 629/30, cited by the learned trial Judge in his judgment, and had thus acquired what is referred to as "a proprietory estoppel". This case in effect is stronger in favour of the respondent than that referred to by Lord Cranworth L.C. in his judgment in Ramsden v. Dyson at p. 140; in that the attitude of other members of the family over the years indicated clearly that they thought the respondent justified in treating the land as his own. Those members of the family were

fully aware of what the respondent was doing with the land, and, until the action taken so very much later by Badal, obviously considered that the division of the land by Udham Singh many years before was intended to mean that the land in dispute became the property of the respondent.

It is, however, contended by counsel for the appellants that if the principles set out in the authorities quoted on the subject of equitable estoppel were held to apply in the present case they might justify a finding that the respondent was entitled to retain the house property but not the rest of the land occupied by him. I am unable to accept this contention. As is pointed out in Snell's Principles of Equity, one of the essential factors is the expenditure of money on the lands in dispute. Although the erection of a house may be a very conspicuous example of the expenditure of money, it is not the only form of such expenditure as would justify the application of the equitable principle. Here the evidence plainly establishes the fact - so found by the learned trial Judge - that the respondent definitely had expended money in the cultivation of the land occupied by him. That being so the application of the principle of Ramsden v. Dyson would entitle the respondent to the whole of the land occupied by him and not only the house and the house site.

As a result I am firmly of opinion

that the equitable principle already cited applies, even more strongly than in any of the cases cited in the judgment of the learned trial Judge.

Accordingly I would hold that the judgment of the learned trial Judge was right and the appeal should be dismissed, with costs.

(Sgd.) Charles C. Marsack
JUDGE OF APPEAL

Suva,
22nd March, 1978.

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JUDGMENT OF HENRY J.A.

I have read the judgment of my learned brother Marsack J.A. I concur in his findings and the result that he has proposed. I would dismiss the appeal.

(Sgd.) T. Henry
JUDGE OF APPEAL

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JUDGMENT OF GOULD V.P.

I have had the advantage of reading the judgment of Marsack J.A. and agree with him that the appeal should be dismissed with costs. The question is essentially one of fact and having read the evidence and the judgment of the learned Judge in the Supreme Court I have no doubt that the intention of the whole family was that the two portions

into which the land was divided were to devolve ultimately upon Arjun and the respondent respectively. As Sukhia put it in her evidence - "Once the land was divided Arjun and Bhim were to stay on the land for ever."

I think that by applying the principle of equitable estoppel the learned Judge gave effect to this underlying intention and that the evidence justified him in doing so. I do not think that the question of possible illegality in the case of the transfer of the half interest in April 1957, from Sukhia to Sukhraji, is a live issue in the matter at all. There was no evidence that the former ever went bankrupt; certainly the transfer was never set aside and there was no evidence that any attempt was made to attain that end. The evidence indicates that the debt was paid from the cane proceeds and the Bank of New Zealand mortgage seems to have been discharged in due course. Nothing in the essential basis of the claim by the respondent in any way hinged upon this transfer, however unfortunately he may have expressed himself in evidence.

For these reasons and for the reasons given by Marsack J.A. I agree that the appeal must be dismissed with costs and, in accordance with the unanimous opinion of the Court, it is so ordered.

(Sgd.) T.J. Gould
VICE-PRESIDENT