IN THE FIJI COURT OF APPEAL
Civil Jurisdiction
Civil Appeal No. 8 of 1977

Between:

CHANDRIKA PRASAD s/o Guddu Lal — Appellant

and

1. GULZARA SINGH s/o Hari Singh
2. NATIVE LAND TRUST BOARD
3. SHIU PRASAD s/o Suchit Bhagat
4. BAIJ NATH s/o Hardeo
5. CHANDRIKA PRASAD s/o Halka — Respondents

K.C. Ramrakha for the appellant
G.P. Shankar for 1st respondent
S.M. Koya for 3rd, 4th & 5th respondents
E. Vula for 2nd respondent

Date of Hearing: 13.3.78
Date of Judgment: 22.3.78

JUDGMENT OF HENRY J.A.

This is an appeal against the dismissal of an action brought by appellant against respondents. First respondent is a moneylender so I shall refer to him as "the moneylender". Second respondent is a statutory body and will be referred to as "the Board" whilst third, fourth and fifth respondents acted as trustees for the Tabia Sanatam Dharam School and they will be referred to as "the trustees". Appellant brought an action against respondents claiming relief or alternatively, damages in respect of the matters about to be set out in detail. The action came before

the Supreme Court at Lautoka when it was dismissed with costs. From such dismissal the present appeal has been brought.

On October 16, 1967 the Board in pursuance of the powers vested in it in respect of native land under the Native Land Trust Ordinance (Cap.115), issued to appellant what is known as a provisional approved application for a lease. This gave to appellant provisional approval of a lease of certain land called Delaivuiloqi containing 11¾ acres for a period of 30 years from July 1, 1965 (sic) at a rental of £8 per acre per annum. The document provided that appellant would not receive final notice of approval, and had no right of occupancy, until rent for the first six months had been paid together with a sum of £52 for survey fees. It also provided that appellant may not transfer sublet mortgage or assign without the written consent of the Board. The conditions were complied with and a permit to occupy was duly issued but it was expressly stated to be non-transferable. Appellant had already been in occupation for some years and it will be noticed that the period of the lease was back-dated to 1965. The intention of the parties was that appellant would, in due course, be given a Memorandum of Lease in a registrable form. Under sections 10 and 11 of the Native Land Trust Ordinance (Cap.115) such a lease may be registered under the provisions of the Land (Transfer and Registration) Ordinance (Cap.136). Appellant thus became an equitable lessee.

In the events which happened appellant never acquired the status of a registered proprietor of a lease in accordance with the above provisions for reasons about to be narrated. On February 22, 1968 appellant executed a form of mortgage in favour of the moneylender over his said interest. The description of the interest referred to the provisional approval and had a sufficient description of the land. This mortgage will require to be considered in more detail later. It secured a total sum of £1397-9-0 payable on demand together with interest at the rate of £12 percent per annum. It was sent to the Board for its consent which was duly granted on March 21, 1968. Appellant made default under the said mortgage. The moneylender purported to exercise a power of sale, and, on June 1970 sold the interest of appellant to the trustees for the sum of $4700. A transfer, in the form prescribed for the transfer of a lease registered under Cap.136, was executed by the moneylender in favour of the trustees. The moneylender also executed a formal discharge of the mortgage and all documents were handed to the trustees.

The relevant documents were presented to the Board with a request that the Board grant to the trustees a lease in terms of the lease to which appellant was entitled under the provisional approval dated October 16, 1967. On November 23, 1970 the Board and the trustees executed a Memorandum of Lease which was for the same term of 30 years and which was duly registered with the Registrar

of Titles as No. 13810 in accordance with the provisions of the Native Land Trust Ordinance (Cap.115), and the Land (Transfer and Registration) Ordinance (Cap.136).

Lack of detail in the notice of appeal as to the nature of the relief sought and failure to set out the grounds of appeal in logical order, make it inconvenient to set them out in this judgment. I shall proceed to deal in logical order with the relief now sought and consider the grounds applicable as they arise.

The first question is whether or not the trustees got an indefeasible title to lease No. 13810 freed from any claim by appellant in respect of the rights which he originally held by reason of his occupation under the provisional approval dated October 16, 1967 followed by the permit to occupy which was granted in pursuance of such provisional approval. Section 14 of Cap. 136 provides as follows:

> "Section 14. The instrument of title of a proprietor issued by the Registrar upon a genuine dealing shall be taken by all courts of law as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, and the title of such proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to have been a party or on the ground of adverse possession in another for the prescriptive period. A duplicate or certified copy of any registered instrument signed by the Registrar and sealed with his seal of office shall be received in evidence in the same manner as an original."

