IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 65 of 1980

Between:

HARILAL s/o Chunni — Appellant

and

1. HARI SHANKAR s/o Chunni
2. DIRECTOR OF LANDS — Respondents

R.D. Patel for the Appellant.
H.C. Patel & M.S. Khan for the 1st Respondent.
S. Matawalu for the 2nd Respondent.

Date of Hearing: 15th July 1981.

Delivery of Judgment: 31 JUL 1981

JUDGMENT OF THE COURT

Gould V.P.

The action from which this appeal orises was brought as o result of a family dispute over land. A large block of land (some 1000 acres) at Sarava near Ba was leased to one James Clark by the Colonial Sugar Refining Company Ltd. It was the policy of the Clark family to work the land for cane growing purposes through share croppers, who in some cases became sublessees. From about 1948 or 1949 one Manfal became one of these share croppers. He had three sons who survived him. One was Hari Shankar, the plaintiff in the action and the present respondent, one was Harilal, the defendant and present oppellont, and the third was Shiu Shankar, who is not a party to the proceedings. Janki the widow of Manfal, was likewise not made a party to the action, though she gave

evidence for Hari Shankar and appeared to align herself with his case.

We have referred to Hari Shankar as the plaintiff and Harilal as the defendant and will continue to do so, rather than as respondent and appellant, but there was in fact a second defendant, the Director of Lands. At an early stage Counsel for the Director obtained, by consent, an order that he be released from further appearances, but the learned Judge has recorded in his judgment -

> " The Lands Department have indicated that they do not wish to contest the issues arising between the plaintiff and first defendant concerning rights in and to the housing area and the 2nd defendant is ready to follow any direction given by the Court in that respect. "

Manfal apparently worked more than one piece of land but the proceedings particularly concern an area of about twelve acres known as farm No. 8706, which he held from Mr. Clark. Manfol, prior to his death permitted the defendant to take it over and work it as a share cropper. Manfal also "gave" another farm to the plaintiff - it was No. 8645. According to the plaintiff it was 40 chains away from the house site we are about to mention, and which is the subject of the proceedings. Shiu Shankar, the third brother occupied farm 8707, which adjoined 8706. All of these areas were unsurveyed.

On an area either forming part of farm no. 8706 or adjacent to it, first Manfal and in course of time the plaintiff and the defendant built houses. That built by Manfal was the family house occupied by Janki; it was damaged or destroyed by a hurricane but has been rebuilt. The factual issue in the proceedings was expressed in the judgment as follows:-

" The area of land on which Manfal and the defendants had their houses adjoins farm 8706 but it has never been under cane and no cane contract attaches to it. The defendant claims that all 3 dwellings are on farm 8706. The plaintiff alleges that the land on which the houses stand is not and never has been part of farm 8706 but was a separate piece of land on which Mr. Clark's father and Mr. Clark allowed Manfal to erect his house which permission was subsequently extended to the parties herein. "

The defendant is now the holder of a Crown lease of farm 8706 and it is common ground that the plan annexed to it includes the site on which the houses stond. It is necessary therefore, in order to understand how the plaintiff claims to be entitled to relief in respect of the area occupied by him and his mother Janki, to look further ot the background of the case.

Mr. W.J. Clark, son of the original lessee of the 1000 acre area gove evidence, which was unreservedly accepted by the learned Judge. From his evidence it appears:-

1. That the family policy in relation to shore croppers was to allot them house sites not on the farms but on unproductive land so far as procticable.

2. That the housing site attached to Manfal's land was about 3-5 acres as well as the 12 acre farm; it was not specifically assigned to any of the parties.

3. He assigned his interests to the farmers in occupation.

4. He entered into an agreement on the 2nd June, 1970, with the defendant, to sublease to him 11 acres more or less "now in occupation of the tenant"; this was Ex. D1 and related to farm 8706.

In 1973, the Colonial Sugar Refining Company transferred its freehold land to the Crown. Following upon this, representatives of the Lands Department called the Clarks' tenants to the office of the Fiji Sugar Corporation and asked them to produce any documents of ogreement they had with Mr. Clark. The defendant produced his agreement, presumably Ex. D1. As a result, according to the defendant's evidence he was given an approval notice for a Crown lease. The Crown lease followed. Shiu Shankor said he also had received a Crown lease in respect of farm 8707.

