IN THE FIJI COURT OF APPEAL
Criminal Jurisdiction
Criminal Appeal No. 70 of 1981

Between:

SUBRAMANI s/o Armaugam Appellant

and

PRICES & INCOMES BOARD Respondent

H.K. Nagin for the Appellant.
K.L. Maharaj and Miss Fong for the Respondent.

Date of Hearing: 3rd March, 1982.
Delivery of Judgment: 19th March, 1982.

JUDGMENT OF THE COURT

Henry J.A.

Appellant was convicted in the Magistrate's Court at Nadi of an offence under sections 33(1) and 35 of the Counter-Inflation Act No. 11 of 1973, namely, that he increased the rent of a dwelling flat, being No. 4 in a block of four flats situated at Qeleloa, Nadi, occupied by one Mereani Vacacegu, from $65 per month to $70 per month without giving twelve weeks prior written notice of the proposed increase to the Prices & Incomes Board. Appellant was ordered to pay a fine of $200 and costs $15. From this conviction he appealed to the Supreme Court which dismissed the appeal with costs fixed at $80. Appellant has now appealed to this Court which appeal is confined to questions of law.

Appellant said that complainant was his tenant occupying one of the four flats erected on native land held by him under a sub-lease. He admitted that the rent had been increased without notice as alleged. Prima facie this was an

admission of guilt but appellant contended that, as he had failed to obtain the consent of the NLTB, the tenancy, was null and void under section 12 of the NLTB Ordinance (Cap.115). We will hereafter refer to the NLTB as "the Board" and Cap.115 as "the Ordinance". From this premise it was contended that the letting was a nullity and so was not a "tenancy" and no "rent" was payable within the relevant provisions of the Counter-Inflation Act, and in particular section 12 of that Act. It was thus claimed that no offence had been committed.

Section 12 of the Ordinance 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. "

There is a proviso which is not relevant. In 1943, by an amendment, the following provision was inserted, namely:-

> "(2) For the purposes of this section "lease" includes a sublease and "lessee" includes a sublessee. "

By section 26 every omission or neglect to comply with, and every act done or attempted to be done, contrary to the Ordinance, is an offence punishable by a fine or imprisonment or both. Section 27 is also relevant because it may well be that the tenant may be in unlawful occupation. Section 27 reads:-

> "27. Any person who is found to be in unlawful occupation of any native land shall be liable to immediate eviction and to a fine of fifty pounds or to imprisonment for six months or to both such fine and imprisonment. "

It will be noticed that a breach of section 12 not only destroys purported transactions but may also visit the parties with penalties. Accordingly it ought to be strictly construed and any ambiguity resolved in favour of innocence.

On September 17, 1932, one John Perry Bailey was the registered proprietor as lessee of a piece of native land, which on that date he subleased to one Kandasamy a part containing 1 rood 36 perches for a period of 66 years from January 1, 1930. At the material time appellant was the proprietor of the said sublease which we will refer to as "the sublease". The learned Judge said that the land in the sub-lease could have been built on some 47 years ago. It was not stated when the flats were built but it is a fair inference that the business of providing flats for letting had continued for a very substantial period.

The Ordinance was passed in June 1940 so the sublease came into existence some eight years earlier. At the time when the Ordinance was passed both the lease to John Perry Baile and the sublease created estates "granted before the commencemer of the Ordinance". This expression will later assume some considerable importance. No evidence was tendered to prove under what authority the lease to John Perry Bailey was granted. The case is completely silent on any of its terms, and, in particular, the term of years is not known.

In the Supreme Court it was held that, in view of the general surrounding circumstances and the use to which the land was put and the nature of the buildings, that it should be inferred the successive sub-lessees had complied with legal requirements and that it was lawful for the sublessees (including appellant) to let the flats from time to time without the consent of the Board. We do not favour this approach and will not pursue it.