This section will give to the trustees an indefeasible title unless the appellant can set up some right to occupy which overrides section 14. On the assumption that the moneylender had no right to exercise a power of sale (and this will be discussed later) appellant claims that the provisional approval and permit to occupy coupled with possesion, brought him within the provisions of the Agricultural Landlord and Tenant Ordinance (Cap.242) and its amendments. From this it was argued that such a tenancy would prevail over the registered memorandum of lease No. 13810. In support of this proposition reliance was placed on Soma Raju v. Bhajan Lal - a case decided by this Court on November 26, 1976 under No. 48 of 1976. I turn now to consider this case.

The facts in Soma Raju's case can be shortly stated. The land was "agricultural land" of which the tenant had been a yearly tenant of part of some 24 years prior to the land being bought by a purchaser who had notice of such tenancy. The tenancy did not require registration under the Agricultural Landlord and Tenant Ordinance which provides for registration in certain other cases. The tenant made an application under the Ordinance to get recognition of his tenancy but the transfer of the landlord's interest was effected before his application was dealt with by the special tribunal set up for that purpose.

Spring J.A. (with whom the other members of the Court concurred) said:

"The authorities show that where there is an interest which is not capable of registration under the Land Transfer Act then the question arises whether the interest was independent of the indefeasibility provisions of the Land Transfer Act and would be a burden on the title of the registered proprietor.

If the estate or interest is not registrable under the Land Transfer Act then its validity so far as the indefeasible sections of the Land Transfer Act are concerned must be determined in accordance with the general principles of law."

Later he said:

"The tenancy agreement was not capable of registration because - being oral - it was not in registrable form but section 54(2) states that <u>any</u> lease which shall have been granted for a term not exceeding one year shall be valid without registration - in other words the position appears to be that <u>any</u> lease for a term not exceeding one year is valid without registration and the lessee would have the same legal estate and interest thereunder as if the land to which it related was not under the Land Transfer Act.

In my view (the argument of counsel that if the legislature intended such a tenancy should have appeared as an exception to section 39 of the Land Transfer Act) his argument must fail."

The learned Judge went on to dismiss the argument that the system of registration under the Act would not permit the application of the principle laid down in <u>Miller v. Minister of Mines</u> (1963) 1 All E.R. 109, and said:

> "If a contract of tenancy under ALTO is not registrable under the Land Transfer Act and the indefeasibility provisions of that Act are to override the contract of tenancy then the tenancy would be of no value to the tenant except as against the original landlord."

The Court of Appeal held that a tenancy of the nature described was a valid tenancy which prevailed against the indefeasibility provisions of the Land Transfer Act.

The nature of the occupancy of appellant must now be considered. He had a permit to occupy the land in terms of the provisional approval dated October 16, 1967. Under these documents he was entitled to a lease for a period of 30 years. The provisional approval provided that the lease would be subject to the conditions set out in the Native Land (Lease and Licences) Regulations (Cap.104). Section 18 of these regulations provides that the lease shall be in form A of the schedule which clearly provides for a lease registrable under the Land (Transfer and Registration) Ordinance. It is the same form as the Memorandum of Lease granted to the trustees. Section 8 of the Agricultural Landlord and Tenant Ordinance (Cap.242) provides that a contract of tenancy shall be evidenced by an instrument in writing which shall be in the prescribed form signed by both parties. Subsection 3(a) then provides:

> "Section 8(3)(a). Every instrument of tenancy shall be signed by the parties thereto and -

> (a) if registrable under the provisions of the Land Transfer Act, 1971 shall be registered in accordance with the provisions of that Act and, notwithstanding the provisions of section 59 of this Act, all other provisions of the said Act shall apply to such instrument and all dealings relating thereto; or"

Subsection (h) provides for cases where the instrument is not registrable. Assuming then for the purpose of this case, but without so deciding, that the facts earlier recited did create a tenancy to which the Agricultural Landlord and Tenant Ordinance applied it is clear that a system of registration for such a dealing to be registered under the Land Transfer Act is provided for. The most favourable position which appellant can take is that he had an equitable interest which would in due course result in the execution of a Memorandum of Lease registrable under the Land Transfer Act. The reasoning in Soma Raju's case and Miller v. Minister of Mines does not apply to a right to have a registrable Memorandum of Lease executed. Prior registration of lease No. 13810 under the Land (Transfer and Registration) Ordinance, (Cap.136) effectually gave the lease to the trustees priority over the right of appellant to require the Board to execute in his favour a registrable Memorandum of Lease in terms of the provisional approval.