It will be helpful to quote certain passages from the judgment under appeal:-

> " It is significant thot each party worked his own cane farm prior to Manfal's death and they all lived in the houses they had erected near to Manfal.
>
> After Manfal's death in 1964 the parties continued to farm their separate farms and they continued to live in the same houses as they had done during Manfal's life. There is nothing in the evidence which leads me to conclude that during Monfal's life and for some years after his death that the defendant 1 laid claim to the land on which the dwellings stood. "

> " During the defendant's evidence the defendant 1's registered lease was first tendered and the plaintiff objected to it because it had not been revealed in the defendant's affidavit of documents. But it was only ot the beginning of the hearing that defendant 2, Lands Department, made it knawn that the Lands Department had registered the lease; the first defendant had been unaware af its existence as is indicated in his Statement of Defence. "

" To determine whether the Londs Department survey mistakenly included a housing site occupied by the plaintiff in farm 8706 I need to know what was actually sub-leased to the first defendant by Mr. Clark (P.W.1) in 1970 under the agreement Ex. D1. Mr. Clork is currently the Minister for Lands. He was an obviously impartial and neutral witness and I accept unreservedly the evidence he has given. It is the Lands Department's obvious intentian to ensure that the farmers in occupatian when the C.S.R.'s freehald reverted to the Crown receive Crown leases cavering the areas which they currently occupy. "

The learned Judge then indicated that he had na hesitation in believing Mr. Clork's evidence which we have already mentioned i.e. that the housing area was not part of cane farm 8706. With regard to Ex. D1 the learned Judge said:-

" The wards "now in occupation" are impartont in the absence of a survey. Clearly he was not in occupatian of the area used by the plaintiff or Manfal's widow as house-sites. That statement defining the land as that "now in occupatian" of defendant 1 is repeated in Clause 1 of the agreement and it states that the boundaries are indicated in a sketch plan attached. The sketch plan attached to Ex. D1 includes farm 8706 and the housing-sites within one boundary but it is significont thot it does not reveal any area as a housing-site. "

Having discussed an aerial photograph the learned Judge continued:-

" Defendant 1's evidence shows that he indicated to the Crown surveyors the orea he regarded as being in his possession and occupation. As a result they treated all three housing sites as being occupied by defendant No. 1. It would be difficult to say that defendant 1's motives were fraudulent. He could have been relying on his own interpretation of the lease Ex. D1 and af the aerial phata Ex. D2.

Following the Lands Department's survey and before issue of the registered lease the defendant No.1 received an Approval Notice of Lease, Ex.D6 dated 6.8.74, indicating that the term would commence on 1.1.75. The defendant 1 then regarded himself os being on safe ground and in 1975 he gave the plaintiff notice to quit.

The approval notice Ex. D6 shows the estimated areos as 11 acres, as does the lease Ex.D2. The registered lease shows that just under 13 acres were surveyed. This suggested to me that the oreo farmed by defendant Na.1 was about 11 acres and that the housing area was just under 2 acres.

In reply to o question put by the Court Mr. Clark said that the 3-5 acres an which Manfal had his family compound was not included in the farm 8706 or in 8707. He stated that the area, i.e. the housing sites were not specifically assigned to any one. It appears from his evidence that the whole of the housing area was not leased to defendant 1. Obviously the lease Ex. D1 in granting to defendant No.1 the land which he currently occupied was expressing what Mr. Clark had in mind. It was the intention of the Lands Department to lease to defendant No. 1 the land which he had held from Mr. Clark. He had never occupied the land on which the houses of Manfal's widow and the plaintiff are erected. It could not have been the intention of the Lands Department to include those areas in a lease to defendant No.1.

