IN THE FIJI COURT OF APPEAL
Appellate Jurisdiction
Civil Appeal No. 43 of 1978

Between:

PHALAD
s/o Shiu Prasad — Appellant

and

SUKH RAJ
s/o Dhani — Respondent

G.P. Shankar for the Appellant
D.S. Sharma for the Respondent

Date of Hearing: 15/11/78
Delivery of Judgment: 8/12/78

JUDGMENT OF HENRY J.A.

In this appeal the primary question is whether a certain agreement for the sale and purchase of native lease No. 6279 granted under the provisions of the Native Land Trust Ordinance (Cap. 115) is null and void by virtue of section 12(1) of the said Ordinance. At all material times respondent was the lessee under the said lease which was due to expire on September 21, 1969. On January 22, 1968 respondent as vendor and appellant as purchaser entered into a written agreement under which respondent purported to sell his interest to appellant for the price of £2,100. By action No. 111/1976 commenced in the Supreme Court at Lautoka respondent, as plaintiff, sought a declaration that he was entitled to rescind the said agreement and to re-enter upon and take possession of the land upon the ground of default in payment of the purchase price. Other incidental relief was sought. By action No. 120 of 1976 issued in the same Registry of the Supreme Court appellant, as plaintiff, sought specific performance and incidental relief. Both actions were consolidated and accordingly were heard together. Both claims were dismissed on a finding that the said agreement was null and void by virtue of section 12(1). There was also a further finding that the terms for payment of the balance of the price were void for uncertainty. Both issues were argued on appeal. If the first

ground succeeds there is no occasion to consider the second ground.

The evidence is that appellant entered into possession in July 1967 but, apart from a bald statement to that effect, it does not seem clear what the basis was for so giving possession (or occupation) of the land to appeallant. It is unimportant. However, on January 22, 1968 a formal written agreement, already referred to, was signed by the parties. The terms of this agreement must now be more carefully examined but before passing from the question of possession it is convenient to set out clause 4 which reads:

> "Possession of the land hereby sold shall be deemed to have been given and taken as at the date of this Agreement."

This clause places beyond doubt what the basis for possession was from that date. Appellant was in full and complete possession of the land under and by virtue of the said agreement. The other relevant provisions will now be examined.

The said agreement provides that respondent "will sell to the purchaser who will purchase" the property which was described in a schedule as:

> "Being two-third share of Vendor's interest in Native land known as 'Naniubilo No. 1' containing 30 a. 1r. 32p. and being land comprised and described in Native Lease No. 6279 (NLTB No. 4/11/71) together with benefit of sugar cane contract No. 11164 (Lomawai Sector)."

A deposit of £1 was paid and the balance of £2,099 was payable when respondent obtained a renewal of the said lease and transferred the same to appellant. Clause 20 was a special provision dealing with this. It provides:

> "The Purchaser and the Vendor hereby admit and acknowledge that the lease of the land described in the schedule hereto is due to expire on 21st day of September, 1969 and that they are aware of the contents of a letter dated 26th day of October, 1967 from the Native Land Trust Board to Anirudh Kuver, Solicitor, Nadroga in which the Board has indicated that the said land is not in reserve and there is no record of any claim from the Fijian Owners for reversion under the Agricultural Landlord & Tenant Legislation and if the Vendor is not successful in obtaining a renewal thereof the Vendor and the Purchaser agree that this agreement shall be deemed to have terminated upon a reply of refusal from the Native Land Trust Board to

> renew the said lease in favour of the Vendor and thereupon two thirds of all moneys received by the Vendor to the date of such refusal and all future proceeds to be received by the Vendor for the crop already harvested and in respect of crop growing on the said land at that date shall be refunded by the Vendor to the Purchaser within 3 months of such refusal."

By Clause 5 respondent agreed, until the purchase price was paid, to pay all rates, taxes, charges, impositions and other outgoings. By clause 24 all moneys so paid were added to the purchase price. Clause 9 required appellant to repair and keep in repair all buildings and improvements. Clause 11 was a provision prohibiting appellant from mortgaging, charging, selling, assigning, transferring or leasing "his interest under the said agreement". Clause 12 conferred on respondent a right to enter and inspect the state of the land, buildings and crops. Clause 8 is a comprehensive clause requiring appellant to cultivate and plant sugar cane on all parts suitable for that purpose and to re-plant in all proper seasons and generally to conduct in a proper and husbandlike manner the business of a cane-grower on the said land.