The first question for determination is who are "lessees" and "sublessees" within the true meaning of those expressions in section 12 which question of course includes a determination of what leases and subleases come within the section. Ex facie, in the absence of some additional

provision, the expressions are confined to persons and documents which have their origin under the Ordinance, that is to say the provision is prospective in its operation and refers to leases and subleases which commence after its enactment in 1940. The law is clear that a retrospective effect should not be given to statutory provisions unless such a construction appears very clearly or by necessary and distinct implication: Ingle v. Farrand [1927] A.C. 417, 428. Thus, taken by itself, section 12 does not apply to lessees and sublessees in leases and subleases granted before the commencement of the Ordinance because, of necessity, they must have had their origin under some other ordinance or provision earlier in point of time.

The Ordinance does not contain an interpretation section which enlarges the meaning of the words "lessee" "sub-lessee", "lease" or "sub-lease". The only provision which deals with pre-existing leasehold grants is section 36 which provides as follows:-

> "36.(1) Any proclamation, order in council, notification, document, licence, lease, certificate, or authority issued, made, given or granted before the commencement of this Ordinance under the Native Lands Ordinance 1905 or the Native Lands (Occupation) Ordinance 1933 shall continue in force as if it had been issued, made, given or granted under this Ordinance.
>
> (2) Every such lease or licence continued in force as aforesaid shall in all respects be subject to the provisions of this Ordinance:
>
> Provided that the provisions of section 12 of this Ordinance and of any regulations made hereunder shall not apply to any such lease granted for a term of nine hundred and ninety-nine years. "
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> (Inserted by 16 of 1945, S.2)

The only transaction relevant to the present appeal is:

> "Any.....lease.....granted before the commencement of this Ordinance. "

Attention has already been drawn to the entire lack of evidence concerning details of the lease to John Perry Bailey.

It is not known whether it comes within the earlier Ordinances named in section 36 or whether it has a term of 999 years, but for the purpose of this appeal it may be assumed that it is a lease to which section 36 applies. A sub-lessee has no privity of contract with the head lessor. He gets no estate from the head lease - his estate is carved out of the estate already granted to the lessee under the head lease. His estate is separate and distinct from that of the lessee under the head lease. The sublease has not been granted under the Ordinances mentioned in section 36 - it was granted by John Perry Bailey.

The Legislature has chosen in section 36 to define with precision the pre-existing transactions in the nature of leases which are brought within the Ordinance. The words are not appropriate to include existing sub-leases. Pre-existing leases became subject to section 12 because subsection (2) expressly enacts that the designated leases shall be subject to the provisions of the Ordinance which, of course, includes section 12.

Since the only pre-existing transaction in the nature of a lease, which is brought into the provisions of the Ordinance, is a lease the result is that a pre-existing sub-lease is not within the provisions of the Ordinance. The provisions of section 36 are clear and unambiguous when defining the nature of pre-existing transactions which are brought within the Ordinance. The pre-existing sub-lease of appellant is not a transaction which is included and, accordingly, it is not subject to the provisions of section 12. There is no ground upon which it could be successfully argued that there is a necessary and distinct implication that section 12 has retrospective effect so as to include pre-existing subleases. Dealings with the sublease are not within section 12 so the tenancy of complainant is therefore not rendered null and void by section 12. The defence of illegality fails.

It should be noted that since the passing of the NLTB Act (Cap.134) which became law last year by virtue of

the Revised Edition of Laws Act (Cap.6), section 36 is no longer in force - it having been omitted from the revised Act. Pre-existing leases and subleases are not subject to section 12 since the date of the revised Act.

This Court deprecates the action of counsel, who had the responsibility of arguing the appeal, failing to appear personally but engaging other counsel, not properly instructed to argue the case, to present written argument without the prior permission of the Court. The Court was deprived of full argument and also of a proper reply to respondent's case.

In the opinion of the Court appellant was correctly convicted. The appeal will be dismissed and the conviction is affirmed.

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VICE PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL

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