I find that the Registered Lease erroneously includes the land occupied by the plaintiff as his housing site. "

The learned Judge, having repeated that the Lands Department (second defendant) were ready and willing to be bound by any direction of the Court, said that it followed that it accepted the finding that it had erroneously included in the registered lease the house site occupied by the plaintiff. It will be seen, however, that when, a little later, he made a declaration, he extended the error to the land hitherto used by Manfal, his widow and the plaintiff.

The learned Judge was satisfied that the error between the lessor Lands Department and the lessee the defendant was mutual, as the defendant thought he was entitled to the house sites under Ex. D1, and the defendant simply accepted his word.

There being no holder or purchaser of the land subsequent to the defendant and no question of a bona fide purchaser for value, the learned Judge found a situation to exist which was covered by section 39(1) of the Land Transfer Act, 1971, in that a portion of land had, by wrong description of boundaries, been erroneously included in the lease. He found power to correct the situation by applying section 168 of the Land Transfer Act, 1971.

Section 39(1) reads (in part):-

> "39(1).....the registered proprietor of any land subject to the provisions of this Act, or of any estate or interest therein, shall, except in the case of fraud, hold the same subject to such encumbronces as may be notified on the folium of the register.....but obsolutely free from all other encumbronces whatsoever except -
>
> (a) .....
>
> (b) So far as regords any portion of land that may by wrong description or parcels or of boundories be erroenously included in the instrument of title of the registered proprietor not being a purchaser or mortgagee for volue or deriving title from o purchaser or mortgagee for value; "

Section 168 reads:-

> "168. In any proceedings respecting any land subject to the provisions of this Act, or any estate or interest therein, or in respect of any transaction relating thereto, or in respect of any instrument, memorial or other entry or endorsement affecting any such land, estate or interest, the court may by decree or order

> direct the Registrar to cancel, correct, substitute or issue any instrument of title or make any memorial or entry in the register or any endorsement or otherwise to do such acts as may be necessary to give effect to the judgment or decree or order of such court. "

The final finding and order of the learned Judge was expressed in his judgment, thus:-

> " I find that under the lease Ex. D2 the defendant No. 1 was only granted a lease of the land of which he was in occupation namely cane farm 8706 that is to say the land which at the time of survey was under cultivation plus that portion of the housing site which he has occupied as his home and domestic compound.
>
> I therefore Declare that the 2nd Defendant, the Lands Department were in error in not surveying the land in the presence of the plaintiff and defendant No.1 and their mother and in not excluding from their grant of a Crown Lease to defendant No.1 that portion of the land which hitherto has been used by Manfal, his widow and the plaintiff as housing sites and domestic compounds.
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> AND I Direct the Registrar to correct the Defendant No.1's certificate of title in accordance with the boundaries should they be amended in accordance with the aforesaid declaration. "

In the appeal the appellant is the first defendant. On his behalf Mr. R.D. Patel has lodged numerous grounds of appeal, some of them repetitive, and we do not find it necessary to deal with them all individually and in detail. First, there was a challenge to the general findings of fact of the learned Judge, resulting in his acceptance of evidence that the house sites were contiguous with but not part of farm 8706. Counsel characterised the evidence of Mr. W.J.Clark, accepted by the learned Judge, as too general. He sought, by examination of the various plans in evidence to demonstrate that the learned Judge had misinterpreted them. All we need

say on this is that we do not find the acceptance of the evidence of Mr. Clark, a quite independent witness, was open to challenge on the ground suggested, or by reason of any lack of cogency. The learned Judge's assessment of the important Exhibit D1, based largely on that evidence, was, in our judgment, entirely justifiable. The document obviously played a part in the implementation of the Lands Department policy in the area and there was no quarrel with the learned Judge's statement of what that policy was. How the boundaries of these unsurveyed farms were adjusted pursuant to that policy, hinted at in the evidence, was stated by Mr. Khan, of counsel for the plaintiff, in his argument in this Court and without objection by Mr. Patel - "If there is a dispute as to boundaries they get all the parties and the neighbours together and resolve it". In the present case that was not done, presumably because the Department did not know of the dispute. As to the various plans, we have not been able to see that the learned Judge misdirected himself in relation to them.