By clause 13 appellant had the right at any time without notice to repay the whole or any part of the balance of the purchase price but in the meantime respondent retained control of the proceeds from all sugar cane sold, apparently because the sugar cane Contract No. 11164 still remained in his name. This was dealt with in clause 15 which reads:

> "The Vendor agrees to credit towards the purchase price all moneys received by him from the South Pacific Sugar Mills Limited for sugar cane sold by the Purchaser as from the 1968 harvesting seasons and thereafter."

The said agreement contained a number of other provisions usually found in an agreement for sale and purchase where possession is granted on terms as to payment of the purchase price. It is necessary to refer further to the expressed provisions on the vital question in this case, namely the consent of the Native Land Trust Board. Clause 23 contains that provision. It reads:

> "This agreement is subject to the consent of the Native Land Trust Board."

It would appear that it was the duty of the respondent to apply for and get such consent. It was not granted until August 8, 1969, that is more than 18 months after the said agreement was entered into.

No explanation was given for the delay. These actions were not commenced until 1976 when actions were taken as previously stated. Respondent claimed the full purchase price had become due, because, in terms of clause 20, a new lease had been granted by the Native Land Trust Board for a period of 10 years from July 1, 1970. Appellant answered with action No. 120 seeking specific performance claiming that the price had been paid.

Section 12 of the Native Land Trust Ordinance (Cap. 115) provides as follows:

> "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:
>
> 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."

The said Ordinance (Cap. 115) is an Ordinance relating to the control and administration of native land. A Board called the Native Land Trust Board was duly constituted under section 3. By section 4 the control of all native land was vested in the Board to be administered for the benefit of the Fijian owners. By section 5 no native land was alienable by the native owners whether by sale, grant, transfer or exchange or to be charged or encumbered by the native owners and no estate or interest previously transferred by native grant was either alienable or chargeable without the consent of the Board. By subsequent sections powers were given to the Board to grant leases or licences. All leases were to be in the prescribed form and registered in the Registry of Titles. This was the procedure followed in the said Lease No. 11164. Licences were to be entered in a special register kept by the Board. After enacting these provisions section 12 was enacted for the purpose of enabling the Board to have absolute control over any dealings by the lessee with any lease so granted by the Board.

Section 12 places restrictions on the right of the lessee to deal with the land comprised in the lease. Any transaction which comes within the ambit of section 12, is declared unlawful unless the consent of the Board as lessor or head lessor is first had and obtained. The granting or withholding of consent is within the absolute discretion of the Board, and, in the absence of such consent, the transaction is declared to be null and void. There is thus no right in a lessee to require the Board to grant its consent and the consent must be one first had and obtained. It is necessary now to examine the nature of the transaction which was evidenced by the said agreement between respondent and appellant. In the absence of a condition such as that set out in clause 23, it is clear that the transaction would be one which would come within section 12 because an unconditional agreement would pass the property in equity to the appellant as the purchaser and then respondent, as the holder of the legal estate, would hold as trustee for the appellant as purchaser: Rayner v. Preston (1881) 18 Ch.D. 1, 13; Shaw v. Foster (1872) L.R. 5 H.L. 321, 338; Hillingdon Estates Co. v. Stonefield Estates Ltd. (1952) Ch. 627, 631-2; and Halsbury Laws of England 3rd Edn. Vol. 34 para. 484 p. 290. The position is, however, affected by the existence of the condition in clause 23 which prevents specific performance until its terms have been fulfilled. The fact that, in the authorities citied, specific performance could be ordered was a factor of importance in determining whether or not the vendor was a mere trustee for the purchaser.

A number of cases have been before this Court involving the application of section 12 to the particular facts of the transaction then in question. I cite, with the greatest respect, what Lord Upjohn said in the Privy Council in Ogden Industries Ltd. v. Lucas (1969) 1 All. E.R. 121 at p. 126. His Lordship said:

> "It is quite clear that judicial statements as to the construction and intention of an Act must never be allowed to supplant or supersede its proper construction and courts must beware of falling into the error of treating the law to be that laid down by the judge in construing the Act rather than found in the words of the Act itself. No doubt a decision on particular words binds inferior courts on the construction of those words on similar facts, but beyond that the observations of judges on the construction of statutes may be of the greatest help and

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guidance but are entitled to no more than respect and cannot absolve the court from its duty of exercising an independent judgment."