Counsel for appellant conceded that, if the interest of appellant under the provisional approval notice created an interest

to which the trustees' lease was subject, then that disposed of all relief sought. However, that has not happened so the relief claimed against the moneylender and the Board must now be considered. In respect of the moneylender counsel contended that the said mortgage was void for non-compliance with the provisions of the Moneylenders Ordinance (Cap. 210) and that no power of sale had been conferred upon the moneylender by the said mortgage. In respect of the Board it was claimed that it was in breach of a contract to grant to appellant a registrable Memorandum of Lease in terms of the provisional approval notice. If either or both claims succeeded it was agreed in the Court below that assessment of damages would later be determined as a separate issue. So the two questions are now (a) Is the moneylender liable for wrongly exercising a power of sale which resulted in the loss of appellant's right to a lease in terms of the approval notice, and, (b) Is the Board liable for a breach of a contract to grant to appellant such a lease?

It is accepted that a mortgagee under an unregistered mortgage has no power of sale unless it can be found in the instrument creating the mortgage. In the absence of such a power application must be made to the Court. That is a sufficient statement of the law for present purposes. Apparently, in accordance with common custom, the mortgage was prepared in the form prescribed for use under the provisions

of the Land Transfer Ordinance. The intention was to register when the title, in this case a registered lease, came into existence. This document would require some amendment before it could be registered because the lease was not, and in fact could not be, correctly described with reference to its registration. However, the interest of appellant was sufficiently identified. The mortgage declared that "the mortgagor hereby mortgages to the mortgagee the land above described". Provision was made for the document to be signed by the solicitor for the mortgagee "as correct for the purposes of the Land Transfer (Transfer and Registration) Ordinance (Cap.136)". The solicitor signed this certificate which is a requirement before acceptance by the Registrar of Titles for registration but there is no evidence when this certificate was signed. There were a number of covenants. The following should be noted.

> "SEVENTHLY It is hereby agreed that the term "one calendar month" referred to in section 61 of the Land (Transfer and Registration) Ordinance (Cap.136) shall for all purposes of this security be reduced to "seven days"."

There was in addition a provision intended to bind the mortgagee. It reads:

> " <u>MORTGAGEE'S UNDERTAKING</u>
>
> I, the undersigned GULJARA SINGH (father's name Hari Singh) of Tabia, Labasa in the Colony of Fiji Licensed Moneylender the within described Mortgagee <u>HEREBY ACKNOWLEDGE AND UNDERTAKE</u> that in the eventof it becoming it necessary to exercise the powers of sale under the provisions

of section 63 of the Land (Transfer and Registration) Ordinance Cap.136 and to grant any tenancy or lease under the said powers contained in the within mortgage and such transfer tenancy or lease in exercise of any such power of sale will require the prior consent of the Native Land Trust Board, Suva in writing as Lessor of the within described Native Lease No. 4/9/1135."

Section 63 subsections (1) and (2) read:

"Section 63(1). If default in payment or in performance or observance of any covenant continues for one month after the service of such notice, the mortgagee or encumbrancee may sell or concur with any other person in selling the mortgaged or encumbered land or any part thereof either subject to prior leases, mortgages and encumbrances or otherwise, and either together or in lots by public auction or by private contract, and either at one or several times, subject to such terms and conditions as the mortgagee or encumbrancee thinks fit, with power to vary any contract for sale and to buy in at any auction or to vary or rescind any contract for sale and to resell without being answerable for any loss occasioned thereby, with power to make such roads, streets and passages and grant such easements of rights of way or drainage over the same as the circumstances of the case require and the mortgagee or encumbrancee thinks fit, and may make and sign such transfers and do such acts and things as are necessary for effectuating any such sale.

(2) No purchaser shall be bound to see or inquire whether default has been made or has happened or has continued or whether notice has been served or otherwise into the propriety or regularity of any such sale."

Then follows two further subsections which are applicable only after registration. They give indefeasibility to a transferee under the power of sale and are not applicable until after registration.

