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IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 43 of 1981

Between:

KIRPAL CHAND s/o Jagar Nath — Appellant

and

SUKH RAJI d/o Durjan — 1st Respondent

NATIVE LAND TRUST BOARD — 2nd Respondent

M.T. Khan for the Appellant
J. Punja for the 1st Respondent
A. Qetaki for the 2nd Respondent

Dates of Hearing: 17th, 18th March, 1982
Delivery of Judgment: 2nd April, 1982

JUDGMENT OF THE COURT

Gould V.P.,

The appellant (as plaintiff) brought an action in the Supreme Court against the first respondent (as first defendant) and the second respondent, to which we will refer hereafter as "the Board", (as second defendant). The Board had issued to the appellant and the first respondent respectively, documents provisionally approving their applications to lease areas of native land which had in the past been owned by the Colonial Sugar Refining Company Limited and let or leased by it to tenants. In course of time the Board acquired the land in question from the C.S.R. Co. and it is not in dispute that the policy of the Board was to grant new tenancies to the

former tenants of the C.S.R. Co. or their successors. The appellant had purchased one such plot from a former C.S.R. Co. tenant named Suruj Pal, the plot bearing the C.S.R. Co. description Saweni No.1 Farm No. 540. The first respondent had succeeded her husband in respect of a similar and adjacent plot numbered Farm 551.

In the respective provisional approval notices from the Board the land was described as Saweni C/N 540 and Saweni C/N 551 and the estimated area was shown as "subject to survey". The dispute, the subject of the present proceedings, arose in the course of the attempt to fix the boundaries of the land as between the appellant and the first respondent. The learned Judge's endeavour in the Supreme Court to resolve the matter is challenged by the appellant, but there is no cross appeal.

We will try to indicate roughly only sufficient of the physical position of the land to enable the judgments to be understood. Into the appellant's plot 540 juts a ridge of higher land unsuitable for cultivation. It emerges from the first respondent's plot 551 and could be described as a peninsula jutting from plot 551 into plot 540; we do not, however, wish to be misunderstood on this, as at least at times the appellant has claimed that the whole of this ridge is part of plot 540 and the first respondent that it is part of plot 551.

On an exhibit referred to by the learned Judge as Ex.5 (but called Ex.4 in the record presented to this Court) is a plan showing a division of the "ridge" area into three parts. The one adjoining or closest to plot 551 we will call area C; the first respondent has a house on it. The next part we will call area B; the appellant has a building on it (apparently some kind of store), and it lies between area C and area A. Area A forms what the learned Judge called the tip of the peninsula; on this area a house was built for one

Ram Kissun who married the first respondent's daughter. We were informed from the Bar that there is no legal right of way connecting area C and area A.

In his judgment the learned Judge said :

"What the plaintiff has asked for is :

a) an injunction restraining NLTB from registering any survey plans or other legal documents so that the disputed area of land is leased to the first defendant Sukhraji;

b) an order that the plaintiff is rightly entitled to the disputed area of land as part of the land leased to him under his approval notice.

The difficulty with this pleading is that it refers to the 'disputed area of land' without defining exactly what piece of land is meant."

The reference to the defect in the pleadings is justified, though in interlocutory proceedings the appellant swore an affidavit in which he referred to it as being one quarter acre and in the context must have meant the portion occupied by Ram Kissun i.e. area A. At least that appears to us to be the position at the present time as the learned Judge's order in the judgment under appeal was as follows :

"That NLTB be restrained from taking any steps to give title to the first defendant of any land except as surveyed in Ex. D5."

That, as we understand it, permits a lease to the first respondent of area C and area A, but not the intervening area B. There is no cross appeal against this order and Mr. Khan, for the appellant, has not addressed any argument to this Court that the first respondent should not retain area C. That leaves only area A.

Mr. Khan confined his submissions to matters of fact and made no reference to his grounds of appeal as filed.

We come to the facts as found by the learned Judge. He made reference to the difficulty that the C.S.R. Co. maps, though accurate in many ways, were no basis for an accurate survey, and the very practical, perhaps the only workable policy adopted, was to get the adjoining land owners together on site and work out an acceptable boundary on the basis of existing occupation and use. The acceptable boundary was then pegged and ultimately to be included in a registerable survey plan.