In the case of Chalmers v. Pardoe (1963) 3 All E.R. 552 upon an appeal to the Privy Council from this Court there had been full performance on one side and this was held to come within the transactions prohibited by section 12. The case is important for the statement that there must necessarily be some prior agreement so that the mere fact of the existence of a prior agreement is not of itself a breach of Section 12. In Jai Kussun Singh v. Sumintra No. 18 of 1970 Fiji C.A. it was said that a signed agreement, held inoperative and inchoate while consent is being sought, is not caught by section 12. It will suffice to refer to two other cases where it was held that on their special facts there was no breach of section 12. In the case of Imam Hussain v. Shiu Narayan Civil Appeal No. 16 of 1978 it was said at p. 14:

"These authorities demonstrate that the inquiry is into the question whether or not the agreement was performed in a manner in which it could be said that there was a 'dealing with' the land. This will involve a question of fact in each case upon a consideration of the true meaning of that term in section 12(1). Where the transaction is subject to a condition precedent with no act of performance no difficulty arises."

It was earlier said at p. 12:

"If the condition as to obtaining consent was a condition precedent then the contract did not come into force until the condition was fulfilled. On the other hand if it were a condition subsequent the contract came into force when it was signed by both parties. A condition subsequent would discharge the contract if it were not fulfilled. Whether or not the condition was a condition precedent or a condition subsequent depends, not on technical words, but on the plain intention of the parties to be determined from the whole instrument: Porter v. Shepherd (1796) 6 Term. Rep. 665, 101 E.R. 761; Roberts v. Brett (1865) 11 H.L. Cas. 337; 11 E.R. 1363."

In Kulamma v. Manadan [1968] 2 W.L.R. 1074 it was said by their Lordships in the Privy Council when dealing with three earlier cases, at p. 1079:

> "But each of these inevitably fell to be decided upon the terms of a particular agreement, which in no case - in so far as the terms of it appear from the report - is identical with the agreement of May 23, 1957, and the decision in the present appeal must be based upon an analysis of that agreement alone."

I would add with respect that acts done in performance of the agreement may, in cases such as the present, be also a relevant topic although not a necessary factor in determining whether or not section 12 has been breached.

In the present case, upon the execution of the agreement, whatever might have been the basis for the earlier occupancy of the land by appellant, he thereupon obtained exclusive possession as a purchaser in the express terms of the agreement. Clause 4 so provided. The pleadings in both cases also admitted this as a fact and the evidence given supports the fact. Indeed, the basis of the claim for appeallant in Case No. 120 was as follows in paragraph 6 of his statement of claim:

> "6. THAT pursuant to the said Agreement the Defendant went into occupation and started cultivating the said land and still occupies and cultivates the same."

This averment was admitted in the statement of defence. After the signing of the said agreement respondent had no right to enter upon the land or otherwise exercise any rights in respect of it save strictly in accordance with the express reservations and powers set out in the agreement. Appellant had exclusive possession and was immediately bound to use the land in accordance with the terms of the agreement. The proceeds from the land were controlled by the agreement, and in fact, before the consent was granted, a substantial sum had been received by respondent from the proceeds of sugar cane. Clause 19 might be noted. It reads:

> "The Purchaser shall be at liberty to purchase from the South Pacific Sugar Mills Limited rice and sugar for his household use and manure for the said farm and the price for these shall be deducted by the said South Pacific Sugar Mills Limited from the proceeds of the crops sold to it according to the system adopted by the Company.

> The moneys so deducted shall not be charged by the Vendor to the Purchaser."

There is no evidence whether advantage was taken of this provision but, in my opinion, it was a right immediately exerciseable by appellant.

A useful approach may be the adoption of that of Isaacs J. in George v. Greater Adelaide Land Development Co. Ltd. [1929] 43 C.L.R. 91 at p. 101 where he said:

> "The second (question) turns on the Town Planning and Development Act 1920. Murray C.J. thought that the words 'subject to ..... the provisions of the Town Planning and Development Act 1920 being complied with' saved the bargain, and on completion of all that the Act and the Regulations under it require, the contract was binding and enforceable. That depends on whether, before the Act is complied with, the law prohibits the making of the contract, or only the transfer of the land."

The cases already cited show that the Courts have held that the mere making of a contract is not necessarily prohibited by section 12. It is the effect of the contract which must be examined to see whether there has been a breach of section 12. The question then is whether, upon the true construction of the said agreement the subsequent acts of appellant, done in pursuance of the agreement, "alienate or deal with the land, whether by sale, transfer or sublease or in any other manner whatsoever" without the prior consent of the Board had or obtained. The use of the term "in any other manner whatsoever" gives a wide meaning to the prohibited acts. For myself I have no doubt but that the true construction of the said agreement and the substantial implementation of such an agreement for sale and purchase, under which possession is completely parted with to the purchaser and immediate mutual rights and liabilities are created in respect of such exclusive possession, is a breach of section 12 if done before the consent is obtained. In every respect appellant was a purchaser in possession exercising his rights as a purchaser and it matters not that his title or rights so being fully exercised are subject to a condition which might, if it be not later fulfilled, discharge the parties from further performance with consequential rights springing into effect. For the argument of counsel for appellant to succeed it would be necessary to read into section 12 some words which would permit a conditional alienation or dealing with the land conditional

upon the consent being later given. This would render the words in section 12 "without the consent of the Board ..... first had and obtained" mere surplusage of no effect. Further the transaction would not be null and void but only so if the consent were not subsequently obtained. The time factor would then be elastic and not certain as the plain words indicate.