Section 61 first deals with the effect of registration and then goes on to deal with the case of default by a mortgagor. It provides that if default shall continue for "one month or for such other period as is therein for that purpose expressly fixed" then certain consequences may follow. The side note to the schedule which reads "effect of mortgage - mortgagee in default" is a fair description of the subject matter of section 61. However that may be, it is clear that the intention of the parties as evidenced in the document is that the default provision in section 61 was to be modified expressly by reducing the period from one month to seven days. Section 63 was also modified as above stated.

A Court, in deciding the terms of a contract between parties, is entitled to look at its express provisions and at any expression which indicates an intention that other provisions, not in the document itself, should be part of the contract. Unless it were the intention of the parties to incorporate sections 61 and 63 into their contract it was superfluous to make any reference to them. Express provisions should not be treated as otiose unless it is impossible to give them any reasonable effect. The intention of the parties is primarily to

give effect to every provision in their contract. In my view the clear intention to be gathered from the document as a whole is that it was intended that sections 61 and 63, modified as expressly stated, should be included as part of the contract. It is nothing to the point that the mortgage has not been registered although obviously it was the intention to register, so that all the other provisions of the Ordinance would also apply. The contract evidenced by the writing came into force as soon as it was executed and the loan was actually advanced. Therefore the mortgage gave a power of sale to the moneylender to be exercised in terms of sections 61 and 63 as modified. There is no claim that it was not so exercised.

Mr. Ramrakha conceded that, if the mortgage contained a power of sale which has been actually exercised, then appellant's case must fail. Counsel gave no reasons, but, in my opinion this concession was properly made. Even if the mortgage were illegal by reason of a breach of the Money-lenders Ordinance (Cap.210) it is clear that the sale to the trustees cannot be attacked upon the ground of illegality. This is so because section 26 protects the trustees who, it is not disputed, acted bona fide for value and without notice of any defect due to the operation of the Ordinance. The trustees come precisely within the protection of section 26 which saves them when dealing with the moneylender's security even if the security itself is unenforcible against appellant. Since the Board did no more

than give effect to the dealing of the trustees no claim can be made by appellant against the Board. Any claim against the Board must therefore fail.

I turn lastly to the position between appellant and the moneylender.

After dealing generally in section 26 with the right of bona fide holders for value the following provision appears in subsection (1)(a)(ii):

> "Subsection (1)(a)(ii)..................
> But in every such case the moneylender shall be liable to indemnity the borrower or any other person who is prejudiced by virtue of this section and nothing in this proviso shall render valid an agreement or security in favour of or apply to proceedings commenced by an assignee or holder for value who is himself a moneylender; and "

This requires a consideration of the position between appellant and the moneylender.

Two grounds were put forward upon which it was claimed that the said mortgage dated February 22, 1968 was illegal by reason of breaches of the Ordinance. They were:

1. that the moneylender was not registered at the date of execution; and,
2. that there was a breach of section 16 of the Ordinance in that a prior mortgage was not disclosed.

Section 6 provides for a method of prima facie proof of registration or non-registration. The onus of proof thus lay on appellant who made the allegation but

advantage of section 6 was not taken nor was any evidence adduced. The matter therefore came for decision on the pleadings.

The relevant pleading of appellant is para.7 of the Supreme Court. It reads:-

> "The first defendant is, and has been, at all material times, a practising moneylender within the meaning of the Moneylenders Ordinance Cap.210, but was not duly licensed under the provisions of the same, having paid no license fees for the year 1967 until the 9th February, 1968 and having paid fees for the year 1968 on the 4th day of March, 1968."

To this the moneylender replied as follows:

> "(a) that he admits that he has been a moneylender within the meaning of the Moneylenders' Ordinance Cap.210 but says that he had entrusted the payment of the licence fees in cash for the year 1967 in 1967 to one Ram Rattan (s/o Charlie Algu) who had fraudulently converted the said monies to his own use and that the 1st defendant did not learn about it until 1968 when he paid licence fees for the year 1968. That in the result he had to make a second payment in the year 1968.
>
> (b) that except as herein expressly admitted he denies each and every allegation contained in paragraph (7) of the Statement of Claim."

The crucial date was February 22, 1968. The admission in para.7 of the Statement of Defence is no higher than that the license fees for1967 and 1968 were not paid "until 1968". Except for that admission para.7 of the Statement of Claim was denied. I consider that was a sufficient denial of the specific date pleaded in the Statement of Claim and that it put appellant to the proof of the specific fact alleged. This ground fails.