There was a conflict of evidence. The Judge rejected the first respondent's testimony that she seriously believed the whole ridge was hers and found she was always prepared to settle for the portion on which her house was built. He accepted that Suruj Pal (appellant's predecessor in title) considered the land to be his, or as land over which he had some form of control - that the building of houses and stores was a neighbourly gesture. This finding of course is a long way from a finding that the appellant had any actual or legal interest in the land.

The Judge next referred to proceedings brought by the appellant in the Magistrate's Court against Ram Kissun (there were no other parties) to have him removed from the part he was occupying (which would be area A). The action was settled - Ram Kissun agreed to move out (after about 6 months) and in a supplementary agreement signed additionally by the first respondent it was agreed that Ram Kissun could rebuild his house within the land occupied by her and near her house site. The appellant agreed to forego "a small portion of his land".

At some stage, it is not clear when, there came to light an old C.S.R. Co. map which, as the Judge found, revealed the isolated portion of land as marginal plot 1/29 and the old C.S.R. Co. register showed it to be allocated to the first respondent. It is shown in her name in juxtaposition to plot 551. From our own observation of the copy provided it is not possible to say how far the lot extends but that is not material as we are, as stated above, only concerned with area A.

We come to the findings concerning Mr. Edmund Chang's evidence, a surveyor employed at the relevant times by the Board. He described himself as agent of the Board but did not claim to be able to make final decisions on their behalf. Acting on the principles we have mentioned above he first put the dividing boundary line somewhere between the first respondent's house (on area C) and the appellant's store (on area B) - under that survey area A would be in the appellant's plot. It was held that appellant and first respondent both agreed to this.

The Board then refused to accept the boundary and the terms of settlement of the action. One of the Board's reasons was that Mr. Chang had believed that Ram Kissun was a squatter on area A and the agreement was on that basis. The Board was not of course a party to the agreement. Mr. Chang was instructed to do another survey excluding the "disputed" area from the appellant's farm. He interpreted that as meaning that all the peninsula was to be given to plot 551 and only the portion in the middle (as we understand that - area B) was to go to plot 540. The result is as shown in Ex. D5.

The Judge held that the appellant could not rely on the first survey as it was not based on all the facts. We agree. Even if it could be said in any event that it would have been binding on the Board (as to which

we express no opinion) it could not be, in the light of the misapprehension that Ram Kissun was a squatter. There is also no ground upon which the settlement in the Magistrate's Court could bind the Board.

Mr. Khan in argument called attention to the fact that the Board had been kept informed about the action against Ram Kissun, that protests had been made to Mr. Chang about any re-survey, and to the Board. The evidence of Sefanaia Finau was relied upon: he said he went to see the manager of the Board and the manager said the case was still in the Court and it was for the Court to decide. It was sought to elevate this evidence into an undertaking that the Board would abide by the event of the Magistrate's Court case as to the land occupied by Ram Kissun (area A). That would be to put too much weight upon a simple statement of intention, particularly when it is remembered that Ram Kissun was not in a position to make admissions on behalf of or binding on the Board: furthermore he settled the case under a misapprehension. There is nothing here to support a plea of estoppel, even if one had been made.

Mr. Khan was invited by the Court to state the legal basis of his claim. He said that it was not an ordinary case of an approval by the Board but a case in which the land had been occupied, used and delineated and the Board was obliged to complete the Approval Notice by providing the same farm with the same boundaries; that what the parties regarded as being their boundaries is evidence of where they should be.

We think that this argument may confuse the Board's policy and practice with its legal obligations under the Approval Notices, though such a question may hinge upon factors which are not before this Court; but in any event the evidence of the parties as to boundaries cannot be regarded as the only evidence or necessarily the best evidence. In the present case the Judge

accepted documentary evidence and was justified in so doing.

We share the regret expressed by the learned Judge in the Supreme Court that this matter could not be resolved by settlement. The result isolates area A without proper access which is obviously undesirable. We consider that with the Board's co-operation the matter would not be incapable of solution.

The appeal is dismissed with costs, to be taxed if not agreed.

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Vice President

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Judge of Appeal

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Judge of Appeal