The words "alienate" and "deal with" as elaborated in section 12, are absolute and do not permit conditional acts in contravention. If before consent, acts are done pending the granting of consent, which come within the prohibited transactions, then the section has been breached and later consent cannot make lawful that which was earlier unlawful and null and void. This does not cut across the cases already cited which deal with the formation of the contract as contrasted with an immediately operative agreement and substantive acts in performance thereof.

In this case it has been clearly proved that the acts of the parties, in entering into and implementing an agreement for sale and purchase before the granting of consent, were done in contravention of section 12 and the said agreement was at all times null and void. The making of the agreement conditional upon consent being granted does not assist appellant because section 12 does not permit the conditional doing of the acts prohibited by section 12. The time factor is plain and manadatory. The acts proved come clearly within the prohibited acts. In Chalmers v. Pardoe (supra) Sir Terence Donovan said at p. 557:

> "In the present case, however, there was not merely agreement, but, on one side, full performance: and the Board found itself with six more buildings on the land without having the opportunity of considering beforehand whether this was desirable. It would seem to their lordships that this is one of the things that s. 12 was designed to prevent. True it is that, confronted with the new buildings, the Board as lessor extracted additional rent from Mr. Pardoe: but whatever effect this might have on the remedies the Board would otherwise have against Mr. Pardoe under the lease, it cannot make lawful that which the ordinance declares to be unlawful."

In the present case the Board would find respondent completely dispossessed and appellant in full possession and control of the land without having an opportunity of considering whether he was a desirable tenant in the exercise of its statutory

duty to administer for the benefit of the Fijian owners. The appellant was in possession for some 18 months before the consent was granted. The fact that it was then granted does not make lawful that which the Ordinance declared to be unlawful: vide Chalmers v. Pardoe p. 557. It is nothing to the point that the Board might, or does, later grant its consent. The lessee would have committed an offence against section 26 and the transaction is declared to be null and void. The Board may waive its remedies against the lessee under his contract but it cannot waive the statutory consequences of a breach of the Statute. In my opinion, a consent given after a breach of section 12 is not a consent under that section. The question is, whether the later consent was a consent "first had and obtained". In my opinion it was not.

The appeal was confined to Case No. 120 of 1976. Case No. 111/1976 was not before this Court. The learned judge was correct in refusing specific performance or any other relief in action No. 120/1976 on the ground that the transaction was null and void. There is no occasion to consider the other ground of appeal. I would dismiss the appeal with costs.

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JUDGE OF APPEAL

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 43 of 1978

Between:

PHALAD s/o Shiu Prasad — Appellant

and

SUKH RAJ s/o Dhani — Respondent

Mr. G.P. Shankar for the Appellant.
Mr. D.S. Sharma for the Respondent.

Date of Hearing: 15th November, 1978
Delivery of Judgment: 8/12/78

JUDGMENT OF SPRING J.A.

I have read the judgment of my learned brother Henry J.A. in this appeal and with respect agree with his reasoning and conclusions.

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JUDGE OF APPEAL

SUVA,

November, 1978.

IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Civil Appeal No. 43 of 1978

Between:

PHALAD s/o Shiu Prasad — Appellant

and

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Date of Hearing: 15th November, 1978
Delivery of Judgment: 8/12/78

JUDGMENT OF GOULD V.P.

I have had the advantage of reading the judgment of Henry J.A. in this appeal and agree with his reasoning and conclusions. I would add that I have given anxious thought to the question whether the circumstances of the case did not create an estoppel whereby the respondent would be prevented from relying upon a plea of illegality in order to show that the consent given by the Native Land Trust Board was inoperative, when for so many years he had held it out as a valid consent. This question was not, however, pleaded or argued and might well be met with the submission that such an estoppel would be against the statute. I do not therefore propose to pursue the question.

As the members of the court are all of the same opinion the appeal is dismissed with costs.

Signed

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VICE PRESIDENT