The second ground relates to section 16 which enacts that no contract for repayment of money lent shall be enforcible unless a note or memorandum in writing of the contract in the English language is signed before the money was lent or before the security was given. I have paraphrased the section sufficiently for present purposes. The allegation was that the mortgage dated February 22, 1968 "was made on November 16, 1967 and not on February 22, 1968". The moneylender denied this allegation and pleaded as follows after the denial.

> "..... and further says that a mortgage deed was first made on the 16th day of November 1967 but it was not forwarded to the second defendant for its consent owing to the fraudulent action of the said Ram Rattan (s/o Charlie Algu) and, on the 22nd of February 1968 the Plaintiff had borrowed further monies (which said advances are acknowledged by the Plaintiff in paragraph (9) of the Statement of Claim) when the second deed of mortgagee was executed and duly consented to by the second defendant.
>
> That except as herein expressly admitted he denies each and every allegation."

The learned Judge disbelieved the evidence of appellant about the date of execution and held that the mortgage was in fact made and signed on February 22, 1968 but it is necessary to deal with a transaction on November 16, 1967.

Exhibits D3 and D4 were produced. Exhibit D4 was a mortgage for a sum of £904 signed by appellant in November 16, 1967. It cited earlier loans and a present loan of £150 making a total of £904. The learned Judge found that

this document bore no stamps and no approval by the Board such approval being necessary by reason of a provision in that conditional approval notices under which appellant occupied the land as an equitable lessee. Counsel for appellant argued that, applying the law laid down by this Court in Totaram v. Nasibau 8 F.L.R. 29, this was a breach of section 16 in that this earlier mortgage was not included in the memorandum exhibit D11 which was signed on February 22, 1968 in relation to the mortgage given on that date. Totaram v. Nasibau held that a condition for repayment from a new loan of a sum already owing was a term which ought to be included in the memorandum required by section 16 on the execution of a security for the new loan.

In Totaram's case the loan of £799 included a sum of £681 already owed so that the advance then being made was only £118. No mention was made of the sum of £681 in any memorandum. The Court held that, since the security was for a present advance of £118 together with an additional sum of £681 already owing, this fact ought to have been disclosed in a memorandum in terms of section 16 because the inclusion of the sum of £681 earlier advanced was a term of the contract then being entered into. Thus the security was in breach of section 16.

In the instant case both the memorandum (Ex.D11) and the mortgage (Ex.D12) disclosed the fact that the prior loan of £150 was included in the contract. I do not consider

it was necessary also to give details of the mortgage which, according to the finding of the learned Judge, had not been completed. It was clear that the sum of £150 referred to in that document was the sum of £150 referred to in exhibits D11 and D12 and it was disclosed in memorandum exhibit D11.

I therefore hold that appellant has not shown that there was a breach of the provisions of the Moneylenders' Ordinance in respect of the mortgage dated February 22, 1968.

The passages in the judgment of the Court below, dealing with the case of Ganpati v. Somasundaran and the reference in that case to Damodaran Reddy v. Raghwan Nand, are not relevant on the view which I have taken on the issues on appeal. However, I desire to state that I do not accept the views expressed by the learned Judge in his judgment when he considered those cases. I should add I was not a member of the Court in Ganpati's case.

I would dismiss the appeal with costs and affirm the judgment in the Court below.

(Sgd.) T. Henry
JUDGE OF APPEAL

IN THE FIJI COURT OF APPEAL

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K.C. Ramrakha for the appellants
G.P. Shankar for 1st respondent
S.M. Koya for 3rd, 4th and 5th respondents
E. Vula for 2nd respondent.

Date of Hearing: 13th March, 1978
Date of Judgment: 22nd March, 1978

JUDGMENT OF MARSACK, J.A.

I agree that, for the reasons set out in full in the judgment of Henry J.A., this appeal should be dismissed; and I have nothing to add.

(Sgd.) C.C. Marsack
JUDGE OF APPEAL

SUVA,
22nd March, 1978.

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S.M. Koya for the 3rd, 4th & 5th Respondents

Date of Hearing: 13th March, 1978
Delivery of Judgment: 22nd March, 1978

JUDGMENT OF GOULD V.P.

I have had the advantage of reading the judgment of Henry J.A.; I agree with his reasoning and conclusions and have nothing to add.

All members of the Court being of the same opinion the appeal is dismissed with costs.

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