Among the arguments put forward were that the second defendant may have decided in its discretion to grant the lease to the defendant, knowing that the plaintiff had another farm. Also that as counsel for the second defendant had obtained leave to withdraw, the finding that it was in error was a decision of an issue not raised and amounted to condemnation of the second defendant in its absence. All that need be said is that any complaint under either of those two heads is for the second defendant, still a party to the appeal, to raise. It has not sought to do so. As it appears to us it is the fact that the boundaries of the lease have been shown to be "erraneous" within the meaning of section 39 of the Land Transfer Act, 1971, which is important, rather than the nature of the error leading up to that position.

We will set out paragraphs 1(g) 1(h) and 1(k) of the

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grounds of appeal, as they raise, perhops obliquely, questions which merit discussion:-

> "(g) Manfal's wife not being a party to the action the learned judge erred in concluding that Manfal's wife had any right to occupy the house site in question, and she was a mere licensee as she is the Appellant's mother.
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> (h) There is nothing in Mr. Clark's evidence that the First Respondent occupied the house site by right in himself or for considerotion.
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> (k) The First Respondent having paid no consideration either to Mr. Clark or to the Second Respondent at any time in any shape or form and having his own separate farm where he was entitled to build his house, has no right to get a lease from the Second Respondent. "

Paragraph (g) states that there is no evidence of payment of rent or other consideration by the plaintiff or Janki to the Clark family or to the defendant. As to the latter, if he has no title to the land in question, neither hos he any claim to rent. The rent he was due to pay under Ex.D1 can be assumed to be in relotion to the land comprised in that instrument - on the findings the cane land and his own house site. As to the position of the plaintiff ond Janki some difficulties arise not so much in relation to whether they paid rent to the Clark family (probably in the absence of evidence it can be assumed thot they did not) but as to whether they had title to challenge the intrusion of the defendant's lease upon the land they occupied. According to Mr. Clark's evidence the house site was not specifically leased to onybody. Nevertheless it is implicit thot the shore croppers lawfully occupied the house sites and if they were not sublessees of the Clorks in relation to them, they were at leost licencees. There is no evidence that if a shore cropper operoted more than one farm he would be allocated more than one house-site and it

appeors hardly likely that he would. The ossumption continues that he would hold the site in relation to all the oreas he occupied.

On that basis it would follow that when Manfa. arranged totransfer farm 8645 to the plaintiff he would also succeed to a share in the house site, just as the defendant would do on acquiring farm 8706.

So far os we con judge from the evidence, the present position moy hinge upon Lands Department policy. Whether the persons concerned hove any legal right to enforce the policy is not in evidence, but we consider it right to oct on the basis that the policy will be implemented. So far as the plaintiff is concerned he has ot the very least a right to lawful possession sufficient to give him status to protect thot possession by action.

As to Janki, she occupied the family house. On the findings she was not liable to pay rent to the defendant. The plointiff soid in evidence that his house and Janki's house were on a piece of land measuring three quarters of an acre and Hori Lal's house was on about an acre, and about 1½ chains away. The plointiff said that he was caring for his mother, that his father (Manfal) gave the house site to him, and "what is mine must be my mother's".

We think that this must be a reference to an Indian family system and that he is treating his house and his mother's as the area "given" him by Manfal. In our opinion this is what exploins the approach of the leorned Judge, when, although Janki was not o party to the action, he included in his order that portion of the land "which hitherto has been used by Manfal, his widow and the plaintiff as housing sites and domestic compounds." The issue between the parties has been

throughout whether the whole of the original "house site" wos rightly incorporated into the new Crown Lease to the defendant or whether the houses of plaintiff and Janki should be deleted. We do not therefore deem it necessary to raise any point as to whether Janki had, by succession to Manfal, any direct interest otherwise than through the plaintiff on an Indian family basis.

The appeal is dismissed with costs, to be taxed if not agreed. It occurs to us that in the working out of the order of the Supreme Court, if it entails a further survey, questions may arise fit for determination by the court, and to meet such a case we give general leave to all parties (including the second defendant) to apply to a Judge of the Supreme Court.

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Vice President

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Judge of Appeal

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Judge of Appeal